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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.
21

CASE NO. CV03-04890-CAS

**PLAINTIFFS' REPLY TO BRIEF
BY CONGREGATION ETZ CHAIM
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 **I. TRANCAS IS DIRECTLY APPLICABLE TO THE FACTS BEFORE**
2 **THIS COURT**

3 The Congregation argues *Trancas* is not applicable because: (a) the
4 Settlement Agreement does not involve a surrender of the City's zoning power; (b)
5 unlike the functional variance granted by the agreement in *Trancas*, the Settlement
6 Agreement's use permission does not functionally resemble a use permit; and (c)
7 *Trancas* does not apply because RLUIPA preempts the zoning laws which Plaintiffs
8 allege are applicable (page 5, lines 8-13). Each of the Congregation's arguments
9 must be rejected.

10 **A. *Trancas* Invalidates A Litigation Settlement Agreement's Grant Of**
11 **A Functional Exemption From An Applicable Zoning Ordinance**

12 In *Trancas*, the Court found the settlement agreement before it "intrinsically
13 invalid" because it included "commitments to take or refrain from regulatory actions
14 regarding . . . zoning which may not lawfully be undertaken by contract". 138
15 Cal.App.4th at 180-81. The court held that one such example of Malibu refraining
16 from regulatory actions regarding zoning was the contractual exemption Malibu
17 granted (through its settlement agreement) from the existing density requirement of
18 its zoning ordinance.

19 The Congregation wrongly asserts that this Court previously applied the
20 theories of *Trancas* to the facts of this case. Before *Trancas*, no California appellate
21 court had squarely invalidated a litigation settlement agreement which circumvents
22 the substantive and procedural requirements of the zoning laws or which grants what
23 functionally resembles an exemption to applicable zoning laws. Here, Plaintiffs
24 assert that the Settlement Agreement exempts the Congregation from an express
25 prohibition of the City's zoning law – the requirement of the *Los Angeles Municipal*
26 *Code ("LAMC")* that synagogue use is barred in an R-1 zone (*LAMC* §12.08) unless
27 permission is granted in accordance with *LAMC* §12.24. Plaintiffs submit that
28 *Trancas* compels a finding that Plaintiffs have stated a claim.

1 When this Court made its prior decisions about Plaintiffs' complaints, *Trancas*
2 had not been decided. This Court is, of course, bound by *Trancas*' holdings. *See,*
3 *e.g., California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1099 (9th Cir.
4 2003); *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F.Supp.2d 1053 (C.D.
5 Cal. 2003).

6 **B. *Trancas* Invalidates An Agreement Which Operates As The**
7 **Functional Equivalent Of A Variance Or CUP**

8 The Congregation argues the contractual exemption from existing zoning
9 laws invalidated in *Trancas* is different from the use permission granted by the
10 Settlement Agreement because the Congregation is not operating a synagogue (even
11 though at this stage of the proceedings there is no evidence before the Court on this
12 issue) and because the Settlement Agreement does not run with the land (page 8,
13 lines 7-16).

14 First, just like the City in its brief, the Congregation asks this Court to decide
15 a question of fact – is the Congregation operating a synagogue. Thus, argues the
16 Congregation, its use "falls far short" of the activities typically permitted at a
17 synagogue (page 8, lines 23-24). Of course, the Court may not decide questions of
18 fact in the context of deciding whether a Rule 12(b)(6) motion to dismiss was
19 properly granted. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
20 2000) ("factual challenges to a plaintiff's complaint have no bearing on the legal
21 sufficiency of the allegations under Rule 12(b)(6)"); *Jones v. Johnson*, 781 F.2d
22 769, 772 n. 1 (9th Cir. 1986) (any weighing of the evidence is inappropriate on a
23 12(b)(6) motion); *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (when
24 ruling on a motion to dismiss, a court accepts all factual allegations in the complaint
25 as true); *PPG Industries, Inc. v. Pilkington*, 825 F.Supp. 1465, 1470 (D. Ariz.

26 ///

1 1993) (Rule 12(b)(6) motion is not a procedure for resolving a contest about the
2 facts or the merits of the case).¹

3 Second, whether or not the Settlement Agreement "runs with land" is
4 irrelevant under *Trancas*. *Trancas* forbids cities from exalting form over substance
5 by condemning contracts which grant use permission which "functionally
6 resembles" use permission governed by applicable zoning ordinances. Like in
7 *Trancas*, Plaintiffs allege that the Settlement Agreement "functionally resembles" a
8 CUP because – like a CUP under *LAMC* §12.24 – the Settlement Agreement permits
9 a synagogue to be operated in an R-1 zone when synagogues may be operated in an
10 R-1 zone only if when a CUP is granted in accordance the requirements of that
11 statute. Whether or not the Settlement Agreement's synagogue use permission "runs
12 with the land," such use permission does not escape the ban on synagogue use set
13 forth in *LAMC* §12.08. Section 12.08 does not authorize contractual use permission
14 nor does it authorize use permission which does not "run with the land". In
15 actuality, the Congregation is asking this Court to amend *LAMC* §§12.08 and 12.24
16 to insert provisions which allow synagogue use if granted by privately negotiated
17 litigation settlement agreements or which do not "run with the land". Courts may
18 not amend statutes. *In re Sheehan*, 253 F.3d 507, 517 (9th Cir. 2001) ("Re-writing
19

20 ¹ Plaintiffs also note that the Congregation here tells the Court the Highland
21 Property is not a synagogue even in the face of what appears to Rabbi Rubin's sworn
22 statement that it is a synagogue (opening brief, Ex. "A"). Plaintiffs offer this
23 document not as part of a request that the Court decide the factual question of
24 synagogue use, but rather to demonstrate that they can allege synagogue use which
25 is barred by the City's zoning ordinances where no CUP for such use has been
26 granted. If, as the Congregation asserts, the Highland Property is not being used by
27 the Congregation as a synagogue and therefore the Settlement Agreement does not
28 offend the zoning laws, the Congregation should not object to Plaintiffs being
allowed to test this argument (by re-instating the complaint) and having the
Settlement Agreement declared void if proof shows the property is being used as a
synagogue.

1 law is not the function of the judiciary"); *California Fed. Savings & Loan Assn. v.*
2 *City of Los Angeles*, (1995) 11 Cal.4th 342, 349 (a court's function is to construe,
3 not to amend, statutes and not to insert what has been omitted).

4 *Trancas* found "functional" resemblance to statute based use permission
5 where the property is granted a contractual exemption from standard zoning which
6 by law could only be granted after administrative proceedings, including public
7 hearings. This is exactly the scenario alleged by Plaintiffs. *Trancas* contains no
8 holding that a sine qua non of "functional" resemblance is that the exemption "runs
9 with the land". To the contrary, *Trancas* condemns contract based use permission
10 which "functionally resemblances" use permission which, under zoning laws, may
11 be granted only after compliance with "substantive qualifications and procedural
12 means". As *Trancas* notes, these substantive qualifications and procedural means
13 discharge public interests and their circumvention by contract is impermissible.²

14 The Congregation simply refuses to acknowledge that California's public
15 policy demands public involvement ". . . at every level of the process when land use
16 decisions are being made" *Penn-Co v. Board of Supervisors*, (1984) 158
17 Cal.App.3d 1072, 1078 and *Trancas'* recognition of the primacy of that public
18 policy. As *Trancas* holds, departures from zoning requirements are governed by
19 laws which "discharge public interests" and circumvention of those laws by contract
20 is impermissible. 138 Cal.App.4th at 182.³

21
22
23 ² "Variances and conditional use permits are methods by which a property
24 owner may seek relief from the strict terms of a comprehensive zoning ordinance."
25 *Royalty Carpet Mills, Inc. v. City of Irvine*, (2005) 125 Cal.App.4th 1110, 1115 n. 1.
26 "The approval of variances, conditional use permits, and tentative subdivision maps,
27 which involve the application of preestablished standards and conditions to
28 particular land uses, is administrative or 'adjudicatory.' *W. W. Dean & Associates v.*
City of South San Francisco, (1987) 190 Cal.App.3d 1368, 1375.

³ As Plaintiffs' opening brief explains, allowing use permission to be

1 **C. RLUIPA Does Not Exempt The Congregation From Operation Of**
2 **The City's Zoning Laws**

3 Without citation to a single authority and without any preemption analysis,
4 the Congregation argues that RLUIPA preempts the City's zoning ordinances (page
5 5, lines 12-13). Section 2000cc-3(e) of RLUIPA, cited by the Congregation (page
6 10) is completely inapplicable.⁴ First, that provision comes into play only when a
7 government policy or practice results in a "substantial burden on religious exercise".
8 No complaint offered by Plaintiffs ever alleged any substantial burden on the
9 Congregation. Indeed, under an RLUIPA analysis it would be the Congregation's
10 burden to establish "substantial burden", a factual question which requires that the
11 Congregation establish a burden which is oppressive to a significantly great extent.
12 *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir.
13 2004). As set forth above, factual issues may not be determined when deciding
14 whether a Rule 12(b)(6) dismissal was properly granted.

15 In fact, diligent research by Plaintiffs' counsel has revealed no case which has
16 ever held that RLUIPA preempts state zoning statutes. Those cases that have
17 considered the issue have held that RLUIPA provides no exemption from the

18
19 governed by private contracts creates a separate land use universe unsanctioned by
20 any legislature and which, as a practical matter, nullifies both valid zoning
21 ordinances and judicial decisions which have reviewed and affirmed decisions made
22 in accordance with their terms. It also bars courts from reviewing land use decisions
23 using legislatively based created criteria and instead substitutes a contract law
24 analysis.

25 ⁴ Section 2000cc-3 does not and could not reflect an intent to preempt the
26 entire field of state and local of zoning law even though it uses the phrase
27 "preemptive effect". Where the field in which federal law operates is naturally and
28 traditionally state controlled (such as zoning), a court must identify "the domain
expressly preempted", even when a statute uses preemptive-type language.
Medtronic v. Lohr, 518 U.S. 470, 486 (1996).

1 application of zoning laws. *See, e.g., Hale Kaula Church v. The Maui Planning*
2 *Commn.*, 229 F.Supp.2d 1056, 1071 (D. Hawaii 2002) (citing to RLUIPA's
3 legislative history which states, in part, that RLUIPA ". . . does not provide religious
4 institutions with immunity from land use regulation, nor does it relieve religious
5 institutions from apply for variances, special permits or exceptions, hardship
6 approval, or other relief provisions in land use regulations"); *Civil Liberties, etc. v.*
7 *City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (RLUIPA does not require
8 exemption from land use regulation – "so such free pass for religious land uses
9 masquerades among the legitimate protections RLUIPA affords to religious
10 exercise"); *Accord Primera Iglesia Bautista v. Broward County*, 450 F.3d 1295,
11 1313 (11 Cir. 2006).

12 The Congregation asserts that faced with an RLUIPA claim, the City was
13 entitled to settle the litigation against it (page 11, lines 26-27). There is no dispute
14 with the general statement that the City and the Congregation could settle the
15 litigation between them. Plaintiffs do dispute that the City had any right to settle by
16 granting a contractual exemption to its zoning laws. *Trancas* is now direct authority
17 – previously unavailable to this Court – that such contractual exemptions are legally
18 invalid.⁵

19 Contrary to the assertion by the Congregation, settlement of an RLUIPA
20 claim does not provide cover for a contract which violates state law (pages 9-10).
21 The Congregation cites no case law which validates a settlement agreement which
22 violates state law and which impacts the rights of third parties such as Plaintiffs.
23 The Congregation simply ignores the case law cited in the Plaintiffs' opening brief
24

25 ⁵ Of course, this court may reconsider previously decided questions in cases
26 in which there has been an intervening change of controlling authority. *See, e.g.,*
27 *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995). Indeed, this
28 Court has been directed to reconsider by the Ninth Circuit.

1 which holds to the contrary. *See, e.g., Southern Cal. Edison v. Lynch*, 307 F.3d 794
2 (9th Cir. 2002) ("State officials cannot enter into a federally-sanctioned consent
3 decree beyond their authority under state law").⁶

4 The Congregation can not validate a contract invalid under *Trancas* by
5 asserting that the contract arises out settlement of a federal law claim. *See U. S. v.*
6 *ITT Continental Baking Co.*, 420 U.S. 223, 235-237 (1975) (directing that a consent
7 decree be construed as contract and holding that it ". . . must be construed as it is
8 written, and not as it might have been written had the plaintiff established his factual
9 claims and legal theories in litigation . . . and [it must also be construed] without
10 reference to the legislation the [plaintiff] originally sought to enforce but never
11 proved applicable through litigation").

12 If the Court accepts the Congregation's argument, it will automatically grant
13 preemptive force (without any preemption analysis) not only to every federal law
14 but to every allegation that federal law has been violated. Of course, preemption is
15 a question of law, *see e.g., Maynard v. City of San Jose*, 37 F.3d 1396, 1405 (9th
16 Cir. 1994) to be determined based on Congressional intent starting with the
17 presumption that Congress does not intend preemption. *See, e.g., United States v.*
18 *4,432 Mastercases of Cigarettes*, 448 F.3d 1168, 1189 (9th Cir. 2006).

19 However, under the Congregation's approach, the question of preemption
20 shifts from the courts and Congress to private parties, acting in their self-interest,
21 who decide to enter into a bilateral contract to settle a federal law claim. According
22 to the Congregation, private parties now have the power to preempt applicable state
23 law and to cause state citizens to lose the protections of those laws – all of this
24 happens because private parties negotiate a bilateral settlement agreement of a

25
26 ⁶ In *Magruder v. Redwood City*, (1928) 203 Cal. 665, 674-75 the California
27 Supreme Court held that that a municipality's governing body has no authority to
28 waive or nullify its zoning ordinances by granting permission for a violating use.

1 federal claim. The implications of the Congregation's position are staggering and
2 must be rejected. As indicated above, RLUIPA does not in its provisions or its
3 legislative history preempt local law, but rather provides religious entities the power
4 to challenge certain land use determinations.

5 **D. The Decision In *108 Holdings* Is Inapposite**

6 The Congregation cites to *108 Holdings Ltd v. Rohnert Park*, (2006) 136
7 Cal.App.4th 186. That case is completely inapposite because it does not address the
8 question presented by this case and resolved in Plaintiffs' favor in *Trancas* – that a
9 City may not, in a litigation settlement agreement, contractually circumvent its
10 zoning laws by granting a contractual exemption to a zoning requirement or
11 limitation.

12 Unlike the situation alleged in the matter before this Court and addressed in
13 *Trancas*, the agreement made in *108 Holdings* did not exempt property from the
14 requirement of an applicable zoning ordinance. Rather, the issue was whether
15 Rohnert Park surrendered its police power by giving up its authority to amend its
16 general plan. The Court found Rohnert Park did not give up this authority and, in
17 fact, followed the legislatively mandated procedures for plan amendment – a point
18 the plaintiff in that action conceded. 136 Cal.App.4th at 198 and 199. Here, in
19 contrast, Plaintiffs have always alleged that the City failed to follow legislatively
20 mandated procedures. They did so by granting synagogue use in an R-1 zone
21 without complying with *LAMC* §12.24 (complaint ¶21, 53-57; first amended
22 complaint ¶20-25, 38-44; second amended complaint ¶20-30, 39-49).

23 Again, *108 Holdings* does not address the question presented in this case and
24 resolved in Plaintiff's favor in *Trancas* – may a city contractually grant land use
25 permission which under zoning statutes or ordinances, require notice, a hearing, and
26 findings. *Trancas* expressly prohibits contractual circumvention of the zoning laws
27 because they contain substantive qualifications and procedural means which
28 discharge public interests. 138 Cal.App.4th at 182. *Trancas* expressly condemns

1 exactly what the City and the Congregation did under the Settlement Agreement –
2 the creation of contractual land use permission granted without legislatively
3 mandated notice, hearings and findings – and holds such agreements to be void.

4 **E. Once Again, the Question Presented Is Whether Plaintiffs Have**
5 **Stated A Claim**

6 The statement on *108 Holdings* that cities have the power to resolve land use
7 litigation by a settlement agreement adds nothing to the Congregation's position.
8 Plaintiffs do not question that land use litigation can be settled. Rather, the question
9 presented in this case is whether a City can settle by granting use permission which,
10 under zoning statutes, has substantive and procedural qualifications. *Trancas*
11 answers that question with a resounding "No". A contractual exemption from a
12 provision of an applicable zoning law granted by a litigation settlement agreement is
13 improper under *Trancas*.

14 Plaintiffs allege that the City granted the Congregation a contractual
15 exemption by allowing synagogue use in an R-1 zone pursuant to the Settlement
16 Agreement when such use is prohibited except if permitted by a CUP granted
17 pursuant to the City's zoning ordinance (§12.24). It is respectfully submitted that
18 Plaintiffs have stated a claim. Neither the City nor the Congregation should be
19 permitted to de-rail that claim by asking this Court – without evidence and in the
20 context of a Rule 12(b)(6) motion – to make factual determinations against Plaintiffs
21 that the Highland Property is not being used as synagogue or that application of
22 City's zoning laws impose a "substantial burden" on the Congregation within the
23 meaning of RLUIPA.

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1 **II. THE RIGHT OF PARTIES TO SETTLE LITIGATION DOES NOT**
2 **INCLUDE THE RIGHT TO NULLIFY LAND USE LAWS,**
3 **DECISIONS UNDER LAND USE LAWS, TO DEROGATE THE**
4 **RIGHTS OF NON-PARTIES OR IMPOSE BURDENS UPON THEM**

5 In a "sky is falling" argument, the Congregation asserts that unless they are
6 allowed to circumvent the zoning laws under cover of a litigation settlement
7 agreement, land use litigation can never be settled (page 14-17). However, no court
8 should assist in or condone the violation of laws in the name of litigation settlement.

9 Zoning laws exist for the benefit of Plaintiffs and the community. *See*
10 *Consolidated Rock Prods. Co. v. City of Los Angeles*, (1962) 57 Cal.2d 515, 524
11 (primary purpose of comprehensive zoning is protection of the general public);
12 *Ehrlich v. City of Culver City*, (1996) 12 Cal.4th 854, 881 (the general purpose of
13 zoning is to regulate land to promote public welfare). California law forbids a
14 waiver of public benefit laws, *Civil Code* §3513; *See, e.g., Strong v. County of Santa*
15 *Cruz*, (1975) 15 Cal.3d 720, 727 (government may not waive the requirements of
16 ordinance enacted for the public benefit); *Friedman v. Pacific Outdoor*, (1946) 74
17 Cal.App.2d 946, 953 (ordinance enacted for public good may not be contravened by
18 contract). Certainly, the City can not waive application of laws intended to protect
19 the community in order to serve its own interests in settling litigation against it.

20 Land use litigation can be settled. However, it can not be settled under
21 existing law by a contract which grants the applicant use permission which can only
22 be granted by application of the zoning laws. What *Trancas* teaches is that a
23 litigation settlement agreement can not circumvent the zoning laws – a result
24 Plaintiffs here allege. It simply can not result in use permission which can only be
25 granted by application of the zoning laws. The protection granted to Plaintiffs and
26 the community by the zoning laws do not terminate when a complaint is filed in a
27 court. If the result is otherwise:

- 28 1. There will be no need for land use applicants to follow legislatively

1 mandated statutory schemes regulating zoning because courts will have upheld the
2 principal that land use applicants can obtain use permission by privately negotiated
3 contracts – whether or not the requirements of the zoning laws have been met.
4 Zoning laws will become superfluous and the public will be denied their right to
5 notice, an opportunity to be heard and the right to have applications judged by a
6 disinterested decision maker (the City) using legislatively created criteria. This will
7 be the alternate land use permission universe, unsanctioned by any legislature,
8 which Plaintiffs have been describing. *Trancas* condemns this result in its holding
9 that zoning decisions discharge public interests and "circumvention of them by
10 contract is impermissible";

11 2. the Court will be condoning a denial of the due process rights of
12 Plaintiffs and the public. Land use permission decisions (including variances and
13 conditional use permits) are adjudicative decisions, *see, e.g., Johnston v. Board of*
14 *Supervisors*, (1947) 31 Cal.2d 66, 73 (disapp. other grounds 46 Cal.2d 132) which
15 invoke procedural due process rights. *See Richardson v. Perales*, (1971) 402 U.S.
16 389, 401-02; *Scott v. City of Indian Wells*, (1972) 6 Cal.3d 541, 548-49; *Drum v.*
17 *Fresno County*, (1983) 144 Cal.App.3d 777, 782; *Nightlife Partners v. City of*
18 *Beverly Hills*, (2003) 108 Cal.App.4th 81, 91. *See also Pettit v. City of Fresno*,
19 (1973) 34 Cal.App.3d 813, 823 (all residents of a community have a protectable
20 property interest in zoning issues).⁷

21 The settlement of litigation between two private parties is not so exalted that
22 it is permitted to deny due process rights, statutory notice and hearing rights or to
23 nullify or circumvent land use laws. The public policy which encourages the
24 settlement of private party litigation does not encourage, condone or exalt

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26 ⁷ Agreements made in violation of Plaintiffs' constitutional rights are void.
27 *See, e.g., Katzberg v. Regents of Univ. of Calif.*, (2002) 29 Cal.4th 300, 307;
28 *Voswinkel v. City of Charlotte*, 495 F.Supp. 588 (W.D.N.C. 1980).

1 settlements which impair the rights on non-parties, which impose burdens upon
2 them, or which violate the law. *See Local No. 93, Intern. Ass'n of Firefighters v.*
3 *City of Cleveland* 478 U.S. 501, 529 (1986) ("Of course, parties who choose to
4 resolve litigation through settlement may not dispose of the claims of a third party,
5 and a fortiori may not impose duties or obligations on a third party, without that
6 party's agreement"); *Siciliano v. Fireman's Fund Ins. Co.*, (1976) 62 Cal.App.3d
7 745, 758 (even though the law favors voluntary settlements or compromises, it does
8 not favor the making thereof in derogation of the rights of third parties); *Timney v.*
9 *Lin*, (2003) 106 Cal.App.4th 1121, 1127 ("even though there is a strong public
10 policy favoring the settlement of litigation, this policy does not excuse a contractual
11 clause that is otherwise illegal or unjust").

12 Finally, if a Court condones a settlement which allows use permission granted
13 by a litigation settlement agreement, the Court will encourage land use litigation.
14 Such litigation will give applicants a second bite at the apple and the right of
15 governments to grant permission unfettered by the restraints of the zoning laws.
16 This will happen despite *Trancas* and California Supreme Court precedent which
17 holds that cities are bound to enforce their zoning laws and have no right to grant
18 permits which violate those laws. *Magruder, supra*, 203 Cal. 665 at 674-75. The
19 Court will also be sanctioning the ability of City's to waive the application of the
20 zoning laws in order to settle litigation against them despite California Supreme
21 Court precedent which holds that zoning laws, which are public benefit laws, can
22 not be waived by local governments. *Strong, supra*, 15 Cal.3d at 727.

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1 **III. THE BROWN ACT DOES NOT SAVE THE SETTLEMENT**
2 **AGREEMENT**

3 In seeking dismissal of Plaintiffs' claims, the Congregation previously argued
4 to this Court that "The City fully complied with the public notice provisions of the
5 City Charter and the Brown Act, and that all is all that is required" (emphasis added)
6 (Congregation's Dec. 8, 2003 motion to dismiss, page 22, lines 3-5).⁸

7 The Congregation now asserts that the Brown Act is not violated because the
8 Settlement Agreement did not take action for which a public hearing was required
9 (page 19, lines 4-5). This argument assumes that the Highland Property is not being
10 used under the Settlement Agreement as a synagogue – a use which expressly
11 requires a public hearing under *Los Angeles Municipal Code* §12.08 and 12.24. Of
12 course, the factual issue of synagogue use can not be determined in the context of
13 this proceeding.

14 Plaintiffs argue that the Settlement Agreement is invalid whether or not the
15 City complied with the Brown Act. As Plaintiffs previously argued to this Court,
16 "The Brown Act is not an immunizing or validating statute which cures or excuses
17 the violations of other laws" (Plaintiffs' Dec, 1, 2003 opposition to the
18 Congregation's motion to dismiss, page 9, lines 7-8). *Trancas* now confirms
19 Plaintiffs' position. *Trancas* holds that the Brown Act's closed session provision
20 (*Government Code* §54956.9),

21 " . . . cannot be construed to empower a city council to
22 take or agree to take, as part of a non-publicly ratified
23 settlement agreement, action that by substantive law may
24 not be taken without a public hearing and an opportunity

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26 ⁸ No notice provisions of the Charter were argued by the Congregation.
27 Rather, it relied on Charter Sec. 273 which grants the City counsel the authority to
28 enter into settlement agreements.

1 to be heard . . . [it] may not be read to authorize
2 circumvention and indeed violation of other laws requiring
3 that decisions be preceded by public hearings simply
4 because the means and object of the violation are
5 settlement of a lawsuit" (emphasis added).

6 138 Cal.App.4th at 186.

7 Thus, *Trancas* stands for the proposition the settlement of litigation does not
8 allow a City to circumvent or avoid its zoning laws. Independent of the Brown Act,
9 *Los Angeles Municipal Code* §12.24 expressly requires that before synagogue use is
10 allowed in an R-1 zone (where the Highland Property is located) there must be a
11 "public hearing at which evidence will be taken" and there must be findings on
12 accordance in §12.24(O). Based on Plaintiffs' allegations that the Settlement
13 Agreement grants use permission, public hearings were also mandated (independent
14 of the Brown Act) by *Government Code* §§65804, 65854, 65090 and 65091.

15 As Plaintiffs have alleged, the City and the Congregation could not
16 circumvent the requirements of the *LAMC* by private agreement – a central holding
17 in *Trancas*. The City is bound to follow and obey its own ordinances and it had no
18 authority to issue use permission, under the guise of a settlement agreement, or in
19 any other manner not in accordence with *LAMC* §12.24. *See Alpha Beta, etc. v.*
20 *Retail Clerks, etc.*, (1955) 45 Cal.2d 764, 771 (gov't regulations cannot be varied or
21 evaded by private contract); *Accord Bright v. Bechtel, etc.*, 780 F.2d 766, 772 n. 7
22 (9th Cir. 1986); *Johnston v. Board of Supervisors*, (1947) 31 Cal.2d 66, 74 (disapp.
23 other grounds 46 Cal.2d 132, 138) (the City is bound by its ordinances); *Magruder,*
24 *supra*, 203 Cal. at 675 (zoning authorities had no power to issue permit contrary to
25 terms of zoning ordinance thereby nullifying ordinance).

26 Thus, *Trancas* establishes that the Brown Act did *not* authorize or excuse the
27 violation of the statutes set forth above, which mandate that a public hearing be held
28 before use permission for a synagogue could have been granted. Plaintiffs have

1 alleged violation of the public hearing and due process requirements inherent in
2 these statues (for example first amended complaint ¶25, 26 and 41 and second
3 amended complaint ¶22 and 26).⁹

4 Thus, whether or not the Brown Act was violated, Plaintiffs have stated a
5 claim that the Settlement Agreement is illegal under *Trancas* because it grants a
6 contractual exemption around the *Los Angeles Municipal Code* §12.08 ban on
7 synagogue use in an R-1 zone unless use permission been granted under §12.24
8 (something which has not happened). This is enough to require that that this Court
9 re-instate Plaintiffs' litigation. *See, e.g., Haddock v. Board of Dental Examiners,*
10 *777 F.2d 462, 464 (9th Cir. 1985)* ("a complaint should not be dismissed if it states a
11 claim under any legal theory") (emphasis added); *Woodrum v. Woodward County,*
12 *866 F.2d 1121, 1124 (9th Cir. 1989)* ("Dismissal for failure to state a claim is proper
13 only if it appears beyond doubt that the plaintiff would be entitled to no relief under
14 any state of facts that could be proved); *S.E.C. v. Cross Financial Services, Inc.,*
15 *908 F.Supp. 718, 727 (C.D. Cal. 1995)* (under Rule 12(b)(6), the test is whether the
16 facts, as alleged, support any valid claim).

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25 ⁹ Due process also requires an impartial decision maker. *See, e.g., Haas v.*
26 *County of San Bernardino,* (2002) 27 Cal.4th 1017, 1025 (impartial decision maker
27 required in administrative proceeding). In approving its own Settlement Agreement,
28 the City was hardly impartial.

1 **IV. 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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9 Respectfully Submitted,

10 MCGUIREWOODS LLP

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13 By: 
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15 Leslie M. Werlin
16 Attorneys for Plaintiffs
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On August 7, 2006, I served the following document(s) described as **PLAINTIFFS' REPLY TO BRIEF BY CONGREGATION ETZ CHAIM 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:

SEE ATTACHED LIST

- BY MAIL:** I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal 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))
- BY FACSIMILE:** At approximately _____, I caused said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was (310) 315-8210. The name(s) and facsimile machine telephone number(s) of the 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.
- BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the overnight service carrier, or 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))
- BY HAND DELIVERY:** I delivered such envelope(s) by hand to the office of the addressee(s). (C.C.P. § 1011(a)(b))
- BY PERSONAL SERVICE:** I personally delivered such envelope(s) to the addressee(s). (C.C.P. § 1011)

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

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

SHERLYNN HICKS

SERVICE LIST

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