

## **Citizens' Oversight Projects (COPs)**

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SaveECPAC Project

September 4, 2014



TO:

Bill Wells, El Cajon Mayor

El Cajon City Council

Douglas Williford, El Cajon City Manager

Morgan Foley, El Cajon City Attorney

## **Issues of Concern Regarding Negotiations with Rock Church for Use of ECPAC and surrounding City Property**

### **Introduction**

The City Council voted 4-0 (with Councilmember Gary Kendrick abstaining<sup>1</sup>) on August 12, 2014 to proceed with exclusive negotiations with the Rock Church to lease the East County Performing Arts Center (ECPAC) as a “major tenant” to use the theater for religious worship services throughout the year, and allow them to build an adjacent and permanent (35 year lease) building for Rock Church offices. Depending on what any final proposal looks like, we strongly believe such an arrangement does not comply with the law. However, since the City is only conducting negotiations at this time, filing a lawsuit in the matter is premature. As we would like to avoid such legal action, we thought that a letter carefully describing the law and removing misconceptions about what is likely acceptable under the law, we can avoid that legal action and save everyone time and expense.

We will show in this document that a long-term lease with the Rock Church for use of ECPAC is not legal. We support instead the previously articulated plan of hiring a theater manager who would plan presentations throughout the year, including nonpreferential use by any church who would like to use it.

We do not take the position that ECPAC can never be used for any religious purposes. It can, but the city must be nonpreferential in allowing various religious and secular uses of the theater. We also do not accept the notion that the lease by the Rock Church is the only option nor even the best option, for

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<sup>1</sup> His relative is employed by CCT, one of the groups that submitted proposals to the city.

operating the theater, as we have thoroughly investigated this question and believe the best course of action is to operate it as a performing arts center operated in the interests of the entire community, and not one mega church user preempting all other uses whenever they want to use it.

## Background<sup>2</sup>

The East County Performing Arts Center (ECPAC) is an 1142-seat performing arts center with excellent audio characteristics, theatrical rigging, audio and lighting systems. It was built using funds from the Grossmont Community College District on El Cajon City property adjacent to the Council Chambers, City Hall, and the County Courthouse, and it was outfitted (in terms of seating and lighting) from donations from the community. Opened in 1977, the theater was initially operated by Grossmont College. Ownership was transferred to the City of El Cajon for \$0 in 1995, with the City warranting “that use of ECPAC shall be for civic, educational, cultural, and recreational purposes” (see Illustration 1).

The theater was operated for a while by the Christian Community Theater (CCT) and then by the 501(c)3 Arts Center Foundation (ACF). The City wanted to perform maintenance and renovate the facility, so they loaned money to the ACF so the ACF could contract the renovations, with the understanding that the City would later forgive the loan. (Some critics assert that the reason the City did not just

perform the renovations directly was to avoid prevailing wage rules.) The City, however, did not forgive the loan and instead, used this debt as rationale to terminate the operating arrangement with the ACF and enter into another operating agreement with the CCT. The CCT ran the theater this second time for five years, with an annual subsidy provided and utilities paid by the City. The theater was closed Dec 2009, reportedly due to difficulties of operating it during construction of the new Police/Fire Station ("Safety Center") and reportedly due to budgetary concerns.

The CCT runs a drama school which caters primarily to elementary through high school students who, for a fee, are included in various theatrical presentations. Unfortunately, the CCT is not

### ARTICLE 3.

3.01 Use for Civic Purposes. CITY warrants that use of ECPAC shall be for civic, educational, cultural, and recreational purposes.

3.02 Continued Use by DISTRICT. CITY shall permit DISTRICT to utilize ECPAC for educational purposes for up to five (5) days each year at no cost to the DISTRICT. In addition, DISTRICT may purchase additional usage at the most favorable rate offered by CITY for ECPAC use. The DISTRICT shall annually draw up and transmit to the CITY, not later than July 1st of each year, a schedule of the proposed times that said auditorium shall be used by the DISTRICT for educational purposes.

*Illustration 1: Snippet from Transfer Agreement in 1995*

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<sup>2</sup> A more extensive background can be seen at <http://www.copswiki.org/Common/SaveECPAC>

accomplished in operating a theater as a “Presenter” organization<sup>3</sup> and did not attempt to bring in headliner acts to any great extent, as the requirement to do so was stricken from their agreement. The result was that the theater was mainly used for CCT events and rented out to other users. (The Grossmont Community Concerts Association (GCCA) was an example of a renter who ran a half dozen events during the year to a subscription-based audience, and always had sell-out crowds.) Although the CCT includes a religious reference in their name "Christian Community Theater" or CYT “Christian Youth Theater,” they were careful to point out that they do not run worship services at the facility, and they were no more religious than the YMCA, although they did tend to include a Christian message in the productions they produced, even those that were traditionally secular.

In March, 2010, just after CCT left, consultant Kurt Swanson reviewed the theater and submitted a proposal to reorient the theater as a "road house," i.e. picking up traveling shows to attract theater-goers to the East County area. His \$4.3 million proposal would have the theater up and running in 18 to 24 months. This was generally accepted as a good idea and would bring in acts from around the world instead of mainly focusing on local community talent which is the forte of the CCT. However, nothing was done to the theater, not even basic roof repairs.

In January, 2012, the courts approved the directive from Gov. Jerry Brown dissolving redevelopment agencies, eliminating redevelopment funding for the proposed theater renovations.

A bit later in 2012, the Safety Center (police and fire combination) was completed in the same governmental superblock as the ECPAC theater, City Hall, Council Chambers, and the County Courthouse. Landscaping, including a new duck pond, was added around the theater for \$2.1 million in redevelopment funds that were previously allocated. With these changes in place, the south-west doors of ECPAC were made accessible from Main St. to allow use as an alternate entry/exit. Unfortunately, the City deferred maintenance of the theater – including roof repairs – instead of rolling it into the Safety Center project.

In March, 2012, the City Council voted to enter into negotiations with a developer who planned to raze the theater and replace it with a Marriott Courtyard hotel with a multipurpose room that would partially replace the ECPAC theater. This proposal was originally based on getting redevelopment funds, so it was doomed from the start. With the RDAs gone, including the fact that it would cost about \$2 million to raze the building, the city would have to take on the risk of going into the hotel business with

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<sup>3</sup> People and organizations who run theaters using traveling talent and not for a resident performing arts organization are called Presenters. The Arts Center Foundation (ACF) was acting as a presenter organization, but the CCT largely did not, as they mostly catered to their own student actor business and to local rentals. See the Association of Performing Arts Presenters <http://www.apap365.org/> for more information.

the developer, so this was essentially a nonstarter.

However, based on this new knowledge that the city might demolish the theater instead of following through with the plans previously articulated, a community working group "Save ECPAC" began to meet, also in March 2012. Over the next several weeks and months, the group toured the theater, documented its condition, and suggested that it could be opened for about \$250K, mostly for roof repairs and other obvious maintenance. It was discovered that many of the big improvements everyone talked about as essential was not essential at all. For example, for years, we heard that the theatrical fly loft was too low, and it was not possible to lift scenery high enough. A professional theatrical rigger inspected the rigging and found that it was in perfect reconditioned shape, and was the same design as the fly loft at the Olde Globe Theater. This was just one of many myths that we were able to dispel.

The group voted to found the "ECPAC Foundation" which would operate as a nonprofit charity (currently under the umbrella of Citizens Oversight, Inc. a 501c3 Corp) to allow the community to join together and raise the money required to get the theater opened once again, similar to what occurred when the theater was first opened and needed to be outfitted with seats, lights, and sound system. That original effort resulted in \$400K being raised. Also, we envisioned that the organization could help provide ideas to the City on theater operation.

In June, 2012, the ECPAC Foundation submitted a detailed plan to the city regarding our findings in terms of what was required to get the theater opened again, and a blueprint for operation. This was presented to the City Manager Douglas Williford, but the City provided no opportunity, other than brief three minute comments at the City Council meeting, to present our plan. The city did not express any interest in proceeding with the plans from the ECPAC Foundation. The Recreation Department did not attempt to cooperate with the ECPAC Foundation in terms of promoting the theater during the Centennial Celebrations. There was no mention of the theater in any historical materials for that event, the theater was not used at all, and it did not even appear on the maps of the Celebration. The City conducted no public workshops or community engagement meetings about the theater since the Kurt Swanson proposal was released.

The ECPAC Foundation conducted an audience survey of members of the public attending El Cajon's Centennial Celebration in late 2012. The group also performed two more theater inspections, which were video recorded, so as to document the state of the theater at that time. City Manager Williford was not interested in the results of the survey because he said the new theater manager would be a professional who would already know all that information.

In mid-2013, the City approved an RFQ process to find an architect to make detailed drawings regarding the planned changes to the theater.

City Manager Douglas Williford continued to assert that his plan was to make appropriate (not minimal) renovations to the theater and then find a professional manager of the facility, so as to have the best chance for

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From: "Douglas Williford" <dwillifo@cityofelcajon.us>
Subject: ECPAC
To: kerry.schimpf@cassidythurley.com
Date: Fri, 20 Sep 2013 11:05:22 -0700

What is going on with Rock and ECPAC?

Connected by DROID on Verizon Wireless
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*Illustration 2: Email from Williford to Real Estate Broker asking whether Rock Church was interested in ECPAC. Subsequent emails involve scheduling a tour of ECPAC, obviously to help them prepare a proposal.*

success. We had no problem with this general game plan, but we would have rather seen the theater opened immediately and allow the community to use the resource rather than keeping the doors closed.

Our Public Records request revealed that Williford approached the Rock Church on September 20, 2013, to find out if they were interested in renting the theater, as they were about to open a branch location in El Cajon at the 29,000 sqft commercial building on Jackman St. in El Cajon (formerly a Michael's crafts supply store.) Rent for the location on Jackman is estimated to be \$25,000 per month based on the rate given to another prospective renter (although we do not know the actual rent being paid by The Rock Church.)

In February 2014, the agenda of the City Council included a closed session to approve further negotiations with the Rock Church. Ray Lutz of Citizens' Oversight objected to the use of a closed session at the City Council meeting and then submitted a formal written objection<sup>4</sup>. The City later essentially admitted this was handled incorrectly, and so issued a request for interest for major tenants of the theater. The request explicitly stated that the city was not interested in any proposals to manage the theater as a performing arts center, and the request was worded to accommodate the Rock Church. Only the Rock Church and CCT submitted proposals to use the theater as major tenants.

At the August 12, 2014 City Council Meeting, the Council voted to engage in exclusive negotiations with the Rock Church, as mentioned in the outset of this document.

The response to our public records request included the original proposal by the Rock Church, as

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<sup>4</sup> <http://www.copswiki.org/Common/M1417>

follows:

- Lease Term 10 years.
- Use the theater for all Sundays (4AM to 11PM), Christmas Eve, New Years Eve, Good Friday - Sunday (Easter weekend), 1 Friday night 4PM-10PM and all day Saturday, once per month, and Every Tuesday Evenings (6pm to 9pm) for rehearsal + Use of the facility outside the above use when nothing else is scheduled at a daily fee.
- Lease land adjacent to the theater on public land so as to build a 20,000 sqft building for church offices, Sunday school rooms, partially available to the city. The term of the lease was proposed to be 35 years at which time ownership of the building would transfer to the City.
- Approve all renovations to the theater so they would be appropriate for their use, all improvements paid for by the City.
- Monthly Rental fee of \$10K.
- Rock Church will manage technical aspects of the ECPAC for church and public use.

We requested the latest proposal by the Rock Church to use the theater, but the City has not responded to our Public Records Request<sup>5</sup>. However, we have the following set of business points expressed by City Manager Douglas Williford in the August 12, 2014 City Council meeting:

- Use of the facility approximately 132 days per year.<sup>6</sup>
- Will pay the City \$216,000 annual rent (\$1,636\day based on 132 day usage.)<sup>7</sup>
- Use is for church and church-related activities.
- Five year option with 2% increase in rent per year.
- Land lease of approximately 13,000 sq. ft. parcel immediately south of ECPAC (between facility and Main Street) to construct a two-story 20,000 sq. ft. office \ classroom \ meeting space building for primary use by the church. All costs of building construction and maintenance are the responsibility of Rock Church.<sup>8</sup>

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5 As of this writing, the City has partly responded to our CPRA request, however parts of the Rock Church proposal were “removed” in an initial meeting with the Rock Church prior to the August 12, 2014 City Council meeting. In that proposal, the Rock Church also proposed earning 20% of gross receipts for “overseer fees” in their management of the facility.

6 “Day” is inappropriately defined here since in the theater business, 1 day is usually defined as an eight-hour time block. The Rock Church wants to use it for 18 hours each Sunday and an undefined period of time when it rents it on Friday and Saturday once a month.

7 This calculation is incorrect due to the improper use of the term “day”, and the actual rent rate is less than \$1000 per 8-hour time slot, compared with \$2500 market rates.

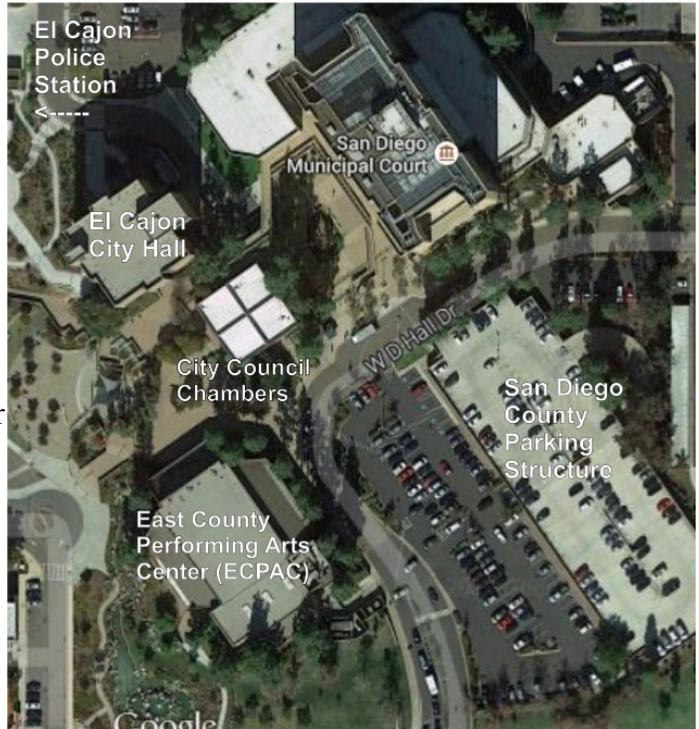
8 The City currently has no public restrooms in the downtown area, including Promenade Park (“Centennial Plaza”) and the restrooms in ECPAC are undersized for the capacity of the theater. Therefore we proposed including public restrooms in a

- Pay City \$4,000 per month for land lease (triple net.)
- 35 year land lease, after which City would take ownership of building at no cost.
- Rooftop will be designed as a quality "event" space and made available to the City unlimited times per year at no cost for the purposes of City direct use or City rental for private events. Useable by the Rock Church all other times.
  - Building to have catering quality kitchen available on reserve basis for rooftop event use.
  - Building to have "VIP\Reception Room" (approximately 20 person occupancy) for use by City \ ECPAC needs on reserve basis

## Important Characteristics

There are a number of important characteristics of this deal as it has been presented so far to the public which will enter into comparisons with the various issues and cases which are referenced.

- The ECPAC facility is on city property and in the governmental superblock. The main doors of ECPAC, City Hall, and the Council Chambers, all open out to a common courtyard. The San Diego County Courthouse is only several dozen steps away. All governmental buildings, including ECPAC, are rotated approx. 30 degrees West from true North, joining them to a unified whole. ECPAC, City Hall, and the Council Chambers, also all use the same brick construction and design elements, further uniting them. (See Illustration 3).
- This is the only public performing arts center in the East County area. The closest performing arts center of a similar size is in Downtown San Diego or Escondido. The other close venues, are either much smaller (Sycuan, 456 seats) or much larger (Viejas arena at SDSU, 12K seats).



*Illustration 3: El Cajon Governmental Superblock*

- ECPAC has been rented for occasional religious events in the past, however, its primary use has

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building that would be an extension to ECPAC and useable by all theater patrons, and also provided to downtown visitors during other events, such as car shows and parades.

been secular.

- The original design intent of the theater is to support the performing arts. Special attention was paid to the audio performance of the theater, it has a newly reconditioned set of theatrical scene rigging which is equal to what is used at the Olde Globe Theater, and an orchestra lift to accommodate a 72-piece orchestra below the level of the stage for live sound.
- Parking has been substantially reduced in recent years. First, the development of the property at the corner of Park and Ballantyne into residential units (by Priest Development), eliminating a former parking lot, and second, the construction of the Safety Center, with many of the parking spaces that used to be available to the public after-hours now no longer available either, as they are in a secured garage<sup>9</sup>. As a result, there is inadequate parking available for the theater, and it is not feasible to run public events during the day because parking in the governmental super block are already severely impacted due to the presence of City Hall visitors, courthouse clients, and jury members.



*Illustration 4: Redondo Beach Performing Arts Center Showing its large dedicated parking lots*

We can compare that with the parking dedicated to the theater at Redondo Beach Performing Arts Center, where they have the sort of parking ECPAC should have, as they are facilities with similar capacity (See Illustration 4).

## **Issue 1: Theater Manager should be hired first**

Time and again, City Manager Williford has asserted that “we have one last chance to run this theater successfully.” That assertion may or may not be true, but in an attempt to run it successfully this time, one thing you should not do is lock in one major tenant before the professional theater manager has had a crack at making the best decisions possible to move the theater toward success.

The course of action originally articulated by Williford should be followed. The City should try first to run the theater as a public resource, rather than contracting it to a single large user. In our research, we asked a number of theater managers if they could run the theater with no subsidy successfully, as long

<sup>9</sup> In fact, this issue was brought up by Citizens Oversight during the public review of the Safety Center but no changes were made to the plans and we now have a severe deficit in terms of parking around the theater.

as the theater would be provided rent free to the organization. Without fail, these operators agreed that it would be hard *not* to be able to make it under those constraints, as long as they had free reign in terms of what acts they would bring into the theater.

City Councilmembers may say that it is not possible to run the theater without a public subsidy. Partly, this is because of accounting manipulations where the City burdens the total costs of other city services – like police, firefighters, road repair, etc. – on the back of the theater. This probably makes sense if you were trying to get money from the federal government and you want to account for the complete costs of city services, but is not fair to compare this with what a theater will actually require on a direct cost and cash flow basis.

Also, the City is supposed to collect taxes from residents and spend that money so all can benefit. The notion that the theater should be a cash cow is simply incorrect, in the same way that parks and recreation facilities generally do require city participation, and the public benefits as a whole.

San Diego CityBeat<sup>10</sup> talked to a handful of experienced theater managers who say the city’s approach is, indeed, backwards.

“I would’ve reversed the process,” says Wes Brustad, a former member of the ECPAC board of directors with decades of experience in performing-arts production. “Anyone who’s going to be involved in managing the space should definitely be involved in any decisions on how the space is used.”

“It does seem odd to me that they may be moving forward with renting the building and then finding the management company afterwards,” agrees Don Telford, president and CEO of San Diego Theatres, which runs the Balboa and San Diego Civic theaters. “It would make sense to me that they might issue [a request for proposals] where respondents could apply as a management company or a renter or both.”

... Mitch Gershenfeld, president and CEO of McCallum Theatre in Palm Desert and the former director of the nonprofit that ran ECPAC for several years. Yet when CityBeat contacted Gershenfeld, he, too, said he thinks the city should have hired a theater manager first.

“To give any tenant two or three days out of seven on a calendar is going to make it difficult for any organization to run an arts center,” Gershenfeld says. “If I were approached about running a performing-arts center in that scenario, it just wouldn’t interest me.”

Gershenfeld and other theater managers mention Sunday matinees as important dates for performing-arts groups, and even say that Tuesdays could present a problem due

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10 <http://www.sdcitybeat.com/sandiego/article-13357-will-east-county-performing-arts-center-become-a-church.html>

to rehearsal time and stage build-outs.

Without fail, all experts in the field recommend AGAINST the idea of renting to a single large tenant, even if there were no religious preference and discrimination issues in play. But there are.

## **Issue 2: Long-term lease exclusively to one religious organization is unconstitutional and unlawful**

Renting a theater and other public spaces to various religious groups is explicitly supported by legal precedents based on the “free exercise” provisions of our U.S. Constitution and the California State Constitution, as long as these rentals are on the same footing as every other user. However, there are severe restrictions, and it is clear that the proposed Rock Church lease agreement, as we understand the proposal, falls outside these legal precedents.

In this section, therefore, we will review the Constitutional provisions, as well as recent cases that reflect on these provisions.

### **U.S. Constitution, First Amendment (First Clause)**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

More specifically, we will be focusing on the “establishment clause” which is the first clause. Although it mentions “Congress”, this applies to all state and local governments<sup>11</sup>. There is a balance that must be struck between the establishment clause and the free exercise clause, and this balance can be seen in the opinions published by the U.S. Supreme Court, which we will discuss shortly.

### **California Constitution, Article 1: Declaration of Rights (SEC 4)**

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

The California Constitution is slightly “stronger” in its wording because it contains the restriction that there can be no “discrimination or preference” either between religions or between religion and no religion.

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<sup>11</sup> Applied to the States through the Fourteenth Amendment

## Notable Cases

### *Lemon v. Kurtzman, 403 U.S. 602 (1971)*<sup>12</sup>

This case was the source of the “Lemon Test” which was used over and over in subsequent cases to determine if governmental action was to be considered constitutional or not.

The case was about whether the state should reimburse the cost of text books and other costs in private church-related institutions. Here is the summary.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

This case introduced the famous “Lemon Test”, recounted as:

In order to pass constitutional muster under the Establishment Clause, a statute

1. must have a secular legislative purpose;
2. must have a principal or primary effect that neither advances nor inhibits religion; and
3. must not foster an excessive government entanglement with religion.<sup>13</sup>

Because the connector is “and”, all three of these must be true or the action is unconstitutional.

Evaluating the lease of the ECPAC theater to the Rock Church using the Lemon Test:

1. The agreement may have a secular legislative purpose, because renting the theater to a single large entity can provide much needed revenue to the city.
2. However, it has the principal effect of advancing religion, because the renting of the only large theater in the area to a religious concern is much different from its historical usage, which was primarily secular.
3. And results in excessive government entanglement, due to the fact that the church sits in the governmental super block, the church has proposed running all technical aspects of the theater, and the church is able to guide the plans for renovations so it will fit its needs.

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<sup>12</sup> <http://supreme.justia.com/cases/federal/us/403/602/case.html>

<sup>13</sup> See *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 426 U. S. 748; *Committee for Public Education v. Nyquist*, supra at 413 U. S. 772-773; *Lemon v. Kurtzman*, supra at 403 U. S. 612, 403 U. S. 613. Pp. 433 U. S. 235-236.

Constructing a new building on site for the offices of the church is unprecedented, and this would be the only nonpublic entity sharing the governmental superblock with the City and County.

***Widmar v. Vincent, 454 U.S. 263 (1981)***<sup>14</sup>

This case is related to the use of rooms in a state university for meetings that had religious content.

The University of Missouri at Kansas City, a state university, makes its facilities generally available for the activities of registered student groups. A registered student religious group that had previously received permission to conduct its meetings in University facilities was informed that it could no longer do so because of a University regulation prohibiting the use of University buildings or grounds "for purposes of religious worship or religious teaching." Members of the group then brought suit in Federal District Court, alleging that the regulation violated, *inter alia*, their rights to free exercise of religion and freedom of speech under the First Amendment. The District Court upheld the regulation as being not only justified, but required, by the Establishment Clause of the First Amendment. The Court of Appeals reversed, viewing the regulation as a content-based discrimination against religious speech, for which it could find no compelling justification, and holding that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds.

Held: The University's exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral. Pp. 454 U. S. 267-277.

Although they allowed use of college rooms for religious use, there are key elements of this case which differ from the use of ECPAC by the Rock Church: a) the fact that many student groups existed on campus, b) they could meet concurrently in different rooms, because each did not use limited resources at the University. And, c) student groups ran the gamut of various interests, with only a few being religious in nature.

From Footnote 14 of *Widmar*:

... In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members." 1980-1981 UMKC Student Handbook 25.

In the case of the Rock Church at ECPAC, ECPAC is the only performing arts center in the region. The exclusive use by one religious group means that it is not usable by other groups at those same times,

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<sup>14</sup> <http://supreme.justia.com/cases/federal/us/454/263/case.html>

all Sundays and religious holidays, and that the largest “anchor” tenant would be a church performing worship services.

One conclusion in *Widmar*:

At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

But the Rock Church *would* dominate the ECPAC theater, dominating over half of all the prime weekend days performing worship services. The effect of the lease would be to advance religion, and certainly, it would give the impression that this particular religion was endorsed by those governmental institutions, since they are all co-located in the same governmental superblock.

***Lamb's Chapel v. Center Moriches Union Free School Dist. 508 U.S. 384 (1993)***<sup>15</sup>

This is perhaps the most instructive case in the recent Supreme Court decisions. Essentially, a school district had a policy not to rent to anyone conducting religious programs in their rooms that they rent after hours to other users. The court held that if the school establishes an open forum by opening up their rooms, then they could not discriminate based on viewpoint, even if it was a religious viewpoint.

Here is the description from the opinion:

New York law authorizes local school boards to adopt reasonable regulations permitting the after-hours use of school property for 10 specified purposes, not including meetings for religious purposes. Pursuant to this law, respondent school board (District) issued rules and regulations allowing, inter alia, social, civic, and recreational uses of its schools (Rule 10), but prohibiting use by any group for religious purposes (Rule 7). After the District refused two requests by petitioners, an evangelical church and its pastor (Church), to use school facilities for a religious oriented film series on family values and child rearing on the ground that the film series appeared to be church related, the Church filed suit in the District Court, claiming that the District's actions violated, among other things, the First Amendment's Freedom of Speech Clause. The court granted summary judgment to the District, and the Court of Appeals affirmed. It reasoned that the school property, as a "limited public forum" open only for designated purposes, remained nonpublic except for the specified purposes, and ruled that the exclusion of the Church's film was reasonable and viewpoint neutral.<sup>16</sup>

Held: Denying the Church access to school premises to exhibit the film series violates the Freedom of Speech Clause. Pp. 390-397.

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15 <http://supreme.justia.com/cases/federal/us/508/384/case.html>

16 Underlining added.

(b) Permitting District property to be used to exhibit the film series would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U. S. 602. Since the series would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, there would be no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been incidental. *Widmar v. Vincent*, 454 U. S. 263, 271-272.

The general rule established by this case is that if rooms are offered up to the public, the government cannot discriminate against users who may deliver a religious message. However, the Supreme Court decision made specific comments about the danger of the community thinking “that the District was endorsing religion or any particular creed” and that any benefit to the religion or the Church would be incidental.

The use of school property dealt with in this decision is the occasional and after-hours use of rooms of the school district by religious groups, and certainly not exclusive use of rooms by those groups, and certainly no long-term contracts with any users, as that would result in preferential treatment.

The proposed long-term and exclusive lease of the theater for religious worship services, including the lease of city property adjacent to it, in the same superblock and within steps of the City Hall, the Council Chambers, and the County Courthouse, is a violation of the establishment clause of the U.S. Constitution. The use of the theater by a specific religion implies approval of that religion by the City, with the city undoubtedly called on to help promote events at the theater. Such a partnership between the City and a Church, not allowing any other religions to use the facility during Sundays and religious holidays, is not even-handed and implies a preference for this religion as opposed to other religions, and indeed also for a non-religious viewpoint.

### **Johnson v. Huntington Beach Union High School District (1977)**

68 Cal.App.3d 1 -- Court of Appeal, Fourth District, Division 2, California. Civ. 15738. | March 11, 1977.

This suit concerns a voluntary student Bible study club which was to meet and conduct its activities on public high school campus during the school day. The court held that permitting Bible study club to meet and conduct its activities on the school campus during the school day was prohibited by the establishment clauses of the Federal and State Constitutions and by state constitutional prohibition against aid by legislature or school district to any religious sect, church, creed, or sectarian purpose; and that the resulting prohibition did not infringe plaintiffs’ free exercise or Fourteenth Amendment rights except to

the limited extent made necessary by the establishment clauses.

### **Board of Educ. v. Mergens, 496 U.S. 226 (1990)<sup>17</sup>**

This case actually predated the Lamb's Chapel case, and differs from that subsequent case due to the fact that it was not an outside church that wishes to use the school for religiously oriented programs, but clubs that would be sponsored and subsidized by public funds. It is very similar to *Widmar* but applies to high schools as opposed to colleges, but meeting occurred after school hours, and thus different from *Johnson v. Huntington Beach High School Dist.* Here, because the club meets after hours, the court ruled to allow it.

...the refusal to permit the proposed club to meet at Westside violated the Equal Access Act, which prohibits public secondary schools that receive federal assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the "religious, political, philosophical, or other content" of the speech at such meetings. In reversing the District Court's entry of judgment for petitioners, the Court of Appeals held that the Act applied to forbid discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the Establishment Clause.

The issue here is whether, unlike college students, would high school students think that religion was being endorsed just because they were allowed to have religious clubs? They said “We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”<sup>18</sup>

That is the big difference between what that case allows and what is being proposed by the Rock Church. The *Mergens* clubs were permitted on a “nondiscriminatory basis,” and could even meet concurrently. At ECPAC with the Rock Church, there would be discrimination, as there is only one venue, and only one major religious tenant consuming all the traditional religious days, holidays, etc. You can argue that the proposed use by the Rock Church is “during operating hours” since they are getting first pick of the hours they wish, and other users relegated to the remaining hours.

### **GOOD NEWS CL DB ET AL. v. MILFORD CENTRAL SCHOOL**

No. 99-2036. Argued February 28, 2001-Decided June 11, 2001<sup>19</sup>

In this decision, the court held that a Christian Club could be formed and meet after-hours on an elementary school campus where district residents would conduct Bible lessons, memorize scripture, and

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<sup>17</sup> <http://supreme.justia.com/cases/federal/us/496/226/case.html>

<sup>18</sup> Mergens Page 496 U. S. 250

<sup>19</sup> <https://supreme.justia.com/cases/federal/us/533/98/case.html>

pray. The court ruled that these did not violate the establishment clause. However, they were careful to point out the provisions of the *Widmar*, *Mergens*, and *Lamb's Chapel* cases, there was no realistic danger that the community would think that the district was endorsing religion. This case was a bit different from those other cases because the weekly meetings were to be held in an elementary school for children from 6 to 12 years of age, not high school or college students.

The reason this differs from the Rock Church at ECPAC is that the school could accommodate almost unlimited different such groups if needed, one studying the Bible, while others studied the Koran, Torah, or perhaps Darwin's *Origins of Species*. In the case of the Rock Church at ECPAC, it is a single church group with exclusive rights to use the public facility to hold worship services on Sundays and preempting all others.

## School Districts Renting Space for Regular Church Services

El Cajon officials have mentioned that a long-term lease to the Rock Church is legal because “churches rent space all the time in school districts.” Indeed, the *Lamb's Chapel* Supreme Court case did find that school districts could not discriminate against churches that wanted to use school facilities after hours, just like every other organization. But there is a difference between how schools handle religious activity and other activities, because the California Constitution requires that no preference must be shown in how our government treats one church over another, or over other secular activities.

The Cajon Valley Union School District provided information about their policies regarding religious use of their facilities and how they deal with the no-preference requirements of the California State Constitution. The school district is guided by Board Policy BP1330<sup>20</sup> and the resulting Admin Regulation AR1330<sup>21</sup>.

### **BP1330 (excerpt)**

5. Religious Use—School facilities shall be made available for religious purposes on a temporary basis. Fees may be charged to offset the actual expenses associated with use.

Admin Regulation is a bit more specific on religious uses, as follows:

### **AR1330 (excerpt)**

Religious Use—School facilities shall be made available for religious purposes on a temporary basis. Temporary use is deemed to be in effect when the religious organization provides evidence of intent to purchase property and construct a church or addition. The term of such use shall be for one year, renewable for up to two

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20 Board Policy BP-1330 <http://schools.cajonvalley.net/files/filesystem/48-BP1330UseofFacilities.pdf>

21 USE OF SCHOOL FACILITIES, AR-1330 – <http://schools.cajonvalley.net/files/filesystem/48-AR1330UseofFacilities.pdf>

additional years at the discretion of the District.

The same document specifies how fees are determined:

Fees shall be determined on an individual basis considering number of rooms requested, frequency of use, and impact on custodial staff.

So there is a big difference between the temporary use of district school rooms (of which there are many) for church services when the facility is not in use, and the long-term lease of ECPAC, the only theater of its type in the region, to a single church entity that will conduct worship services during prime operating days of the facility, on a permanent basis.

The school district mentioned a number of legal references, which we will review relevant references in detail:

## EDUCATION CODE

### **10900-10914.5 Community recreation programs<sup>22</sup>**

The education code allows school districts to cooperate with other public agencies to establish community recreation programs using school district facilities, and even constructing new facilities on school (or city) property for such public recreation programs.

### **38130-38138 Civic Center Act: use of school property for public purposes<sup>23</sup>**

This provision sets out the general fact that school districts can provide their “civic center” where groups can meet and “discuss, from time to time, as they may desire, any subjects and questions that in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside.” There is an explicit mention of religion or use of the rooms for churches to conduct “religious services for temporary periods, on a one-time or renewable basis.”

38131. (a) There is a civic center at each and every public school facility and grounds within the state where the citizens, parent teacher associations, Camp Fire girls, Boy Scout troops, veterans' organizations, farmers' organizations, school-community advisory councils, senior citizens' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions that in their judgment pertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. For purposes of this section, "veterans' organizations" are those groups included within the definition of that term as specified in subdivision (a) of Section 1800 of

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22 <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=edc&group=10001-11000&file=10900-10914.5>

23 <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=edc&group=38001-39000&file=38130-38139>

the Military and Veterans Code.

(b) The governing board of any school district may grant the use of school facilities or grounds as a civic center upon the terms and conditions the board deems proper, subject to the limitations, requirements, and restrictions set forth in this article, for any of the following purposes:

(1) Public, literary, scientific, recreational, educational, or public agency meetings.

(2) The discussion of matters of general or public interest.

(3) The conduct of religious services for temporary periods, on a one-time or renewable basis, by any church or religious organization that has no suitable meeting place for the conduct of the services, provided the governing board charges the church or religious organization using the school facilities or grounds a fee as specified in subdivision (d) of Section 38134.

(4) Child care or day care programs to provide supervision and activities for children of preschool and elementary schoolage.

(5) The administration of examinations for the selection of personnel or the instruction of precinct board members by public agencies.

(6) Supervised recreational activities including, but not limited to, sports league activities for youths that are arranged for and supervised by entities, including religious organizations or churches, and in which youths may participate regardless of religious belief or denomination.

(7) A community youth center.

(8) A ceremony, patriotic celebration, or related educational assembly conducted by a veterans' organization.

(9) Other purposes deemed appropriate by the governing board.

## Attorney General Opinions

### 79 Ops.Cal.Atty.Gen. 248 (1996)<sup>24</sup>

The California Attorney General was asked to weigh in on how a school district should evaluate whether a church is seeking another permanent location (one meaning of the term “temporary”) and if they can continue to renew the temporary permit indefinitely.

THE HONORABLE CATHIE WRIGHT, MEMBER OF THE CALIFORNIA STATE SENATE, has requested an opinion on the following questions:

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<sup>24</sup> <http://oag.ca.gov/system/files/opinions/pdfs/95-1107.pdf>

1. In order for the governing board of a school district to permit a religious organization to conduct its services at a school facility, what showing must be made that the religious organization lacks another suitable meeting place for the conduct of its services?
2. May the governing board of a school district permit a religious organization to conduct its services at a school facility for an indefinite period of time?

## CONCLUSIONS

1. In order for the governing board of a school district to permit a religious organization to conduct its services at a school facility, no showing must be made that the religious organization lacks another suitable meeting place for the conduct of its services.
2. The governing board of a school district may indefinitely renew the temporary permit of a religious organization to conduct its services at a school facility.

However, it also states:

The fact that a permit may be consecutively renewed does not transform the temporary permit into a permanent one. (Cf., *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1530.)

It seems logical that if a school district is faced with two different churches or a church user and a nonchurch user, that wish to use the same facility in a school district on the same day at the same time, that the nonpreferential and nondiscriminatory provision of the California State Constitution would require that the school district somehow fairly arbitrate between the two users so as not to show a preference. This would clearly mean that the church user may be faced with finding a new venue for their worship services if the school district decided not to renew their permit and instead chose to rent to the other user. We note that in 79 Ops.Cal.Atty.Gen. 248 (1996)<sup>25</sup>, the California Attorney General said a church could use a school district meeting room even if they had another permanent location, and they also ruled that renewals of the annual permits could go on indefinitely, but this did not result in a “permanent” permit.

Thus, there are no “long term leases” of school district property for use as a church, as each agreement is one year in duration (or less) and there is no guarantee that the room will continue to be available to that group if another group also wished to use the room. Admittedly, since school districts do want to rent these rooms to help defray budget expenses, they will likely continue to renew the temporary permit each year. It can be noted also that the term of the agreement – one year – is not established by the education code in this section, but it just says “temporary.”

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<sup>25</sup> <http://oag.ca.gov/system/files/opinions/pdfs/95-1107.pdf>

The meaning of the term “temporary” varies widely, depending on when and how it is used. For displaced tenants, anything less than 20 days is temporary, whereas over 20 days is considered permanent displacement.<sup>26</sup> Workers who are employed for more than a year are generally considered permanent employees.

Certainly, nothing is absolutely permanent and everything is temporary. The idea of temporary here, we argue, is due to the fact that the school district must be non-preferential in their approval of which church (or other group) can rent the facility. The important aspect of the term “temporary” in this case is the fact that the parties can terminate the agreement more easily, and there is no guarantee that it will be renewed.

Citizens Oversight believes that the annual term of these agreements is too long and does not allow sufficient ability of other users to attempt to use the room so as to respect the California Constitution's nonpreferential provision. It is quite onerous to require that a group wait for a whole year to rent the room for one Sunday, for example. The selection of which group can use it must not be based on who can contract for the longer time. We may decide to challenge the term of these agreements to insure that they are indeed “temporary” perhaps only one quarter (three months) in duration, which is then renewable if no one else wants to use the room. In that manner, another user could have an equal chance at the same room for the same days.

But the other big difference between the situation in school districts is that they have a plethora of meeting rooms that can be provided to various users. Normally, this will eliminate any notion of preference. This is not the case if ECPAC is rented only to the Rock Church for every Sunday and important religious days, and so this agreement would clearly violate the nonpreference and nondiscriminatory provision of the State Constitution.

Libraries generally have rooms that are available for use, and they do limit how much any one group can monopolize the rooms by simple restrictions applicable to all groups. For example, at the El Cajon Library, the rooms may be used up to four times per month, per group, and they can be scheduled up to 3 months in advance. If the library wants to schedule its own event in the time slot a renter is used to using, then they can preempt that renter and use it for their own programs.

San Diego Public library has the following provision for repeating meetings. These regulations<sup>27</sup> apply to San Diego Central Library and all library branches.

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26 “The bill defines a temporary displacement as one that lasts less than 20 days.” – <https://www.rentalhousingnetwork.com/newsdetails/San-Francisco-Temporary-Displacement>

27 <http://www.sandiego.gov/public-library/services/specialresources/meeting/meetreg.shtml>

Groups may not use the rooms for ongoing organizational meetings for longer than 3 (three) months before rebooking; however, tentative bookings may be available one year in advance at the discretion of the Branch Manager or the Central Library Deputy Director. At branch libraries, each group may schedule 1 (one) meeting per month with a maximum 4-hour limit. Each group is responsible for set-up prior to the event and clean-up afterwards, and the period reserved must include time for these tasks. If a series of classes or lectures is planned, these meetings shall have a beginning and ending date. These series will be scheduled for no longer than 3(three) months at a time. Another or subsequent series cannot be scheduled more than 30 days in advance.

Our point here is that “temporary” use in libraries means you can only book use up to three months in advance, and there is no guarantee that you will be able to hold your event at the exact time and place every single month or week. Because these regulations do not come close to any long-term agreement, there is no need to mention any special limitations on religious use.

Therefore, we see that the statement that “school districts rent their rooms all the time” is not at all comparable to what is proposed at ECPAC.

## Entanglement

Before we turn from the legal issue, one further issue should be highlighted, that of undue entanglement. Partly, the concern about “church and state” has to do with giving one church an endorsement by the government. For example, the Latin cross on the top of Mt. Soledad has been ruled unconstitutional<sup>28</sup>. Perhaps if every possible religious symbol were also erected, then that would probably settle it, because then there would be no perception of endorsement of one religion. Of course removing it and replacing it with an American Flag is probably the simplest way to eliminate the legal question of endorsement and preference. Similarly, allowing a single church to dominate the ECPAC theater can be perceived as an endorsement of that religion by the City. A way around the endorsement issue is to allow any church or non-church user an equal chance in renting the church on any particular day. This is what the libraries and the school districts have done by drastically reducing the term of the rental agreement, and not guaranteeing renewal.

But there is a second area of concern that is perhaps more of a factor in this case than in the other cases of library or school district room use. The concern of entanglement is when the influence is in the other direction. Although the Supreme Court just heard a case and ruled that the opening prayer in governmental meetings is allowed<sup>29</sup>, the cities must strive to allow any religion (in the area) to come in

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28 [http://www.leagle.com/decision/20011147262F3d885\\_11054.xml/PAULSON%20v.%20CITY%20OF%20SAN%20DIEGO](http://www.leagle.com/decision/20011147262F3d885_11054.xml/PAULSON%20v.%20CITY%20OF%20SAN%20DIEGO)

29 *Town of Greece v. Galloway*, 572 U.S. \_\_\_\_ (2014) – <https://supreme.justia.com/cases/federal/us/572/12-696/> –

and say their prayer. The Supreme Court said “If the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers to achieve religious balance.” It goes without saying that many would find it difficult to pray to the Flying Spaghetti Monster, pagan gods, or definitely Satan. But if you allow prayer, then just about anything must be allowed that exists in the community. The town must continue its “practice of neither editing nor approving prayers in advance nor criticizing their content after the fact.”

There is not much doubt that the courts would rule against allowing churches to use City Council Chambers for worship services, even if they paid handsomely for that use. But even if that were allowed, there is no way only one church could dominate that prestigious pulpit. Unlike school room use or library room use, the governmental superblock is where our elected officials and public servants work. Allowing one mega church to also establish their headquarters in that customarily secular domain provides the church will too much influence, and the co-location of the church results in a conflict of interest.

These issues were very well recognized by our founding fathers who worked diligently to establish a wall of separation between our government and the various churches and religious sects. This separation is not anti-religious. The Christian religion teaches this explicitly, as Jesus himself commented on the separation of church and state in Mark 12:17 which reads “Then Jesus said to them, 'Give back to Caesar what is Caesar's and to God what is God's.'” -- so Jesus separated STATE (Caesar) and the CHURCH (God), and instructed his followers to respect both, but separately.

The establishment of the Rock Church in the governmental superblock is vastly different from allowing a church to rent space in an outlying building. As a hypothetical, consider a building among many in the airport region which was unused and owned by the city. Certainly, you would want to be fair about finding a tenant, and so the methods used by the school districts may be sufficient. But since it is not right in the governmental superblock, there are no other concerns of proximity to our secular government. ECPAC is different. It is the only theater of its type in the East County. The theater was established for use by the entire community on an equal basis. It is also right next to the governmental super block. For these reasons, any long-term lease is out of the question, and is definitely a violation of church and state separation mandated by our Constitution (and by Biblical scripture as well.)

### **Issue 3: Regular Church Use Incompatible with Other Uses**

Although we believe the use of ECPAC by the Rock Church in a long-term and exclusive lease agreement is unconstitutional, we now process other issues which we feel are subsidiary to this primary objection, but nevertheless we submit these of further proof that the agreement cannot proceed.

To be successful, “Presenters”<sup>30</sup> must contract with performing acts usually two years (or more) in advance, based on the schedule of the performers, which is particularly true if these performers are popular and are in the process of scheduling national tours. If they are very popular, it may be appropriate to schedule these acts for more than one day at ECPAC. Having all the Sundays contracted away to one tenant means the theater manager or presenting organization will have a great deal of trouble getting these acts in.

For example, we see that the Rock Church wants to rent the theater on Sunday from 4:00 am to 11:00pm. Saturday night is prime time for a public theater. Reconfiguring the theater after a performance on Saturday night may be nearly impossible to complete prior to a 4:00 am start. We must note also, that the 18 hours planned to be used by the Rock Church on Sunday qualifies not as a single day rental typically limited to 8 hours, but more than two 8-hour “day” rentals, which start so early that they will definitely impact the viability of any Saturday evening rentals. Thus the calculation of the number of days rented is incorrect if applied to any standard rate schedule. We will talk more about that later, as we consider if the price is fair.

The Rock Church has proposed that they handle the technical operation of the theater. The GCCA found in their renting of the theater, that the ACF used professional sound and lighting personnel, for example, whereas when the CCT operated the theater, that personnel was replaced with workers with much less experience, sometimes relying on volunteers. There is a concern that the personnel and management of the technical aspects of the theater when operated by the Rock Church will limit the scope of performances that can be supported from a technical standpoint, and will result in shoddy “we know about church and that is about all” operation.

With the Rock Church dominating the schedule so many days of the year, the theater will mainly be supporting the church, and only when feasible, allowing others to rent the theater. In fact, this is the way the opportunity has been stated in news articles, that the building would “be provided” to the City by the Rock Church for other purposes when they did not want to use it.

In fact, the proposal on the table appears to allow the Rock Church to rent all available time at the theater, and completely remove it from any other use. What is to prevent the Church from blocking a competitor church or perhaps an atheist group from using a time they wish to use if they try to schedule it?

Rates provided to the Rock Church would wind up – by default – being the highest rates possible for use of the theater. If any one were charged more, an instant complaint could be raised that the City is

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30 Theater managers who select shows from traveling performers.

providing better rates to the Rock Church, and therefore helping to establish religion. Thus the rates given to the Rock Church are the highest rates that can be charged to anyone.

Some may argue that the Rock Church should be given lower than market rates, a sort of “quantity discount” of sorts. Unfortunately, just the opposite should be the case. Because the church demands specific dates and access to the theater and the ability to preempt other users, approval of all improvements, etc. so that it makes it difficult to use for other users, they should be charged a HIGHER rate, not lower.

## **Issue 4: Under Market Rates Proposed**

As we have brought out, the amount of time requested by the Rock Church consumes a grid of time every week like the bars on a jail cell. Renting the theater for other uses is not impossible, but those uses will be minimal. Contracting with a single massive tenant like the Rock Church means no really good theater manager can be attracted, and the renting will likely just be done by the city to local community groups with limited market potential, such as CCT. With Rock Church personnel handling all technical aspects of other users, coupled with the proposal for a 20,000 sqft annex for Church offices, certainly, this will become the permanent church location, not a temporary rental for special events.

Other churches have to rent or purchase their entire facility, including all the time they are not actually using it. Some elect to rent out their space to users to mitigate their expenses. Such is the case in venues such as at Shadow Mountain Church. But they still have to pay for the space, even if they are not using it.

Comparing the costs to the Rock Church when using ECPAC and if they had to purchase or lease a separate building without City backing, we see that the City is providing unprecedented benefit to this one church organization.

Their current El Cajon Rock Church facility (formerly Michael's crafts supply store) is approximately 29,000 sqft and their lease payment is somewhere around \$25,000 per month<sup>31</sup>. That is \$0.86 per square foot. But it is difficult to compare square feet due to the configuration of the theater and the fact that some of the square footage is dressing rooms, orchestra pit, and other areas that are useful only for theatrical and other performing arts users and not so much for a church user.

Their current sanctuary seats 725, according to an email we received in a CPRA request. So the Rock Church now pays \$34 per seat per month. ECPAC seats 1142, and the comparable rate per month

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<sup>31</sup> This is an estimate based on information from another prospective tenant of that location.

should be AT LEAST \$34 times 1142 or \$38.8K per month, and \$465K per year. The proposal by the Rock Church to pay only \$216K per year means the City is relieving them of about a quarter million dollars over what other churches would have to pay for a similar situation, and that does not take into account the fact that ECPAC is a superior facility when compared to their current church, sited in a retail storefront.

This is a violation of the establishment clause.

As we mentioned earlier, calculating the rate based on the time used has to take into account that most users consume 8 hours per “day” of rental. The Rock wants to use the theater for 18 hours on Sunday, and that is not “one day” of rental.

## **Issue 5: Annex unconstitutional; Will trigger CEQA**

The Rock Church has proposed that they be allowed to lease city property and build an annex next to ECPAC for their exclusive use, save the “rooftop venue” which will be “provided to the city” when they are not using it, and this is a prerequisite for their proposal to move forward.

First, we assert that providing a land lease to a church in the governmental superblock at the unheard of low price of \$4000 per month for 35 years is a blatant violation of the establishment clause and nonpreferential/nondiscrimination clause. If a cross on Mt. Soledad is unconstitutional, and the courts thus far have found that to be the case, then clearly an operating church at ECPAC in the governmental superblock, at exceptional rates, and providing centrally-located land to a specific church is also unconstitutional.

Also, if such a building is to move forward, this will undoubtedly trigger CEQA, the California Environmental Quality Act. One of the many provisions of this act requires that traffic and parking concerns be evaluated. It will be very difficult for the Rock Church to find a way to get through this process as they are already hated by nearly every Pt. Loma resident for tying up the roads near Liberty Station in San Diego, and access and parking at ECPAC is demonstrably worse, as Main Street has been narrowed over the years and public downtown parking removed. We talked with Coco's restaurant workers near the El Cajon branch of Rock Church and they commented that they have no parking for their own customers on Sunday and almost no one from the Rock Church uses the restaurant before or after church service begins. The current Rock Church location in El Cajon is also only a few blocks – within walking distance – from the trolley stop, whereas at ECPAC, bus connectors must be used for anyone who intends to use public transportation, and who can decipher the various complex route schedules.

Conventional use of the theater usually results in an event in the evening and perhaps matinees on the weekend. Some performers – such as opera singers – cannot do more than one performance a day due to the demands their performance makes on them physically, such as vocal chords in the case of opera singers. Those conventional uses include a significant gap between each performance.

The Rock Church intends to have many services in all on one day, and we expect they will also quickly expand to Saturday services as well – if they could have their way – as this is the pattern at other evangelical churches; Saturday services can even be used to separate that Christian denomination from others. The services are run one after the next, and existing roads have a very hard time dealing with both the influx of the next service while current churchgoers are leaving the prior service. The evidence is clear from the situation in Pt. Loma where the roads have much higher capacity than those in El Cajon, and yet traffic is brought to a standstill on Sundays in that area. Without significant upgrades, it is doubtful that the traffic impacts can be mitigated.

#### **NO SIGNS:**

Just like what is allowed in public schools, no permanent signs promoting the Rock Church can be allowed, unless similar signage is given to all churches to promote their beliefs. This is very much like the Mt. Soledad Cross, which is already settled by the courts. A big lighted sign on Main Street promoting the Rock Church is a nonstarter.

## **Process Defective**

The process used to get to this point was unfair, unlawful, and defective.

## **No public meetings, workshops, or community engagement**

As a very major change from prior City Managers, Williford has held no public meetings, workshops, or community engagement meetings to solicit interest from community groups regarding the operation of ECPAC. Even though the ECPAC Foundation was ready to work with the City and prepared an extensive 65+ page plan and review of the theater, the City never did attempt to engage with this group. When the results of our survey were becoming available, Williford expressed no interest in the results, stating that any good theater manager would already have that information.

## **City Requested a Proposal by Rock Church**

City Manager Williford and other City officials have stated that the Rock Church brought their proposal in “unsolicited”. However, according to the September 20, 2013 email (Illustration 2), it is clear

that Williford first asked the broker “What is going on with Rock and ECPAC?” COPS got this email from a CPRA request where we asked for all communications between the City and the Rock Church and other tenants or management firms. By this email, it is clear that the City was requesting something from Real Estate Broker Kerry Schimpf *prior to* the so-called unsolicited proposal. This was, in essence, a request by the City through Williford for the Rock Church to make a proposal. At this point, no other church or group was being approached to consider the theater, and certainly, no theater management groups were approached.

## **Inappropriate secret negotiations**

COPS already has submitted a formal objection<sup>32</sup> to the closed session negotiation meeting that occurred in February of this year. Thus, Williford was already deep in negotiations and talking with one major user of the ECPAC theater – the Rock Church. This preferential treatment is unconstitutional.

## **Request for Interested Tenants**

Realizing that they had gone too far in courting this single religious group for the theater, the City then issued a request for interested tenants. Of course, this was structured in such a way that only very large tenants would be interested, and explicitly stated that no operating managers should submit proposals. Thus the city was only able to evaluate a very few proposals, only one from the Rock Church and local theater darling CCT, and was unable to evaluate all options, including the performing arts theater option with professional manager... what Williford said was the “right way” to do it.

## **Aug 12 Evaluation of Proposals Misleading and Deceptive**

In the August 12, 2014, City Council Meeting the proposal by the Rock Church was not provided to the public.<sup>33</sup> However, City Manager Williford, who wrote the evaluation, talked of it in glowing terms, and provided misleading and we think deceptive information. Those claims will be reviewed below.

Williford wrote:

From a business and community benefit perspective, it is clear that the Rock Church proposal presents the greatest financial, usability and facility opportunities for the City and the community at large.

Of course, this is hardly clear at all, since the City did not attempt to solicit proposals for theater managers or presenter firms, the city focused myopically on the church option alone. Sure, among the two entities that responded to the request for interest, the Rock Church proposal may be the most lucrative, but

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<sup>32</sup> <http://www.copswiki.org/Common/M1417>

<sup>33</sup> COPS has requested this proposal in an August 18 CPRA request but has not received it as of this writing.

without examining all the options, the City has biased the results toward the entity that was personally solicited by Williford in his September 20, 2013 email. Additionally, it does not benefit the community to arm-wrestle over this clear violation of constitutional provisions, as a court challenge will obviously occur if the City proceeds with the Rock Church agreement.

While only a small portion of the community may utilize the Rock Church itself, a far larger portion of the community will utilize the performing arts center once it is re-opened for entertainment purposes.

Here, Williford incorrectly implies that without the Rock Church, then ECPAC will never reopen at all. This is a false dichotomy, and in fact just the opposite is the case. If the Rock Church does not lease the building, then the theater can open as a Performing Arts and Entertainment center, without being hamstrung with over half of the prime weekend days already consumed by a single user. This will result in a far larger portion of the community being served, including allowing the Rock Church (and other churches) to use it for special events on a temporary basis.

In staffs view, the Rock Church proposal is so significant as to create an unprecedented positive impact upon the surrounding business community, as well as facilitate the sustained financial stability of ECPAC for the benefit of the entire community.

Since the Rock Church already exists in El Cajon, moving to the ECPAC theater provides only an incremental improvement in any business that may be derived from these patrons. The impact of the Rock Church in other areas is also quite negative, as they have become quite hated in the Pt. Loma area for bringing unprecedented vehicle traffic to the Liberty Station area and bringing everything to a standstill. Despite being served by high-capacity surface streets, the area of Liberty Station is severely impacted every Sunday. And since many businesses are closed on Sunday (and indeed the Christian religion, which the Rock Church is a part, includes the mandate that Sunday would be a “day of rest,” and thus many businesses refuse to operate on Sunday, particularly in the morning when most churchgoers attend church) this means that the apparent high traffic will have a very small “multiplication factor” of these visitors to El Cajon.

A reasonable estimate of attracting new people to downtown El Cajon based on Rock Church usage and two private booked users per week would be 11,000 - 12,000 people per week or 572,000 - 624,000 people per year. Staff considers this to be a conservative estimate given that this estimate does not take into account that December and other holiday times of the year have traditionally attracted greater use of the facility and, therefore, even more visitors to downtown.

These calculations are extremely deceptive. The unfortunate fact is that churchgoers are repeat

visitors and not unique visitors. This is like comparing hits to a website and unique website visitors. And there is no comparison provided in the analysis between running the theater with the Rock Church and other options. The Rock Church runs five services each Sunday. At 90% average capacity, the theater can accommodate about 1000 non-disabled visitors, resulting in 5000 unique visitors per week. Two private functions can be estimated at 50% capacity, and that adds 1142 visitors. The total in this scenario is 6142 unique visitors per week, not 11,000 to 12,000 per week. Rehearsals on Tuesdays do not have attendees, so that is just overhead with no visitors except for cast members. So the Williford estimate is not a conservative estimate at all, but a blatant exaggeration. In addition, simply multiplying the weekly unique visitors by 52 does not compare with a performing arts and entertainment center, where there are many more unique visitors and fewer repeats. Operating the theater as a general entertainment and Performing Arts center will result in many more unique visitors than if it is hamstrung by the grid of usage by a church.

According to information obtained from CCT, in 2007 they produced 16 presentations, selling 76446 tickets (4777 tickets average per multi-day presentation) and rented the theater 145 times. Assuming 50% capacity for an average rental, that gives  $145 * 1142 / 2 = 82795$ . This looks at first glance like far less than the Rock Church usage, but since these are unique visitors, they will have far more impact on the local economy than repeat visitors. Assuming 5000 unique church visitors, this is a minor improvement over the CCT and rentals, which still can be the case no matter how the theater is run.

But that is not all. CCT did not attempt to run the theater as a “roadhouse,” as suggested by consultant Kurt Swanson, and instead attempted almost no headliner events. If the theater were run “correctly” as envisioned by the various consultants and advisors, the number of visitors would be far greater than the church plus random rentals, and these visitors are not repeats on Sunday morning when everything is usually closed.

Thus we must insist that the City should more carefully compare the expected affect on the economy taking into account the unique vs. repeat visitor issue, as well as the fact that many Rock Church visitors will be visiting when most businesses are closed, and prevent other events from being able to effectively use the theater, gridlocking the streets, effectively blocking all other commerce.

There is no other action or development proposal that has ever come before the City that would generate more new business for downtown El Cajon and surrounding areas than this proposal.

Oh really? City Manager Douglass Williford has only been on the job for a couple of years and has seen very little of the history of the city. The original gift of the theater to the city is probably a better

choice for the best thing that has every happened, but it has been squandered by inappropriate management and meddling by the City Council, rather than running it for the best interests of the community. Since the Rock Church is already in El Cajon, it seems incomprehensible that this statement could be true. And why was the Rock Church proposal not provided in its entirety to the City Council so they could evaluate it for themselves, and instead they have to rely on the opinions of the City Manager? If it is that good, why keep it under wraps?

As a part of their proposal, approximately 75% of all Fridays and Saturdays will be left available for booking by entertainment \ performing arts \ conference engagements, along with most week nights throughout the year. This would enable the facility to be used in its traditional role as a performing arts and event center for the entirety of the community's enjoyment, fully apart from the Rock Church's private use of the facility as a church.

Unfortunately, as we described earlier in this document, use as a church on Sundays starting at 4:00 AM makes it very difficult to reconfigure the theater after a Saturday night event, and many acts will want to use the entire weekend. Using the theater as a church and allowing it to preempt other engagements makes it very difficult to use as a conventional performing arts and entertainment center, and all but impossible to find a professional theater manager to run a theater crippled in this manner.

Finally, later in the agenda item on August 12, Williford says:

**FISCAL IMPACT:**

No fiscal impact to engage in negotiations with the Rock Church. Depending upon final agreement, all costs to the City to maintain the facility based on Rock Church's usage are expected to be covered by monthly rental fees. Potential land lease monthly fees would represent additional revenue to the City.

Of course there is a cost to doing anything. Unfortunately, the analysis here does not consider the cost which the City will incur defending its position in court, should the final agreement be approved.

## **Conclusion**

It is hoped that this letter will impress upon the city the strong case that we have to block such an arrangement, should they proceed with a long-term lease agreement and plan to build a permanent offices for the Rock Church on City property.

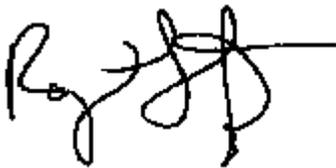
We urge the city take the proposal by the Rock Church and set it aside as an impossible course of action, and instead proceed with the previously established game plan: completing renovations, hiring a professional theater manager and/or Presenter organization, and run it as a performing arts and

entertainment center.

In this preferred scenario, the theater will likely still be used by the Rock Church for occasional big events, in addition to CCT, as well as being appropriately available to the theater manager to schedule the best and most attractive events for El Cajon. If the Rock Church sees a huge demographic that will attend their events in the El Cajon area, not renting ECPAC to them does not reduce any impact they may have in the future, as they will still be here, either at their current location or at some future larger site that is not ECPAC.

We would like to avoid legal action but if the City does proceed with an agreement with the Rock Church along the lines of the proposal, we will proceed along all available avenues based on the clear case we have described here.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Ray Lutz', with a long horizontal line extending to the right.

Ray Lutz  
Save ECPAC Committee  
Citizens Oversight, Inc, a 501c3 Corporation