

City of San Diego told to pay lawyer \$962,673 in cross case

by Greg Moran

SAN DIEGO - A federal judge said Monday that the city of San Diego must pay more than \$900,000 in legal fees to the attorney for Philip Paulson, the atheist who sued over the presence of the Mount Soledad cross on city land.

CROSS - A fight over legal fees is swirling around the Mount Soledad cross. Photo by Nelvin Cepeda. U.S. District Judge Gordon Thompson Jr. ordered that the city pay lawyer James McElroy \$962,673.28 for his work on the case over the past four years.

Thompson is the same judge who ruled in 1991 that the cross on city land violated the state constitution's ban on government preference for religions - a ruling that touched off an epic legal battle that continues today.

City Attorney Michael Aguirre immediately said Thompson's ruling would be appealed.

He said the city would argue, as it did unsuccessfully in front of Thompson, that McElroy is not entitled to fees because he was not on the winning side.

McElroy had argued that he had, in fact, won - even though Thompson's 1991 order was never carried out.

He is also involved in a lawsuit against the federal government filed after the land where the cross stands was transferred from the city to the Department of Defense.

This latest twist in the case stems from the flurry of legal action and legislative maneuvering just one year ago.

At that time, McElroy filed papers urging Thompson to order the city finally to comply with his order from 1991.

On May 6, 2006, the judge did so - saying it was "long past time" for the issue to be resolved and ordering the city to remove the cross in 90 days, or face \$5,000 in fines per day.

The city appealed and eventually won a stay of Thompson's order from U.S. Supreme Court Justice Anthony Kennedy.

Meanwhile, a bill that would transfer the property from the city to the federal government moved quickly through Congress. The land transfer would mean the cross was no longer on city land, supporters said - undercutting the central holding in Thompson's ruling that the cross violated the state constitution.

In August, President Bush signed that bill and the federal government took control of the land.

In seeking his legal fees, McElroy argued that asking Thompson last year to enforce his 1991 order set off the chain of events that led to the land transfer to the federal government.

If that hadn't happened, he argued, the city would still be in violation of Thompson's order.

"The federal government would not have taken the cross if not for this lawsuit," McElroy said after Monday's hearing. "When the federal government took that land that solved the constitutional problem in Paulson's suit - and we effectively won."

But Aguirre said that the city will argue McElroy was not the winner - especially given his current suit seeking to overturn the land transfer. "Serious questions remain here if he prevailed at all," Aguirre said.

Deputy City Attorney David Karlin said that McElroy is, on the one hand, claiming credit for forcing the federal government to take the land - and at the same time, trying to undo that transaction.

"He wants to have it both ways," he said.

State law allows attorneys fees to be awarded in legal actions that "resulted in the enforcement of an important right affecting the public interest." The state Supreme Court has ruled fees can be awarded in instances where the lawsuit was the "catalyst" behind enforcing an important right that affected the public interest.

McElroy contended in court papers that the suit "vindicated" important rights of Californians by forcing the city to transfer the land to the federal government "thus curing the constitutional violation which was at the heart of this case."

He had initially sought \$1.4 million in fees, based on the hours he worked plus a "multiplier" the law allows in certain cases. He bills at a rate of \$400 per hour.

The two sides tried to settle the fee issue in past weeks, but could not agree. Aguirre declined to say how much the city offered, but said it was "substantial."

McElroy noted that in 2004 he offered to waive all his fees as an incentive for the City Council to agree to a settlement. That deal would have moved the cross to the nearby Mount Soledad Presbyterian Church a short distance away.

Reaction from City Hall was muted Monday. A spokesman for Mayor Jerry Sanders declined to comment. Council President Scott Peters, who has been a critic of Aguirre and represents the district where Mount Soledad is located, said he is concerned about the effects on the city budget as legal costs rise.

Rising expenses have been an issue for San Diego for several years. Sanders has called for cuts of nearly 700 jobs in the fiscal year that begins July 1 in order to spend more than \$250 million on the city's pension fund and other long-ignored needs.

"I certainly would have preferred that the city attorney reach a settlement, but that didn't happen," Sanders said.

Peters said he wants a briefing from Aguirre on the city's basis for appealing, and that he might decide it's "better to just put an end to it," by paying McElroy, rather than again taking the case to a higher court.

Aguirre said he will discuss the appeal with council members next month.

Staff writer Jennifer Vigil contributed to this report.

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