No. 06-55769

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON

Plaintiff and Appellee,

vs.

CITY OF SAN DIEGO, et al.

Defendant and Appellant.

On Appeal from the Order of the
United States District Court For the Southern District of California
The Honorable Gordon Thompson, Jr., Presiding
United States District Court No. 89-0820GT

APPELLANT CITY OF SAN DIEGO'S URGENT MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(b)

Action is Necessary on or before July 5, 2006, In Order to Avoid Irreparable Harm

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INTRODUCTION

The City of San Diego ("City") hereby moves this Court pursuant to Rule 8 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3(b) for an urgent motion to stay enforcement of the district court's order of May 3, 2006 ("Order"). A stay is necessary to avoid irreparable harm and to preserve the status quo pending full resolution of a related state court matter that is currently on appeal in the California appellate courts, possible federal condemnation, and a proper review of the permanent injunction in light of the changed circumstances. Furthermore, in order to avoid irreparable harm, the City's motion must be heard and considered on or before July 5, 2006.

A. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993)

The facts and circumstances surrounding the Mt. Soledad cross are well known to this Court as it has been asked to review this matter twice since its inception in 1989. That year Philip Paulson ("Paulson") filed the underlying action against the City alleging the presence of a forty-three-foot Latin cross located in the Mt. Soledad Natural Park, a City-owned and dedicated public park, violated both the United States and California Constitutions. The cross was constructed in 1954 by the Mount Soledad Memorial Association ("Memorial Association") and dedicated as a tribute

to veterans of both World Wars and the Korean War ("Veterans Memorial"). *Murphy v. Bilbray,* 782 F. Supp. 1420, 1423 n.7 & n.11 (S.D. Cal. 1991), aff'd *sub nom. Ellis v. City of La Mesa,* 990 F.2d 1518 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994). In December 1991, the district court granted Paulson's motion for summary judgment and held that the presence of the cross was unconstitutional under the California Constitution. The district court held the City impermissibly exhibited a preference for one religion over another in violation of California Constitution's "No Preference" Clause, and issued a permanent injunction "forbidding the permanent presence of . . .[the] cross on the public property . . . where it currently appears." *Id*. at 1438. This Court subsequently affirmed the district court's order granting summary judgment in favor of Paulson. *Ellis,* 990 F.2d at 1520.

B. *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002)

In an effort to comply with the district court's injunction, the City attempted to sell approximately one-half acre surrounding the cross. Public bids were solicited for the express purpose of "maintaining an [sic] historic war memorial." *Paulson v. City of San Diego*, 294 F.3d 1124, 1127 (9th Cir. 2002), *cert. denied*, 538 U.S. 978 (2003). The Memorial Association submitted the highest bid for the Veterans Memorial and subsequently was

approved by the City as the most qualified bidder in 1998. *Id*. at 1128. The Memorial Association took title to the property and set about building a world-class memorial honoring military veterans.[1] Paulson, however, objected to the terms of the sale. An *en banc* panel of this Court found that the sale was "structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross," in violation of the "No Aid to Religion" Clause of the California Constitution. *Id*. at 1133. The Ninth Circuit remanded the matter back to the district court stating, "No doubt there are several possible ways to cure this violation. We leave it to the parties and to the district court, in the first instance, to devise a remedy for the constitutional violation . . .."*Id*. at 1134.

C. Additional Attempted Sale and Federal Legislation

In July 2004, the City adopted an ordinance authorizing the placement of Proposition K on the November 2004 ballot. (Karlin Dec. ¶ 7.) The proposition sought voter authorization to conduct another sale of the Veterans Memorial. However, Proposition K failed to gather sufficient votes

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[1] As set forth below, the Veterans Memorial has changed significantly since the Court first reviewed the matter in 1993. The Veterans Memorial now consists of extensive landscaping and walls of granite plaques engraved with the names and photographs of veterans. These changed circumstances warrant a reversal of the permanent injunction, further demonstrating the need for a stay.

as 59 percent of the voters rejected the proposition in the November 2004 election. (*Id.*)

Later that month, the United States Congress adopted Bill No. 4818 calling for the creation of a national memorial honoring veterans of the United States Armed Forces on the Veterans Memorial property. (Karlin Dec. ¶ 8.) The Bill was signed into law on December 8, 2004, as part of the Fiscal Year 2005 Omnibus Appropriations Act (P.L. No. 108-447). The Bill authorized the Secretary of the Interior to accept all rights, title, and interest to the Veterans Memorial, specifically defined as "consist[ing] of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forces," upon donation from the City to the federal government for the purpose of creating the national memorial. (*Id.*)

D. Proposition A and *Paulson v. Abdelnour*, San Diego Superior Court Case No. GIC849667

In March 2005, the City declined to donate its rights, title, and interests in the Veterans Memorial to the federal government. (Karlin Dec. ¶ 9.) Thereafter, the *San Diegans for the Mount Soledad National War Memorial* submitted sufficient referendary petitions causing the City to either rescind its decision declining the federal government's offer or call for a special election so that the electorate could consider the adoption of the

resolution declining the donation offer. (Karlin Dec. ¶ 10.) In May 2005, the City rescinded its declination of the federal government's donation offer in light of the referendary petitions. The City then passed an ordinance authorizing Proposition A for the Special Municipal Election held July 26, 2005. (Karlin Dec. ¶ 11.) The proposition asked the electorate, "Shall the City of San Diego donate to the federal government all of the City's rights, title, and interest in the Mt. Soledad Veterans Memorial property for the federal government's use of the property as a national memorial honoring veterans of the United States Armed Forces?" (*Id.*)

In June 2005, Paulson initiated a pre-election challenge to Proposition A in the matter of *Paulson v. Abdelnour, et al.*, San Diego Superior Court Case No. GIC849667. (Karlin Dec. ¶ 12.) Paulson argued, among other things, that Proposition A would result in an unconstitutional act as it represented the latest unconstitutional attempt to preserve the cross on Mt. Soledad. Proposition A passed as 76 percent of the voters favored the proposed donation. (*Id.*)

In October 2005, the San Diego Superior Court issued a decision finding both the ordinance and Proposition A to be unconstitutional and, therefore, invalid and unenforceable. (Karlin Dec. ¶ 13.) Judgment was entered against the City on November 28, 2005. (Karlin Dec. ¶ 14.) Timely

notices of appeal were filed, and the matter is currently under review in the California Court of Appeal, Fourth District, Division One. (Karlin Dec. ¶ 15.)

E. Motion to Enforce 1991 Injunction

On May 3, 2006, the district court granted Paulson's motion to enforce the injunction issued in 1991. (Karlin Dec. ¶ 16.) Citing the "long and tortuous legal history" of this case, the district court stated that, "[i]t is now time, and perhaps long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of the Mount Soledad cross on City property." (*Id.*) The district court ordered that the City had 90 days from May 3, 2006, within which to comply with the court's order and cure the constitutional infirmities (i.e., remove the cross from City property as its presence violates the California Constitution). (Karlin Dec. ¶ 17.) Furthermore, the district court ordered that the City shall be fined $5,000 per day for each day the cross remains on City property after the 90 days have expired. (Karlin Dec. ¶ 18.) The parties were directed that any stay of the Order should be sought from the Ninth Circuit Court of Appeals. (Karlin Dec. ¶ 19.)

F. Request for Federal Condemnation

On May 10, 2006, the Honorable Duncan Hunter requested that the President of the United States authorize condemnation proceedings in order to bring the Veterans Memorial into the federal park system as contemplated by Section 116 of Public Law No. 108-447. (Karlin Dec. ¶ 20.) Recently, San Diego's mayor visited with senior White House staff members to discuss available options to preserve the integrity of the Veterans Memorial. (Karlin Dec. ¶ 21.) While no commitments were made, White House officials agreed to study the available options. (*Id.*)

ARGUMENT

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, a party seeking a stay "must ordinarily move first in the district court." Fed. R. App. P. 8(a)(1). However, a motion for a stay "may be made to the court of appeals" if the movant shows that "moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). As previously noted, the district court expressly directed that any stay of its Order be sought from this Court. (Karlin Dec. ¶ 19.) As such, this motion is properly before the Court because moving first in the district court would be impracticable.

A. Urgent Motion Under Circuit Rule 27-3(b)

The instant motion is being brought pursuant to Circuit Rule 27-3, as action on the motion is needed by a specific date but not within 21 days. Here, action is needed by July 5, 2006, in order to avoid irreparable harm to the citizens of San Diego. If the motion is denied, sufficient time is required to bring the matter before the San Diego City Council for further consideration prior to imposition of the fines starting on August 2, 2006.

B. Standard for Issuing a Stay

The standard for evaluating requests for stays pending appeals is similar to that employed by district courts in deciding whether to grant a preliminary injunction. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). There are two interrelated tests for the issuance of preliminary injunction. *Id*. The first test utilizes a traditional method wherein a court may issue a preliminary injunction if it determines that (1) the moving party will probably prevail on the merits, (2) the moving party will suffer irreparable injury if the relief is denied, (3) the balance of potential harm favors the moving party, and (4) the public interest favors granting relief. *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). The alternative test provides that a moving party may meet its burden for the issuance of a preliminary injunction by showing either (1) a combination of probable success on the

merits and the possibility of irreparable injury if the relief is not granted, or (2) that serious questions are raised and the balance of hardships tips in its favor. *See Id*. at 795; *Lopez*, 713 F.2d at 1435. "The two tests are not separate tests but represent a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases." *Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 459 (9th Cir. 1994). "The relative hardships to the parties is the critical element in deciding at which point along the continuum a stay is justified." *Lopez*, 713 F.3d at 1435 (internal citations and quotations omitted). Additionally, "the public interest is a factor to be strongly considered." *Id*.; *see also Westlands Water Dist.*, 43 F.3d at 459 ("If the public interest is involved, the [Court] must also determine whether the public interest favors [the movant].").

1. Relative Hardship to the Parties

As noted above, "the relative hardship to the parties" is the "critical element" for deciding at which point along the continuum a stay is justified. *Lopez*, 713 F.2d at 1435. In this case, the relative hardship to the parties' points this Court to consider that end of the continuum focusing on (1) whether the City has demonstrated that there is a serious legal question at issue, and (2) whether the balance of hardships tips sharply in its favor.

Absent a stay of the district court's Order and its underlying injunction, the City will be forced to remove the cross, thereby effectively destroying the Veterans Memorial causing irreparable harm to the citizens of San Diego who support fulfilling the purpose of Proposition A and preserving the memorial intact. This result would be premature and unjust if the City prevails in state court and/or the property is transferred to the federal government. On the other hand, if this Court stays the district court's Order and injunction pending resolution of the state court proceeding as well as a review of district court's enforcement of the injunction, the status quo will remain as it has since 1954. The parties have been involved in litigation surrounding the cross for over 17 years. Issuing a stay and preserving the status quo will not substantially prejudice Paulson or irreparably injury his position.

2. Serious Legal Questions are Raised.

The state court action is a challenge to a successful initiative measure seeking to transfer the Veterans Memorial to the federal government. The implementation of Proposition A is consistent with the will of the citizens of San Diego, who approved this measure by 76% of the vote, and the intent of Congress, who in 2004 passed a law authorizing acceptance of the transfer of this property from the City. If ruled constitutional in the parallel state

court proceedings, Proposition A will effectively moot the district court's Order and injunction by transferring all ownership rights and responsibilities from the City to the federal government. Furthermore, a transfer to the federal government renders the underlying decision declaring the presence of the cross unconstitutional to be a nullity as it was based wholly on state law grounds. The federal government would have complete discretion whether to keep the cross as a part of the Veterans Memorial.

Additionally, there are significant changes in the display at issue that call into question the underlying decision to remove the cross, as well as recent federal judicial decisions that support the constitutionality of the use of religious symbols in displays with historical significance. *See*, *e.g.*, *Van Orden v. Perry*, 125 S.Ct. 2854 (2005). Like the Ten Commandments in *Van Orden*, the cross passively stood atop Mt. Soledad for many years without any objection from the community. Recent additions to the memorial have changed its overall characteristic, creating a multi-faceted, world-class memorial.

There are serious legal questions raised by the state court challenge to Proposition A and the evolving federal jurisprudence. The outcome of the state court proceeding will have a direct and substantial impact on the outcome of the federal legislation. Moreover, there are genuine changes in

constitutionality significant conditions that impact the underlying rationale for the injunction in the first instance. Therefore, serious legal questions are involved that merit issuing a stay.

3. Balance of Hardships Tips Sharply in Favor of Issuing the Requested Stay

If the Court does not issue the requested stay, the Veterans Memorial will be inextricably altered forever, and a cherished memorial will be lost for all generations, causing irreparable harm to the citizens of San Diego and many others. On the other hand, should this Court issue the requested stay, the status quo will be maintained as it has been since 1954. Therefore, the balance of hardships tips sharply in favor of a stay.

4. Public Interest Overwhelming Favors Maintaining the Veterans Memorial in its Present Condition and Issuing a Stay

This Court must consider the public interest when deciding to issue a stay in this case. *Lopez*, 713 F.2d at 1435 ("the public interest is a factor to be strongly considered"); *Westlands Water Dist.*, 43 F.3d at 459 ("If the public interest is involved, the [Court] must also determine whether the public interest favors [the movant]."). It is difficult to conceive of any stronger evidence of the public interest favoring the issue of stay than what is present here. In July 2005, the vast majority of the voting citizens of San Diego (76%) voted to transfer the property at issue to the federal

government, thereby seeking to preserve the Veterans Memorial and the cross. The public interest strongly favors the issuance of a stay in this case.

5. Probability of Success on the Merits

Lastly, this Court will have an opportunity to conduct a *de novo* review to determine whether the district court abused its discretion in granting the motion to enforce the 1991 injunction. In doing so, the Court will find that the district court was well aware of the numerous attempts by the City to remedy the constitutional infirmity associated with the presence of the cross on City property by either selling the property to private interests or attempting to donate the land to the federal government. As recognized by the Seventh Circuit Court of Appeals, "[a]bsent unusual circumstances, the sale of public property containing an unconstitutional religious display is an effective way for a public body to end its inappropriate endorsement of religion." *Buono v. Norton*, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005)(quoting *Freedom from Religion Found, Inc. v. City of Marshfield, Wisconsin*, 203 F.3d 487, 491-92 (7th Cir. 2000)). The district court's decision to enforce the 1991 injunction and order the $5,000 per day sanctions was an abuse of discretion in light of the numerous previous attempts to sell the property and current attempt to transfer the land to the federal government pursuant to Proposition A.

CONCLUSION

For the reasons stated herein, the City respectfully requests that a stay pending appeal be issued in this matter. Maintaining the status quo while the City exhausts its available legal remedies in both state and federal court is warranted under the circumstances.

Dated: June _____, 2006 MICHAEL J. AGUIRRE, City Attorney

By _____
David J. Karlin
Deputy City Attorney

Attorneys for Defendant City of San Diego

DECLARATION OF DAVID J. KARLIN IN SUPPORT OF CITY OF SAN DIEGO'S URGENT MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(b)

I, David J. Karlin, declare:

1. I am an attorney duly licensed to practice before the courts of the State of California; the United States Court of Appeals for the Ninth Circuit; and the United States District Court for the Southern District of California.

2. In February 2005, I was assigned to represent the City of San Diego ("City") in the matter of *Philip K. Paulson v. City of San Diego, et al.*, Case No. 89cv820-GT (LSP) in the United States District Court, Southern District of California.

3. This matter began in 1989 when Philip Paulson ("Paulson") filed suit against the City alleging the presence of a forty-three foot Latin cross located in Mt. Soledad Natural Park, a City-owned and dedicated public park, violated both the United States and California Constitutions.

4. In December 1991, the district court held that the presence of the cross atop Mt. Soledad violated the California Constitution. A permanent injunction was issued forbidding the permanent presence of the cross on publicly-owned land. *Murphy v. Bilbray*, 782 F.Supp. 1420, 1438 (S.D. Cal.

1991), aff'd *sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

5. In 1998, the City sold a portion of the Mt. Soledad Natural Park, including the cross, to the Mt. Soledad Memorial Association ("Memorial Association"). The Memorial Association set about building a world-class memorial honoring military veterans. The memorial now consists of extensive landscaping and wall of granite plaques engraved with the names and photographs of veterans.

6. Paulson objected to the terms of the sale to the Memorial Association and challenged the matter in court. An *en banc* panel from the Ninth Circuit Court of Appeals held the sale was "structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross," in violation of the California Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002), *cert. denied*, 538 U.S. 978 (2003).

7. In July 2004, the City authorized Proposition K which sought voter authorization to attempt another sale of the memorial property. Proposition K failed to pass in the November 2004 election.

8. The United States Congress adopted Bill No. 4818 calling for the creation of a national memorial honoring veterans of the United States Armed Forces on the Veterans Memorial property. The Bill was signed into law on December 8, 2004, as part of the Fiscal Year 2005 Omnibus Appropriations Act (P.L. No. 108-447). The Bill authorized the Secretary of the Interior to accept all rights, title, and interest to the Veterans Memorial, specifically defined as "consist[ing] of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forces," upon donation from the City to the federal government for the purpose of creating the national memorial.

9. In March 2005, the City declined to donate its rights, title, and interests in the Veterans Memorial to the federal government.

10. Thereafter, the *San Diegans for the Mount Soledad National War Memorial* submitted sufficient referendary petitions causing the City to either rescind its decision declining the federal government's offer or call for a special election so that the electorate could consider the adoption of the resolution declining the donation offer.

11. In May 2005, the City passed an ordinance authorizing Proposition A for the Special Municipal Election held July 26, 2005. The proposition asked the electorate, "Shall the City of San Diego donate to the federal government all of the City's rights, title, and interest in the Mt. Soledad Veterans Memorial property for the federal government's use of the property as a national memorial honoring veterans of the United States Armed Forces?"

12. In June 2005, Paulson initiated a pre-election challenge to Proposition A in the matter of *Paulson v. Abdelnour, et al.*, San Diego Superior Court Case No. GIC849667. Paulson argued, among other things, that Proposition A would result in an unconstitutional act as it represented the latest unconstitutional attempt to preserve the cross on Mt. Soledad. Proposition A passed as 76 percent of the voters favored the proposed donation.

13. In October 2005, the San Diego Superior Court issued a decision finding both the ordinance and Proposition A to be unconstitutional and, therefore, invalid and unenforceable.

14. Judgment was entered against the City in *Paulson v. Abdelnour, et al.*, San Diego Superior Court Case No. GIC849667 on November 28, 2005.

15. Timely notices of appeal were filed, and the matter is currently under review in the California Court of Appeal, Fourth District, Division One.

16. On May 3, 2006, the district court granted Paulson's motion to enforce the injunction issued in 1991. Citing the "long and tortuous legal history" of this case, the district court stated that, "[i]t is now time, and perhaps long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of the Mount Soledad cross on City property." (A copy of the May 3, 2006 Order is attached hereto as Exhibit A.)

17. The district court ordered that the City had 90 days from May 3, 2006, within which to comply with the court's order and cure the constitutional infirmities (i.e., remove the cross from City property as its presence violates the California Constitution).

18. The district court also ordered that the City shall be fined $5,000 per day for each day the cross remains on City property after the 90 days have expired.

19. The parties were directed that any stay of the Order of May 3, 2006 should be sought from the Ninth Circuit Court of Appeals.

20. On May 10, 2006, the Honorable Duncan Hunter requested that the President of the United States authorize condemnation proceedings in order to bring the Veterans Memorial into the federal park system as contemplated by Section 116 of Public Law No. 108-447.

21. Recently, San Diego's mayor visited with senior White House staff members to discuss available options to preserve the integrity of the Veterans Memorial. While no commitments were made, White House officials agreed to study the available options.

22. Action is needs to be taken by the Ninth Circuit Court of Appeals on the City's urgent motion to stay enforcement of the district court's Order of May 3, 2006, by July 5, 2006, in order to avoid irreparable harm to the citizens of San Diego. If the motion is denied, sufficient time is required to bring the matter before the San Diego City Council for further consideration prior to imposition of the fines starting on August 2, 2006.

23. James McElroy, Paulson's counsel, has been informed of the City's intent to seek a stay pending appeal. He does not concur in the relief sought.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 2nd day of June 2006 at San Diego, California.

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David J. Karlin