

Nos. 13-57126 & 14-55231

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STEVE TRUNK, et al.,  
Plaintiffs-Appellees,

v.

CITY OF SAN DIEGO,  
Defendant,

and

UNITED STATES OF AMERICA, and  
ASHTON CARTER, in his capacity as Secretary  
of the United States Department of Defense,  
Defendants-Appellants

and

MOUNT SOLEDAD MEMORIAL ASSOCIATION,  
Intervenor-Defendant-Appellant

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**UNOPPOSED MOTION TO DISMISS APPEALS AS MOOT,  
VACATE THE JUDGMENT OF THE DISTRICT COURT,  
AND REMAND FOR DISMISSAL OF THE CASE AS MOOT**

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The United States of America and Ashton Carter, Secretary of Defense, appellants in No. 14-55231, and the Mt. Soledad Memorial Association (MSMA), appellants in No. 13-57126, hereby move this Court to dismiss these consolidated appeals as moot, vacate the district

court judgment from which these appeals arise, and remand the case to the district court with instructions to dismiss, pursuant to *United States v. Munsingwear Inc.*, 340 U.S. 36, 39 (1950). The case has been mooted by the legislatively-mandated transfer of the property that is the subject of this lawsuit.

Adam Raviv and James McElroy, counsel for the plaintiffs-appellees, have stated that they do not oppose the relief requested by this motion.

#### **STATEMENT**

This lawsuit concerns the Mt. Soledad Veterans Memorial (Memorial) in San Diego, California, which features a Latin cross. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1103 (9th Cir. 2011).

Litigation over the presence of the cross as part of the Memorial began in 1989 against its then-owner, the City of San Diego, but was mooted in 2006 when the United States acquired the property by Act of Congress. *Id.* at 1104-05. *See also* Pub. L. No. 109-272, 120 Stat. 770 (2006). A new round of litigation against the United States promptly commenced.

Plaintiffs Steve Trunk and Jewish War Veterans of the United States of America, Inc., then filed separate suits alleging that the display of the cross on federal land as part of the Memorial violated the Establishment Clause. After consolidating the two cases, the United States District Court for the Southern District of California (Hon. Larry A. Burns) granted summary judgment for the government. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008). Plaintiffs timely appealed.

On January 4, 2011, a panel of this Court reversed, holding that the Memorial “conveys a message of government endorsement of religion that violates the Establishment Clause.” 629 F.3d. at 1125. The panel remanded the case for entry of summary judgment in favor of plaintiffs and for further proceedings consistent with its opinion. *Id.*

The government, as well as the MSMA, petitioned for rehearing and rehearing *en banc*, which was denied. Five judges filed an opinion dissenting from the denial of rehearing *en banc* and contending that the panel erred in holding that the Memorial violates the Establishment Clause. *Trunk v. City of San Diego*, 660 F.3d 1091 (9th Cir. 2011).

The government and the MSMA then petitioned the Supreme Court for writs of certiorari. *Mount Soledad Memorial Ass'n v. Trunk*, 132 S. Ct. 2535 (2012). The petitions were denied, with Justice Alito explaining in a statement that “[t]he current petitions come to us in an interlocutory posture,” and that “[b]ecause no final judgment has been rendered,” the case was not yet ripe for Supreme Court review. *Id.* at 2536.

On remand, the district court entered summary judgment for the plaintiffs, as this Court had directed. *Trunk v. City of San Diego*, 2013 WL 6528884 (S.D. Cal. Dec. 12, 2013). On remedy, the district court found that “removal of the large, historic cross is the only remedy” consistent with this Court’s 2011 decision. *Id.* at \*1-2. The district court stayed the order of injunctive relief “pending any appeal,” noting Justice Alito’s statement that this case presents “a question of substantial importance” and the likelihood that the Memorial’s constitutionality would ultimately be decided by the Supreme Court. *Id.* at \*4.

The government and the MSMA, which intervened as a defendant, both appealed. The MSMA petitioned the Supreme Court for a writ of

certiorari before judgment, which was denied in an order accompanied by a statement by Justice Alito that in light of the district court's stay of its removal order, "any review by this Court can await the decision of the Court of Appeals." *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658 (2014).

On December 19, 2014, when briefing in this case was underway but not complete, Congress passed the National Defense Authorization Act (NDAA) for Fiscal Year 2015, Pub. L. No. 113-29, § 2852, 128 Stat. 3292, 3713-15 (2014). Section 2852 of that Act directed that "the Secretary of Defense shall convey all right, title, and interest of the United States in and to the Mt. Soledad Veterans Memorial in San Diego, California, to the Mount Soledad Memorial Association" for consideration. *Id.* The conveyance took place on July 17, 2015. *See* Exhibit A (Quitclaim Deed).

Under the auspices of this Court's mediation program, the United States and the plaintiffs have negotiated a settlement agreement resolving all remaining issues, including attorneys' fees, arising from this litigation and from the federal government's 2006 acquisition, ownership, and 2015 disposition of the Mt. Soledad Veterans Memorial.

That settlement will be promptly executed if the relief requested by this motion is granted.

## ARGUMENT

### **A. The Legislatively Mandated Transfer of the Mt. Soledad Veterans Memorial Has Mooted These Appeals.**

Under Article III, § 2 of the Constitution, a federal court has jurisdiction to address only actual “Cases” or “Controversies.” U.S. Const. Art. III, § 2, cl. 1. “[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.”

*Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)

(internal quotation marks and citation omitted).

Although an Article III case or controversy over the constitutionality of the Mt. Soledad Veterans Memorial existed at the time the appeals were filed, that controversy became moot when the Memorial was transferred to the MSMA as required by the NDAA. Both complaints alleged that the display of the cross *on federal land* violated the Establishment Clause. Now that the Memorial, including the cross, is no longer federally owned and does not occupy federal land, there is no longer a live controversy about whether the cross’s display

on federal land would violate the Establishment Clause. The Establishment Clause does not govern the display of a privately owned memorial on privately owned land.

**B. Because Mootness Was Caused by Congress and Not by Voluntary Action of the Appellants, Vacatur Is Required**

“The ‘established’ practice when a civil suit becomes moot on appeal is to vacate the district court’s judgment and remand for dismissal of the complaint.” *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011), quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Vacatur in such situations “eliminat[es] a judgment the loser was stopped from opposing on direct review.” *Arizonans for Official English*, 520 U.S. at 71. Without vacatur, the lower court’s judgment, “which, in the statutory scheme was only preliminary,” would escape appellate review thanks to the “happenstance” of mootness. *Munsingwear*, 340 U.S. at 39. Under the *Munsingwear* rule, vacatur is generally considered “automatic” in this Circuit when a case becomes moot on appeal for reasons other than the voluntary action of the appellant. *Public Util. Comm’n v. FERC*, 100

F.3d 1451, 1461 (9th Cir. 1996), *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995).

An exception to the rule of automatic vacatur applies when the voluntary action of the appellant caused the appeal to become moot. In such cases, the Supreme Court has explained, “[t]he judgment is not unreviewable, but simply unreviewed by [the appellant’s] own choice.” *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

This is not such a case, because the mootness in this case was caused by an Act of Congress, not by the voluntary action of any of the appellants. As this Court explained in *Chemical Prod. & Distributors v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006), it is “inherent in the principle of separation of powers” that “legislation is attributed to the legislature alone” and not to the executive branch, and certainly not to a private party like MSMA. “Even where new legislation moots the executive branch’s appeal of an adverse judgment, the new legislation is not attributed to the executive branch.” *Id.* (collecting cases).

That remains true even if the legislation requires implementation by the executive branch. *See Log Cabin Republicans*, 658 F.3d at 1168

(vacating district court decision due to mootness caused by legislation, in case where legislation required agency action to become effective). Mere compliance with statutory requirements cannot be construed as “voluntary action” by the executive branch; the cause of mootness in such cases remains the legislation that compelled the agency action.

Here, mootness was caused by the transfer of the property from the Department of Defense to the MSMA, which was done in compliance with a statutory requirement that “the Secretary of Defense shall convey all right, title, and interest of the United States in and to the Mt. Soledad Veterans Memorial in San Diego, California, to the Mount Soledad Memorial Association.” NDAA for Fiscal Year 2015, Pub. L. No. 113-29, § 2852, 128 Stat. 3292, 3713-15 (2014). Because the mootness action was caused by an Act of Congress, and not because of any voluntary action by either appellant, the “voluntary action” exception to the usual rule of automatic vacatur for mootness does not apply here.

Appellants the United States of America, Ashton Carter, and the MSMA therefore respectfully move this Court to vacate the district

court judgment as moot, remand this case to the district court with instructions to dismiss, and dismiss this appeal as moot.

Respectfully submitted,

s/ Joan M. Pepin

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United States of America and  
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*Counsel for Intervenor-Defendant-  
Appellant Mt. Soledad Memorial  
Association*

**EXHIBIT A**

FIRST AMERICAN TITLE COMPANY

4944882 05

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:  
Commanding Officer  
Naval Facilities Engineering Command Southwest  
1220 Pacific Highway  
San Diego, CA 92132

CERTIFIED A TRUE COPY OF THE ORIGINAL  
DOCUMENT RECORDED 7-17-2015  
AS INSTRUMENT NO. 2015-0379341  
IN BOOK N/A PAGE N/A  
OFFICIAL RECORDS OF SAN DIEGO COUNTY  
FIRST AMERICAN TITLE COMPANY

BY 

**QUITCLAIM DEED**

**MT. SOLEDAD VETERANS MEMORIAL**

This Quitclaim Deed is made this 30<sup>th</sup> day of June, 2015, by and between the UNITED STATES OF AMERICA, acting by and through the Department of the Navy, hereinafter referred to as "GRANTOR", and the Mt. Soledad Memorial Association, Inc., a 501(c)(3) non-profit corporation of the State of California, hereinafter referred to as "GRANTEE".

**WITNESSETH:**

WHEREAS section 2852 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, directs and authorizes GRANTOR to convey the Mt. Soledad Veterans Memorial to GRANTEE;

NOW, THEREFORE, GRANTOR, for valuable consideration, the receipt of which is hereby acknowledged, does hereby remise, release and forever quitclaim "as is" to GRANTEE all of GRANTOR's right, title and interest in and to that certain real property (hereinafter referred to as the "Property") in the City and County of San Diego, State of California, comprising approximately .51 acres, as more particularly described in Exhibit "A" and shown on Exhibit "B" attached hereto and by these references made a part hereof.

**I. TOGETHER WITH all of GRANTOR's right, title and interest in and to:**

A. All buildings, improvements, utilities and related personal property located on the Property.

B. All rights, tenements and hereditaments therein and issues, profits, privileges, appurtenances and other rights belonging or related thereto.

C. All rights to minerals, gas, oil and water.

**II. SUBJECT TO THE FOLLOWING COVENANTS, CONDITIONS AND RESTRICTIONS**, which shall be binding upon and enforceable against GRANTEE, its successors and assigns in perpetuity:

A. GRANTEE accepts the Property in an "as is" condition. GRANTOR specifically disclaims and excludes any representations or warranties, express or implied, of title, of condition, of fitness for a particular purpose, of merchantability or of any other kind under federal, state or local law.

B. The Association, and any successive owner of the Property, shall maintain and use the Property as a veterans memorial in perpetuity.

C. That if the Secretary of Defense determines that the Property is ever put to a use other than as a veterans memorial, as defined by section 2852 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, GRANTOR shall have the right, at its election, to reacquire all right, title and interest in and to the Property without any right of compensation to the owner or any other person.

**D. LEAD BASED PAINT (LBP)**

GRANTEE covenants and agrees that in its use and occupancy of the Property, it will comply with Title X and all applicable federal, state, and local laws relating to LBP. GRANTEE acknowledges that GRANTOR assumes no liability for damages for personal injury, illness, disability or death to GRANTEE or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition or other activity causing or leading to contact of any kind whatsoever with LBP on the Property, arising after the conveyance of the Property from GRANTOR to GRANTEE, whether GRANTEE has properly warned or failed to properly warn the person(s) injured.

**E. ASBESTOS AND ASBESTOS-CONTAINING MATERIALS**

1. GRANTEE is hereby informed and does hereby acknowledge that asbestos, asbestos-containing materials (ACM) and asbestos-containing construction materials (ACCM) may exist in buildings and structures located on the Property. GRANTEE covenants, on behalf of itself, its successors and assigns, as a covenant running with the land, that it will prohibit occupancy and use of buildings and structures, or portions thereof, containing known asbestos, ACM or ACCM hazard prior to abatement of the ACCM hazard or demolition of the building or structure.

2. GRANTEE has inspected the Property for asbestos content and any hazardous condition relating thereto. GRANTEE is deemed to have relied solely on its own judgment in assessing the overall condition of all or any portion of the Property, including any asbestos hazards or concerns. GRANTEE covenants and agrees, on behalf of itself, its successors and assigns, that in connection with its use and occupancy of the Property and the existing buildings and structures, it will comply with all applicable federal, state, and local laws relating to asbestos, ACM and ACCM; and that GRANTOR assumes no liability for damages for personal injury, illness, disability or death to GRANTEE, or to GRANTEE's successors, assigns, employees or invitees, or to any


other person subject to the control or direction of GRANTEE, its successors or assigns, or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition or other activity causing or leading to contact of any kind whatsoever with asbestos in or about the Property, whether the GRANTEE, its successors or assigns have properly warned or failed to properly warn the person(s) injured. GRANTEE hereby assumes responsibility for the management of any asbestos, ACM or ACCM and acknowledges that if asbestos, ACM or ACCM is not managed in compliance with applicable federal, state, and local laws and regulations, it may become a hazard.

WITNESS the hands and seal of said GRANTOR this 30<sup>th</sup> day of June 2015.

IN WITNESS WHEREOF, GRANTOR has caused this Quitclaim Deed to be executed in its name and on its behalf by its duly authorized officer on the day first above written.

**THE UNITED STATES OF AMERICA**

Acting by and through the Department of the Navy

By:  30 June 2015  
**DAVID B. BIXLER** **DATE**  
Real Estate Contracting Officer  
Naval Facilities Engineering Command Southwest

SEE ATTACHED NOTARY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of SAN DIEGO

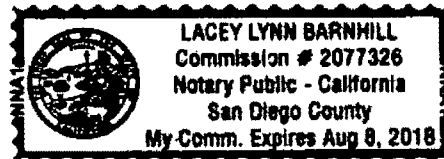
On 10/30/15 before me, LACEY LYNN BARNHILL, NOTARY PUBLIC,  
Date Name and Title of the Officer

personally, appeared DAVID B. BIXLER  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature: [Handwritten Signature]

Place Notary Seal Above  
Signature of the Notary Public

**ACCEPTANCE AND ACKNOWLEDGMENT:**

**GRANTEE** hereby accepts this Quitclaim Deed, acknowledges receipt of the documents described therein and agrees to be bound by all the agreements, covenants, conditions and restrictions contained therein.

**MT. SOLEDAD MEMORIAL ASSOCIATION**

By: *[Signature]* *June 30, 2015*  
**BRUCE S. BAILEY** **DATE**  
Resident and CEO

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of *San Diego*

On *June 30, 2015* before me, *Anita J. E. Hansen*  
Date Name and Title of the Officer

personally, appeared *Bruce S. Bailey*  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature: *[Signature]*

Place Notary Seal Above  
Signature of the Notary Public

J-15604

EXHIBIT "A"

LEGAL DESCRIPTION  
A.P.N. 353-010-17

ALL THAT PORTION OF PUEBLO LOT 1265 OF THE PUEBLO LANDS OF SAN DIEGO, IN THE CITY AND COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF BY JAMES PASCOE IN 1879, A COPY OF WHICH MAP WAS FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, NOVEMBER 14, 1921, AND IS KNOWN AS MISCELLANEOUS MAP NO. 36, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THE AREA BOUNDED BY THE BACK EDGE OF THE EXISTING INNER SIDEWALK OF THE STRUCTURE KNOWN AS THE MOUNT SOLEDAD VETERAN'S MEMORIAL LOCATED ON TOP OF MOUNT SOLEDAD AS SAID SIDEWALK EXISTED ON AUGUST 14, 2006, BEING ALSO A CIRCLE WITH AN APPROXIMATE CIRCLE WITH A RADIUS 84 FEET, THE CENTER OF WHICH CIRCLE IS LOCATED AS FOLLOWS:

BEGINNING AT THE SOUTHWESTERLY CORNER OF SAID PUEBLO LOT 1265, SAID CORNER BEING SOUTH 17°12'44" EAST (RECORD NORTH 17°11'10" WEST) 607.04 FEET DISTANT ALONG THE WESTERLY LINE OF SAID PUEBLO LOT 1265 FROM THE INTERSECTION WITH THE NORTH LINE OF LA JOLLA SCENIC DRIVE SOUTH AS DESCRIBED AND DEDICATED AS PARCEL 2 OF CITY COUNCIL RESOLUTION NO. 216644 ADOPTED AUGUST 25, 1976; THENCE NORTH 40°00'11" EAST 1147.73 FEET TO THE CENTER OF SAID CIRCLE.

IN ADDITION, ANY AREAS BETWEEN SAID BACK EDGE OF SIDEWALK AND SAID 84 FOOT RADIUS CIRCLE.

EXCEPTING THEREFROM ANY PORTIONS OF SAID SIDEWALK ENCROACHING INTO SAID 84 FOOT RADIUS CIRCLE.

CONTAINING 22,167 SQUARE FEET (0.51 ACRES), MORE OR LESS.

*Jeffrey J. Safford* 8/30/2007  
JEFFREY J. SAFFORD, L.S. 6703                      DATE



JB/15604.001

REVIEWED & ACCEPTED  
*Carla Moore* CADASTRAL  
DATE 8/30/2007

**EXHIBIT "B"**

REFERENCE DOCUMENTS

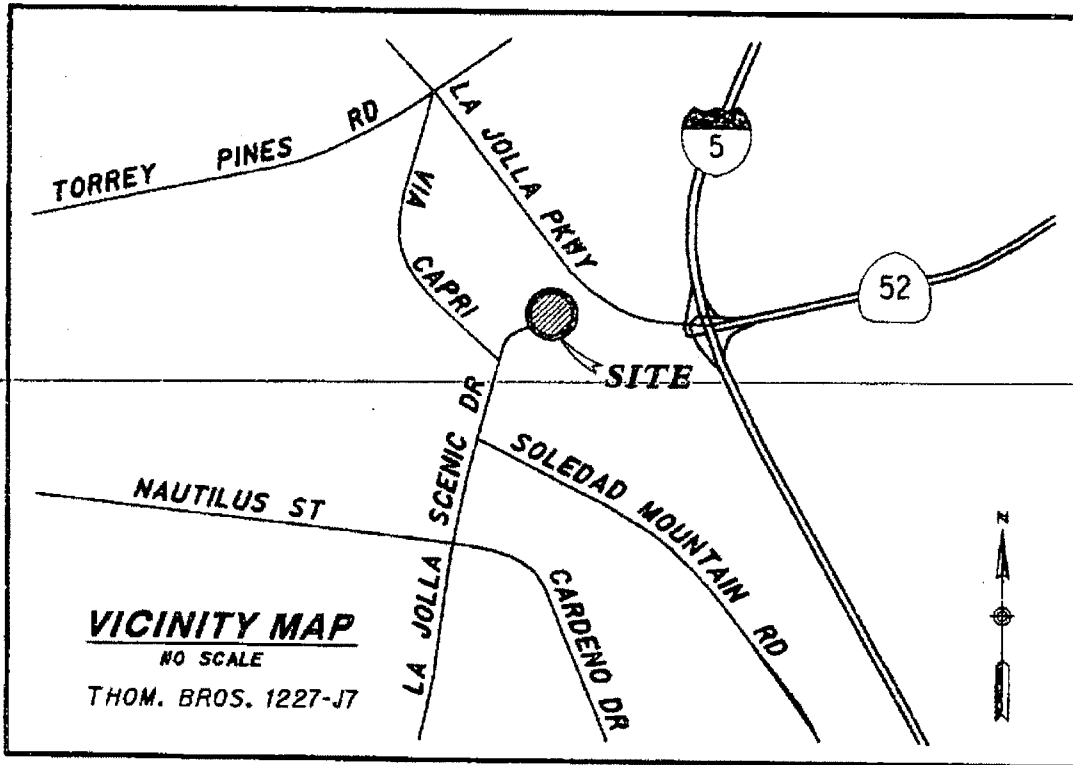
PUBLIC LAW 109 - 272 - AUGUST 14, 2006.  
 CITY OF SAN DIEGO ENGINEERING DEPARTMENT FIELD NOTES, W.O. NO. 117068 DATED APRIL 3, 1979.

REFERENCE MAPS

MISCELLANEOUS MAP NO. 36.  
 RECORD OF SURVEY 6065.  
 MAP NO. 8656 AND 9641.  
 PARCEL MAP 12884.

LEGEND

- ⊙ INDICATES FOUND MONUMENT AS NOTED.
- ⊕ INDICATES FOUND BRASS CAP PER ROS 14492.
- ▲ INDICATES FOUND WELL MONUMENT PER CITY FIELD NOTES.
- ( ) INDICATES RECORD DATA PER MAP 9641.
- POB INDICATES POINT OF BEGINNING.



THIS PLAT WAS PREPARED BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE PROFESSIONAL LAND SURVEYOR'S ACT ON AUGUST 30, 2007.

*Jeffrey J. Safford* 8/30/2007

JEFFREY J. SAFFORD DATE  
 LS 6703

J-15804



REVIEWED & ACCEPTED

*Cris Ware* CADASTRAL  
 DATE 8/30/2007

SHEET 1 OF 2

PROJECT NO.

CONSTRUCTION NO.

DRAWING NO.

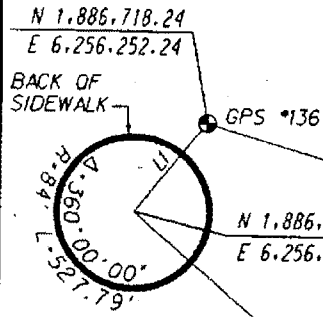
MT. SOLEDAD VETERANS  
 MEMORIAL FEE PARCEL  
 IN THE CITY OF SAN DIEGO,  
 STATE OF CALIFORNIA

| NO. |                                   | DATE    | BY  | APP'D |
|-----|-----------------------------------|---------|-----|-------|
| 1   | ORIGINAL                          | 8-16-07 | KvB |       |
| 2   | ADDRESSED NAVFAC SW DIV. COMMENTS | 8-30-07 | KvB |       |

**EXHIBIT "B"**

**BASIS OF BEARINGS**

THE BASIS OF BEARINGS FOR THIS SURVEY IS THE CALIFORNIA COORDINATE SYSTEM CCS83 ZONE 6, EPOCH 1991.35 AND IS DETERMINED BY RTK GPS MEASUREMENTS TAKEN ON AUGUST 10, 2007 AT POINT \*136 AND POINT \*752 AS SHOWN ON RECORD OF SURVEY MAP NO.14492. GRID BEARING \*136 TO \*752: N16°25'30"E

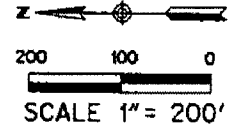


N16°25'30"E  
BASIS OF BEARINGS  
2006 BT GRID

N 1,884,793.33  
E 6,255,684.80

GPS \*752

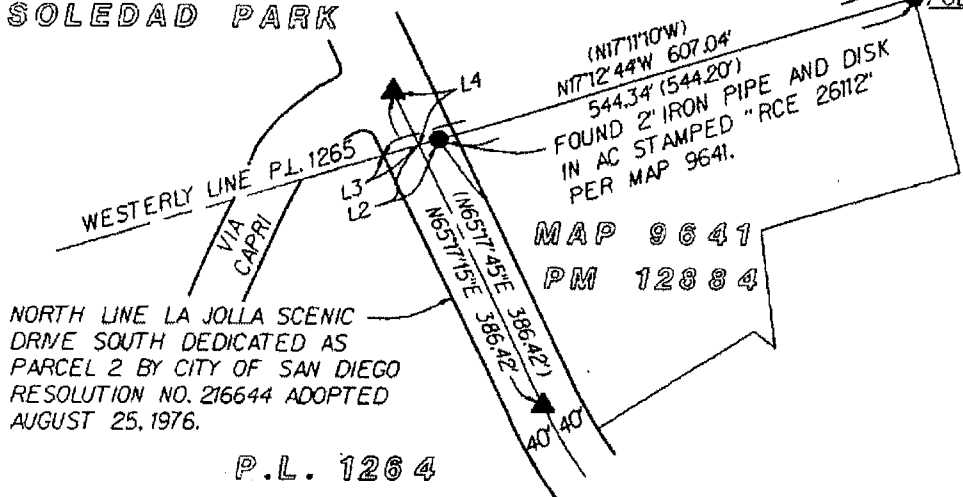
| LINE TABLE |               |        |
|------------|---------------|--------|
| NAME       | DIRECTION     | LENGTH |
| L1         | N 51°08'40" W | 128.41 |
| L2         | N 17°12'44" W | 22.36  |
| L3         | N 17°12'44" W | 40.34  |
| L4         | N 65°17'15" E | 65.40  |



P.L. 1254

P.L. 1265  
MISC. MAP NO. 36

SOLEDAD PARK



P.L. 1264

J-15604

SHEET 2 OF 2

|   |                                   |                  |     |       |
|---|-----------------------------------|------------------|-----|-------|
| <p>MT. SOLEDAD VETERANS<br/>MEMORIAL FEE PARCEL<br/>IN THE CITY OF SAN DIEGO,<br/>STATE OF CALIFORNIA</p> |                                   | PROJECT NO.      |     |       |
|   |                                   | CONSTRUCTION NO. |     |       |
|   |                                   | DRAWING NO.      |     |       |
| NO.   |                                   | DATE             | BY  | APP'D |
| 1   | ORIGINAL                          | 8-16-07          | KvB |       |
| 2   | ADDRESSED NAVFAC SW DIV. COMMENTS | 8-30-07          | KvB |       |