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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14

15 THE LEAGUE OF RESIDENTIAL  
16 NEIGHBORHOOD ADVOCATES, et  
al.,

17 Plaintiffs,

18 vs.

19 CITY OF LOS ANGELES, et al.,

20 Defendants.  
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CASE NO. CV03-04890-CAS

**PLAINTIFFS' REPLY TO BRIEF  
BY CITY OF LOS ANGELES  
REGARDING APPLICABILITY OF  
*TRANCAS V. CITY OF MALIBU***

Date: August 14, 2006

Time: 10:00 a.m.

Dept.: Courtroom 5  
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1 The question presented is whether Plaintiffs' second amended complaint  
2 should remain dismissed without leave to amend under Rule 12(b)(6) in view of the  
3 California appellate court's decision in *Trancas*. The test for dismissal is set forth  
4 in *Bodine Produce, Inc. v. United Farm Workers, etc.*, 494 F.2d 541 (9th Cir. 1974)  
5 as follows

6 "A complaint is not subject to dismissal unless it appears  
7 to a certainty that no relief can be granted under any set of  
8 facts that can be proved in support of its allegations. This  
9 rule, which has been stated literally hundreds of times,  
10 precludes final dismissal for insufficiency of the complaint  
11 except in the extraordinary case where the pleader makes  
12 allegations that show on the face of the complaint some  
13 insuperable bar to relief."

14 494 F.2d at 556. Whether Plaintiffs' second amended (or a new amended complaint)  
15 would fail this test in light of *Trancas* is now the issue before this Court.<sup>1</sup>

16 **I. THE COURT MAY NOT DECIDE THE FACTUAL ISSUE OF**  
17 **SYNAGOGUE USE IN THE CONTEXT OF A RULE 12(B)(6)**  
18 **MOTION TO DISMISS**

19 The brief by the City argues the propriety of dismissal by asking this Court to  
20 decide, in the City's favor, the factual question of whether the Settlement Agreement  
21 allows the property at 303 S. Highland Avenue ("the Highland Property") to be used  
22 by the Congregation as synagogue. It is elementary that a Court may not decide

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24 <sup>1</sup> If the Court determines that Plaintiffs have or can allege facts sufficient to  
25 state a claim, it would be error to allow the dismissal under Rule 12(b)(6) to stand.  
26 See *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir.  
27 2001) (leave to amend should be granted under Rule 12(b)(6) unless the district  
28 court determines that the pleading could not possibly be cured by the allegation of  
other facts).

1 questions of fact on a Rule 12(b)(6) motion. *See, e.g., Lee v. City of Los Angeles,*  
2 250 F.3d 668, 688 (9th Cir. 2000) ("factual challenges to a plaintiff's complaint have  
3 no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)"); *Jones*  
4 *v. Johnson*, 781 F.2d 769, 772 n. 1 (9th Cir. 1986) (any weighing of the evidence is  
5 inappropriate on a 12(b)(6) motion); *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th  
6 Cir. 2005) (when ruling on a motion to dismiss, a court accepts all factual  
7 allegations in the complaint as true); *PPG Industries, Inc. v. Pilkington*, 825  
8 F.Supp. 1465, 1470 (D. Ariz. 1993) (Rule 12(b)(6) motion is not a procedure for  
9 resolving a contest about the facts or the merits of the case).

10 The City improperly argues the factual issue of synagogue use by asserting  
11 that the Settlement Agreement does not allow such use. The City says the Highland  
12 Property is not a synagogue because it permits use "[i]nferior to the CUP requested  
13 by the Congregation" (page 6, lines 12-13). The City further argues that the  
14 Settlement Agreement "rejected a synagogue; instead it allowed for a few people to  
15 gather and pray in a residence" (page 7, lines 7-8) and that "in the City's eyes, the  
16 property is still residential, not a church or synagogue" (page 8, lines 22-23).

17 The City's current assertions of non-synagogue use should be viewed with  
18 much skepticism. In briefs previously filed with this Court, the City spoke outside  
19 the other side of its mouth by stating that the Settlement Agreement allows ". . .  
20 limited use of the Highland Property as a house of worship" (emphasis added)  
21 (City's March 29, 2004 motion for judgment on the pleadings, page 4, lines 13-15;  
22 City's September 29, 2003 brief arguing jurisdiction, page 2, lines 14-16). In  
23 addition, although the Congregation challenged Plaintiffs' complaint and first  
24 amended complaint by motions to dismiss, the City chose to answer. In its answer  
25 to each, it admitted (based on information and belief) that the Congregation was  
26 "currently erecting a structure at 303 South Highland Avenue intended to be used as  
27 a house of worship" (emphasis added) (answer to complaint filed August 26, 2003,  
28 page 2, lines 21-22; answer to first amended complaint filed November 3, 2003,

1 page 2, lines 23-26).

2       The City now argues a completely illogical position – that the Highland  
3 Property is not being used as a synagogue because the Congregation was not granted  
4 the full CUP requested by its permit application.<sup>2</sup> The City also asserts that to ". . .  
5 ensure that the Congregation would not use the premises as a synagogue . . ."  
6 parking associated with religious use was curtailed (page 7, lines 14-17). The City  
7 fails to explain how parking limitations prevent a building from being used as a  
8 synagogue. The City also argues (without explanation) that double pane windows, a  
9 grass lawn and removal of concrete pavement (page 6, lines 20-22) somehow bar the  
10 Court from finding synagogue use.

11       The City's brief reflects the reality that the Settlement Agreement is a permit  
12 for synagogue use. As the City itself notes, the Settlement Agreement limits the  
13 number of persons who can worship, the time limits on worship, parking and the  
14 nature of activities allowed (page 6, line 24 to page 7, line 3). These types of  
15 restrictions are exactly what would be expected in a church based conditional use  
16 permit. *See Lucas Valley Homeowners Assn. v. County of Marin*, (1991) 233  
17 Cal.App.3d 130, 148-149 where the CUP for synagogue use allowed services during  
18 certain hours, limited the number of attendees, defined the activities allowed and  
19 addressed the parking issue (233 Cal.App.3d at 140). The conditions imposed in the

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25       <sup>2</sup> Had the Congregation asked for the right to allow 5,000 attendees and the  
26 Settlement Agreement allowed only 4,500, would the City argue this is not  
27 synagogue use because the Congregation was not granted the full CUP requested by  
28 its permit application?

1 Settlement Agreement are completely consistent with the limits that could be  
2 imposed by a use permit issued under the City's ordinances. *Los Angeles Municipal*  
3 *Code* §12.24(F) thus allows the CUP decision maker to impose conditions ". . .  
4 which it deems necessary to protect the best interests of the surrounding property or  
5 neighborhood."<sup>3</sup>

6 Because there is a factual issue about synagogue use, the Court must find that  
7 Plaintiffs have stated a claim and allow Plaintiffs the opportunity to prove the  
8 allegation. As noted, it is only when a complaint reveals an insuperable bar to relief  
9 that a motion to dismiss is properly granted. *Bodine Produce, supra*, 495 F.2d at  
10 556. *See also Martin Marietta v. International Telecomms., etc.*, 991 F.2d 94, 97  
11 (4th Cir. 1992) (the construction of ambiguous contract provisions is a factual  
12 determination that precludes dismissal on a motion for failure to state a claim);  
13 *Accord Reynolds v. Allstate Life Ins. Co.*, (E.D. Cal. 2006) 2006 WL 662749, 2;  
14 *Mason v. Arizona*, 260 F.Supp.2d 807, 814 (D. Ariz. 2003) (any ambiguities in  
15 considered documents should be resolved in a plaintiff's favor on a motion to  
16 dismiss).

17 Plaintiffs have referenced materials outside the second amended complaint  
18 only to demonstrate that they can allege facts to state a claim that the Settlement  
19 Agreement allows the Highland Property to be used as a synagogue. Certainly, the  
20 manner in which the Highland Property is actually being used (a question of fact) is  
21 a highly reliable indicator of the use allowed by the Settlement Agreement. For  
22 example, if the Highland Property is actually being used as synagogue and the City  
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25 <sup>3</sup> Apparently the City believes that if they require someone to live at the  
26 Highland Property (even a caretaker for the synagogue) and they require the  
27 building to look like a house, this will bar a Court from making a factual  
28 determination that in reality the building is a synagogue. The City's position is a  
classic attempt to exalt form over substance.

1 has not brought any action claiming such use is a breach, this is strong evidence the  
2 true intent of the Settlement Agreement was to allow synagogue use. Under  
3 California law, a court may consider the subsequent acts and conduct of the  
4 Congregation and the City in order to interpret whether the Settlement Agreement  
5 allows synagogue use. As held in *Woodbine v. Van Horn*, 29 Cal.2d 95, 104 ". . . a  
6 construction given the contract by the acts and conduct of the parties with  
7 knowledge of its terms, before any controversy has arisen as to its meaning, is  
8 entitled to great weight and will, when reasonable, be adopted and enforced by the  
9 court". *Accord U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281F.3d 929, 937 (9th  
10 Cir. 2002).

11 As Plaintiffs have noted in their brief, given a chance to proceed on their  
12 complaint, they will allege (and they believe they will be able to prove) the  
13 Highland Property has always been used as a synagogue under the Settlement  
14 Agreement. This is sufficient to withstand a motion to dismiss. *See, e.g., Conley v.*  
15 *Gibson*, 355 U.S. 41, 45-46 (1957) (" . . . a complaint should not be dismissed for  
16 failure to state a claim unless it appears beyond doubt that the plaintiff can prove no  
17 set of facts in support of his claim which would entitle him to relief); *Accord*  
18 *Rabang v. I.N.S.*, 35 F.3d 1449, 1451 (9th Cir. 1994).

19 In summary, the factual question of synagogue use of the Highland Property  
20 simply can not be decided against Plaintiffs on a motion to dismiss. The City makes  
21 no showing of any insuperable bar to a finding that the use allowed by the  
22 Settlement Agreement is synagogue use. As such, the dismissal should not be  
23 allowed to stand.

## 24 **II THE CITY IGNORES A KEY HOLDING OF TRANCAS**

25 The City refuses to acknowledge that Plaintiffs have alleged (or can allege  
26 and believe they can prove) that synagogue use permission – which can only be  
27 granted after notice, a hearing and findings – has been granted by the Settlement  
28 Agreement. The City further refuses to acknowledge that if a fact finder determines

1 that the Settlement Agreement allows synagogue use of the Highland Property, then  
2 the Settlement Agreement is invalid under *Trancas*. It is invalid because *Trancas*  
3 holds that a litigation settlement agreement can not be used to circumvent the  
4 requirement of the zoning laws and can not grant the use permission or the  
5 functional equivalent of use permission which by statute requires notice, a hearing  
6 and findings. 138 Cal.App.4th 181-82. As *Trancas* holds, such an agreement is  
7 void. In *Trancas*, the litigation settlement agreement allowed the developer to use  
8 property without complying with a Malibu city ordinance limiting density. The  
9 *Trancas* court found that a contractual exemption to a zoning law requirement is  
10 invalid under the California Supreme Court's decision in *Avco Community Dev., Inc.*  
11 *v. South Coast Reg. Commn.*, (1976) 17 Cal.3d 785 and invalid because it is  
12 functionally equivalent to a variance or exception to the requirements of the  
13 governing zoning ordinance which can be granted only after notice, a hearing and  
14 findings mandated by statute (138 Cal.App.4th at 181-82) .

15       The City does not (and can not ) contest that, as fully set forth in Plaintiffs'  
16 opening brief, synagogue use of the Highland Property can be granted only by a  
17 CUP which requires notice, a hearing and findings. The City also does not (and can  
18 not ) contest that if the Highland Property is being used as a synagogue, that use is  
19 illegal and improper and the Settlement Agreement is void under *Trancas*. The only  
20 way the City can escape the illegality of the Settlement Agreement is to argue that  
21 the Highland Property is not being used as a synagogue. This is a fact question that  
22 should be decided at trial or on summary judgment – not on a motion to dismiss  
23 under rule 12(b)(6).

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1 **III CONCLUSION**

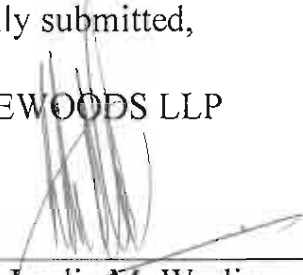
2 Under *Trancas*, the Court can not deny Plaintiffs the right to proceed on their  
3 claim unless the Court makes the factual determination that the Highland Property is  
4 not being used as a synagogue under the Settlement Agreement. As set forth above,  
5 at this procedural stage, no such factual determination is proper.

6 The Court's order dismissing the second amended complaint should be  
7 vacated and the complaint re-instated.

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Respectfully submitted,

MCGUIREWOODS LLP

By:   
\_\_\_\_\_  
Leslie M. Werlin  
Attorneys for Plaintiffs

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over  
4 the age of eighteen years and not a party to the within action; my business address is  
1800 Century Park East, 8<sup>th</sup> Floor, Los Angeles, CA 90067.

5 On August 7, 2006, I served the following document(s) described as  
6 **PLAINTIFFS' REPLY TO BRIEF BY CITY OF LOS ANGELES**  
7 **REGARDING APPLICABILITY OF TRANCAS V. CITY OF MALIBU** on the  
interested parties in this action by placing true copies thereof enclosed in sealed  
envelopes addressed as follows:

8 **SEE ATTACHED LIST**

9  **BY MAIL:** I am "readily familiar" with the firm's practice of collection and  
10 processing correspondence for mailing with the United States Postal Service.  
11 Under that practice, it would be deposited with the United States Postal  
12 Service that same day in the ordinary course of business. Such envelope(s)  
were placed for collection and mailing with postage thereon fully prepaid at  
Los Angeles, California, on that same day following ordinary business  
practices. (C.C.P. § 1013 (a) and 1013a(3))

13  **BY FACSIMILE:** At approximately \_\_\_\_\_, I caused said document(s) to be  
14 transmitted by facsimile pursuant to Rule 2008 of the California Rules of  
15 Court. The telephone number of the sending facsimile machine was (310)  
16 315-8210. The name(s) and facsimile machine telephone number(s) of the  
17 person(s) served are set forth in the service list. The document was  
transmitted by facsimile transmission, and the sending facsimile machine  
properly issued a transmission report confirming that the transmission was  
complete and without error.

18  **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or  
19 other facility regularly maintained by the overnight service carrier, or  
20 delivered such document(s) to a courier or driver authorized by the overnight  
service carrier to receive documents, in an envelope or package designated by  
the overnight service carrier with delivery fees paid or provided for,  
addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

21  **BY HAND DELIVERY:** I delivered such envelope(s) by hand to the office  
22 of the addressee(s). (C.C.P. § 1011(a)(b))

23  **BY PERSONAL SERVICE:** I personally delivered such envelope(s) to the  
addressee(s). (C.C.P. § 1011)

24 I declare that I am employed in the office of a member of the bar of this Court  
25 at whose direction the service was made.

26 Executed on August 7, 2006, at Los Angeles, California.

27 \_\_\_\_\_  
28 **SHERLYNN HICKS**

**SERVICE LIST**

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