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LIVING RIVERS COUNCIL  
6

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF NAPA

10 LIVING RIVERS COUNCIL, an unincorporated )  
association, )  
11 )  
Petitioner, )  
12 v. )  
13 CITY OF ST. HELENA, CITY OF ST. )  
HELENA CITY COUNCIL, and DOES 1 )  
14 through 10, inclusive, )  
15 Respondents. )  
16 )  
\_\_\_\_\_ /

Case No. 26-24908

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO ENFORCE  
SETTLEMENT AGREEMENT**

Date: October 4, 2006

Time: 8:30 a.m.

Dept: A

Judge: Honorable Raymond A. Guadagni

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1 **I. INTRODUCTION**

2 In this action Petitioner Living River Council (“LRC”) challenged Respondent City of St.  
3 Helena’s (“City”) certification of an Environmental Impact Report (“EIR”) prepared pursuant to the  
4 California Environmental Quality Act (“CEQA”) for its adoption of a Comprehensive Flood  
5 Protection Project situated on the Napa River in St. Helena. This court ruled in LRC’s favor on one  
6 CEQA claim, against LRC on its other CEQA claims and ordered the City to set aside its approval  
7 of the Project. See Judgment Granting Petition for Writ of Mandate entered herein on March 10,  
8 2005. Both sides appealed.

9 While the appeal was pending, LRC and the City settled the case on November 11, 2004.  
10 (See Stipulation and Order Reserving Trial Court's Jurisdiction to Enforce Parties' Settlement  
11 Agreement (hereinafter “Stipulation and Order”) filed herein on January 30, 2005. For the Court’s  
12 convenience, a copy of the Stipulation and Order is attached as Exhibit 1 to the Declaration of  
13 Thomas N. Lippe in Support of Motion to Enforce Settlement Agreement (hereinafter “Lippe Decl.”).  
14 The Settlement Agreement is attached to the Stipulation and Order as Exhibit 1.

15 Pursuant to Code of Civil Procedure § 664.6, the Stipulation and Order provides that “This  
16 Court hereby reserves jurisdiction to enforce the Litigation Settlement Agreement of the Parties  
17 pursuant to Code of Civil Procedure section 664.6 and this written stipulation of the parties.”

18 In 2004, the City originally adopted a version of the Flood Control Project known as the  
19 Enhanced Minimum Plan A or "EMP-A." In the City’s most recent administrative proceedings from  
20 which this motion arises, the EMP-A is referred to as the “2004 Plan.” Pursuant to the Settlement  
21 Agreement, the City agreed to modify the “EMP-A/2004 Plan” in certain particulars. These  
22 modifications altered the balance of environmental risks and benefits that LRC perceived in the  
23 Project to the point where LRC agreed to dismiss the action. The modifications authorized by the  
24 Settlement Agreement are referred to in the City’s most recent administrative proceedings as the  
25 “2005 Plan.”

26 The legal effect of LRC’s dismissal of the lawsuit is profound, because it forever bars LRC  
27 from litigating the adequacy of the EIR certified by the City for the Project in 2004. Thereafter,  
28 absent the Settlement Agreement, the City would be free to make changes to the Project utilizing only

1 an "Addendum" to that EIR to comply with CEQA. Any party challenging the City's use of an  
2 Addendum to the previous EIR to evaluate the effects of later changes to the Project must show that  
3 there is no substantial evidence to support the City's conclusion that the changes will not cause new  
4 or more severe significant adverse environmental effects that were not previously assessed in the  
5 original EIR. In short, the dismissal bars LRC from litigating its CEQA claims that the original  
6 EMP-A/2004 Plan has significant adverse environmental effects that the original EIR failed to  
7 disclose, and relegates any CEQA challenge to later changes to the EMP-A/2004 Plan to challenging  
8 just the additional effects of those changes. [cite to CEQA excerpt]

9 The consideration that LRC received in exchange for this major concession was the City's  
10 agreement to limit the changes to the EMP-A/2004 Plan to those specified in the Settlement  
11 Agreement (i.e., the 2005 Plan); changes that LRC believed represented an acceptable trade-off in  
12 environmental risks and benefits of the Project.

13 Instead of limiting itself to the specific changes authorized in the Settlement Agreement,  
14 however, the City has made a number of additional changes to the Project. These additional changes  
15 (referred to in the City's most recent administrative proceedings as "2006 Refinements" to the "2006  
16 Plan") fundamentally alter the balance of environmental risks and benefits of the Project to the point  
17 where LRC cannot accept the changes and, therefore, has chosen to enforce the Settlement  
18 Agreement by way of this motion for specific performance, injunctive relief and declaratory relief.

## 19 II. STATEMENT OF FACTS

20 On February 24, 2004, the City Council certified the Final Environmental Impact Report  
21 ("EIR") for the St. Helena Comprehensive Flood Protection Project and adopted Resolution 2004-16  
22 by which it selected and approved the Enhanced Minimum Plan A ("EMP-A") design alternative for  
23 the project to provide flood protection along a portion of the Napa River within the City's reach  
24 (hereinafter the "Project"). (Lippe Decl. Exh 1, Settlement Agreement, p. 1 of 23. )

25 On March 26, 2004, LRC filed a petition for writ of mandate in this action challenging the  
26 City's approval of the Project on various grounds under the California Environmental Quality Act  
27 ("CEQA") (Pub. Resources Code, § 21000 et seq.). *Id.*

28 On December 17, 2004, the Superior Court granted LRC's petition on the basis of one claim

1 regarding the cumulative impacts analysis in the EIR. On February 2, 2005, the City appealed the  
2 Superior Court's ruling to the First Appellate District, Fourth Division. LRC cross-appealed on  
3 February 15, 2005. *Id.*

4 On or about November 11, 2004 LRC and the City entered into a written Settlement  
5 Agreement in contemplation of the Court reserving jurisdiction to enforce the agreement. Settlement  
6 Agreement, pp. 21-23. On January 30, 2005 this Court entered the Stipulation and Order reserving  
7 jurisdiction to enforce the agreement. (Lippe Decl. Exh 1, Stipulation and Order.)

8 The Settlement Agreement requires that the City modify the EMP-A/2004 Plan by adding,  
9 deleting or changing a number of specific components of the Project. These changes are described  
10 in detail at pages 4 through 11 of the Settlement Agreement at Lippe Decl Exh 1. These changes are  
11 also described in summary fashion in the City's CEQA Addendum for the 2006 Plan as follows:

12 ■ **2005 Adopted Refinement No. 1/Element C** -Element C vegetation removal will  
13 be geared towards protecting critical environmental habitat while enhancing  
floodwater transport.

14 ■ **2005 Adopted Refinement No. 2/Modified Terrace B** - The 2005 modifications  
15 to Terrace B are included in 2006 Refinement No. 2 as noted above.

16 ■ **2005 Adopted Refinement No. 3/Sulphur Creek/Napa River Confluence** - The  
17 floodwall at the confluence of Sulphur Creek and Napa River, and continuing west  
18 approximately 150 feet upstream on Sulphur Creek, will be designed to maintain the  
19 banks in their natural condition as feasible. The floodwall will be designed to gain  
FEMA certification for protection in a "100 year" flood event to the greatest degree  
feasible from both engineering and fiscal standpoints while avoiding biological  
impacts.

20 ■ **2005 Adopted Refinement No. 4/Levee Alignments East of Paseo Grande** - The  
21 realignment affects only the portion of the levee east of Paseo Grande Drive. The  
22 Adams Street Levee will terminate at Paseo Grande Drive. The VVMHP Levee will  
be turned westward to connect to the Adams Street Levee. The Adams Street Levee  
between Paseo Grande Drive and Starr Avenue will only be available for emergencies  
and as a maintenance road, but otherwise would be gated at Starr Avenue.

23 ■ **2005 Adopted Refinement No. 5/Woody Debris in River** - The Adaptive  
24 Management Plan will include additional language to incorporate opportunities to  
25 leave woody debris in the Napa River where feasible and consistent with the overall  
project objectives.

26 ■ **2005 Adopted Refinement No. 6/Change of Design Profile** - This refinement  
27 includes a change of the design profile of the project from 100-year to a 200-year  
water surface profile. This design change would require an increase in the levee and  
floodwall heights by about 0.5 feet.

28 ■ **Adams Street Causeway/Bridge** - This project feature will be considered a

1 separate project by the City and will only be considered after preparation of a separate  
2 CEQA evaluation.

3 ■ **Pope Street Sill Removal** - This project feature will be considered a separate  
4 project by the City and will only be considered after appropriate compliance with  
5 CEQA and NEPA.

6 (Lippe Decl. Exh 2, CEQA Addendum - 2006 Plan, pp. 2-3, June 2006.) These are the only changes  
7 to the EMP-A/2004 Plan authorized by the Settlement Agreement.

8 With respect to enforcement, the Settlement Agreement provides, in relevant part, as follows:

- 9 ● Recital H: “in exchange for LRC's agreement to dismiss the ongoing litigation with  
10 prejudice and not to fund, participate in, or intervene in any other future litigation  
11 regarding the Project, the City has agreed to modify the design of the Project to reflect  
12 suggestions made by LRC....” (Lippe Decl. Exh 1, Settlement Agreement, pp. 2-3 of  
13 23.)
- 14 ● Paragraph 11a: “Except for causes of action for alleged breach of duties arising under  
15 this Agreement or as described below in section 11.a(1), LRC agrees that it will not  
16 initiate, participate in, intervene in, fund, or otherwise carry out any administrative  
17 appeals or litigation against the Project including, without limitation, litigation against  
18 (1) any local, regional, state or federal permit or approval required for all or a portion  
19 of the Project or any infrastructure, services, or facilities needed for the Project; (2)  
20 any environmental review document prepared under the California Environmental  
21 Quality Act or the National Environmental Policy Act to evaluate the environmental  
22 impacts of all or any portion of the Project or any infrastructure, services, or facilities  
23 needed for the Project; or (3) any action taken by City or any other person or entity  
24 to carry out all or a portion of the Project or any infrastructure, services or facilities  
25 needed for the Project. The prohibitions set forth in this subsection (a) shall apply to  
26 LRC whether. it acts independently or in concert with other persons, entities, or  
27 associations, whether under his, her, or its own name or some other name.” (Lippe  
28 Decl. Exh 1, Settlement Agreement, pp. 12-13 of 23.)
- Paragraph 11a(1): “The Parties agree that the following potential changes to the  
Project as modified by this Agreement, being beyond the scope of the Agreement, are  
not subject to enforcement by LRC pursuant to this Agreement (except to the limited  
extent that this agreement requires they be subject to a separate permitting process)  
and that LRC may initiate new litigation with respect to these changes: sediment  
removal from Element C, the use of heavy equipment for routine maintenance within  
Element C, and extending Adams Street past Paseo Grande Avenue. **The Parties  
agree that any other changes to the Project as modified by this Agreement are  
subject to enforcement by LRC pursuant to this Agreement.** The Parties agree that  
after construction of the Project as modified by this Agreement, any new flood control  
measures undertaken by the City (other than the continuing adaptive management  
measures that are part of this Project as modified by this agreement) are not subject  
to enforcement by LRC pursuant to this Agreement and LRC retains its right to seek  
judicial review of any such actions.” (Lippe Decl. Exh 1, Settlement Agreement, p.  
13 of 23 (emphasis added).)
- Paragraph p: “Equitable Relief: Because the amount of damages in the event of a  
breach of this Agreement may be difficult or impossible to determine, the obligations  
of the Parties shall be enforceable by specific performance or other equitable relief,  
in addition to any other available remedy.” (Lippe Decl. Exh 1, Settlement

1 Agreement, p. 21 of 23.)

2 In June 2006 the City proposed additional changes to the Project that were not authorized or  
3 contemplated by the Settlement Agreement. The City prepared a“CEQA Addendum” dated June  
4 2006, to evaluate the additional environmental effects of these changes. The CEQA Addendum  
5 describes the new changes not required or authorized by the Settlement Agreement (termed “2006  
6 Refinements”) as follows:

7 ■ **2006 Refinement No. 1/Delete Terrace A** - Terrace A will be eliminated from the  
8 project.

9 ■ **2006 Refinement No. 2/Modified Terrace B** - Terrace B will be narrower within  
10 the VVMHP, and wider and higher in the vineyard adjacent to the VVMHP than in  
11 the 2004 Plan. Terrace B will not include an inlet from the river channel and will  
12 minimize the removal of trees in the riparian remnant.

13 ■ **2006 Refinement No. 3/VVMHP Floodwall** - The floodwall will be slightly closer  
14 to the Napa River within the VVMHP adjacent to Terrace B.<sup>1</sup>

15 ■ **2006 Refinement No. 4/No Relocation Area** - The number of home relocations  
16 will be reduced from 33 to 17. Where these home sites are occupied, the intent is to  
17 relocate them to unoccupied pads within the VVMHP and/or for the City to purchase  
18 available VVMHP homes as replacements. Where home sites to be removed are not  
19 occupied, no relocation is proposed. This eliminates the need to construct the  
20 relocation area in the adjacent vineyard.

21 ■ **2006 Refinement No. 5/Drainage Design** - Drainage will be rerouted from an  
22 existing storm drain on Starr Avenue into a new storm drain that will be routed  
23 outside the new levee and then into a grass-lined swale that drains into and through  
24 Terrace B. The existing culverts that drain into the Napa River will be abandoned.  
25 Interior drainage will be via a detention basin with a low level culvert and lift pump  
26 facilities that will empty into the grass-lined swale on Terrace B.

27 ■ **2006 Refinement No. 6/Soil Disposal** - Four options for soil disposal are included  
28 in the 2006 Plan: (1) disposal on the Miller Parcel and the vineyard portion of the  
Hunter parcel; (2) disposal on the Miller Parcel, the vineyard portion of the Hunter  
parcel and additional areas on the Hunter parcel; (3) disposal on the Miller Parcel with  
off haul of excess soil; and (4) off haul of all excess soil.

■ **2006 Refinement No. 7/Defer WWTP Flood Proofing** - Flood proofing at the  
WWTP will be deferred until a later date when funding is available. The impacts of  
WWTP flood proofing are not analyzed in this Addendum as the design of this  
element has not been changed. The impacts of WWTP flood proofing were analyzed  
in the 2004 EIR.

(Lippe Decl. Exh 2, CEQA Addendum - 2006 Plan, pp. 2-3, June 2006.)

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<sup>1</sup>In fact, as discussed below, this 2006 Refinement would move the floodwall not “slightly closer” as the City claims but a full 115 feet closer, a significant difference. See Lippe Decl. Exh 4, p. 9.

1 LRC objected to the City's approval of the "2006 Refinements" on environmental and legal  
2 grounds, including grounds that the changes violate the Settlement Agreement. (See e.g. Lippe Decl.  
3 Exh 3, June 19, 2006 letter from counsel for LRC to City.) The City issued a response to LRC's and  
4 other public comments. (Lippe Decl. Exh 4, CEQA Addendum - Response to Comments, June  
5 2006.) LRC then submitted additional comments objecting to the City's approval of the "2006  
6 Refinements." (See e.g. Lippe Decl. Exh 5, June 27, 2006 letter from counsel for LRC to City.)

7 On June 27, 2006, the City adopted Resolution No. 2006-71, by which it adopted the 2006  
8 Refinements and the CEQA addendum for the 2006 Plan. (Lippe Decl. Exh 6.)

### 9 III. ARGUMENT

10 Written settlement agreements may be enforced by noticed motion pursuant to Code Civ.  
11 Proc. § 664.6.<sup>2</sup> (*Gorman v Holte* (1985) 164 Cal App 3d 984, 989) and the Court may enter judgment  
12 on a stipulated settlement where a party refuses to comply with its terms (*Casa de Valley View*  
13 *Owner's Ass'n v Stevenson* (1985) 167 Cal App 3d 1182, 1189). A motion to enforce a settlement  
14 agreement invokes the court's equity powers. *Nicholson v Barab* (1991) 233 Cal App 3d 1671, 1681.

#### 15 A. THE CITY VIOLATED THE SETTLEMENT AGREEMENT BY ADOPTING THE 16 2006 REFINEMENTS.

17 Paragraph 11(a)(1) of the Settlement Agreement clearly expresses the parties agreement as  
18 to how different categories of changes to the Project will be treated for purposes of future  
19 enforcement. The agreement recognizes that with respect to three specific components of the 2004  
20 Plan, i.e., (1) sediment removal from Element C, (2) the use of heavy equipment for routine  
21 maintenance within Element C, and (3) extending Adams Street past Paseo Grande Avenue, the  
22 agreement requires separate permit processes and the agreement may be enforced to the extent of  
23 ensuring that these separate permit processes occur, but that LRC may bring new litigation  
24 challenging the results of any of these separate permit processes.

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25 <sup>2</sup>California Code of Civil Procedure sec. 664.6 states: "Judgment pursuant to terms of settlement. If parties  
26 to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally  
27 before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment  
28 pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the  
parties to enforce the settlement until performance in full of the terms of the settlement."

1 Paragraph 11(a)(1) then states that: “The Parties agree that any other changes to the Project  
2 as modified by this Agreement are subject to enforcement by LRC pursuant to this Agreement.”  
3 Since the essence of the agreement is to provide a project description that LRC can live with, the City  
4 cannot unilaterally change that project description. Otherwise, LRC is deprived of the benefit of its  
5 bargain, after it has performed its obligation to dismiss its action challenging the 2004 Plan EIR.

6 This is exactly what has happened and will happen unless this court provides LRC with the  
7 relief requested in this motion.

8 Nor is LRC insisting on compliance with the agreement just for its own sake. Several of the  
9 2006 Refinements will exacerbate adverse environmental effects of the Project. For example, one  
10 refinement moves the floodwall near the Vineyard Valley Mobile Home Park not just “slightly  
11 closer” to the river channel as claimed by the City , but 115 feet closer to the river channel to  
12 accommodate another 2006 Refinement that reduces the number of homes to be relocated from near  
13 the river in the Vineyard Valley Mobile Home Park from 33 to 17. (Lippe Decl Exh 2, pp. C-2 and  
14 C-4; Exh 4, p. 9). These changes will constrict flood flows in a narrower channel than was provided  
15 by the 2004 Plan or the 2005 Plan, leading to higher flood flow velocities in different locations on  
16 the river, from approximately 6 cubic feet per second to 9 cubic feet per second, a 50% increase over  
17 the 2004-2005 Plan.” (See, Exh 2, p. C-4: “Compared to the 2004 Plan, the 2006 Plan increases flow  
18 velocity and channel shear stress along the banks of the Napa River for the range flood events 1.5 to  
19 10-year.” See also, Exh 4, p. 1 of 4: “Flow velocities in Area 3 begin to increase as a result of the  
20 increase in flow in the channel, the increased water surface gradient created by removing the  
21 Vineyard Valley Mobile Home Park constriction and the effect of the proposed 2006 Plan levee on  
22 the right overbank area floodplain. Here velocities increase from a little over 6 ft/s to a maximum  
23 of 8.8 feet per second.”) This will cause bank failures and incision of the river bed, resulting in  
24 greater entrainment of sediment and higher turbidity in the river. (See e.g. Lippe Decl. Exhs 3 and  
25 5; see also, Lippe Decl Exh 8, Final EIR for the 2004 Plan, at AR pp. 8914-8915, acknowledging that  
26 “increasing instream sedimentation” “may adversely impact steelhead and Chinook spawning and  
27 rearing.”) Bank failures also cause loss of riparian vegetation and its associated wildlife habitat.

28 The City’s Response to Comments contends this change in velocity was analyzed in the 2004

1 EIR where it was found to not be large enough to significantly effect “channel stability” and  
2 referring to the 2004 “RDEIR Appendix G, Figure 22b.” (See Lippe Decl Exh 4, Appendix C, p 2of  
3 4.) But Figure 22b (at Lippe Decl Exh. 9) relates to Main Channel Distance (HEC Station) 15136,  
4 an entirely different location. Therefore, the effects of changes in velocity at Main Channel Distance  
5 15750 were not analyzed.

6 In short, the mix of environmental benefits and costs that LRC found acceptable in the 2005  
7 Plan project description has been destroyed, in violation of the binding Settlement Agreement.

8 **B. LRC IS ENTITLED TO DECLARATORY RELIEF, INJUNCTIVE RELIEF AND  
9 SPECIFIC PERFORMANCE.**

10 Because the City’s 2006 Plan violates the Settlement Agreement, LRC is entitled to  
11 declaratory relief, injunctive relief, and specific performance.

12 **1. Declaratory Relief**

13 LRC is entitled to a Court Declaration that the 2006 Plan does not comply with the Settlement  
14 Agreement. Declaratory Judgments are allowed under Cal Code Civ Proc Sec 1060, which states in  
15 relevant part:

16 “Any person interested under a written instrument ... who desires a declaration of his  
17 or her rights or duties with respect to another, may, in cases of actual controversy  
18 relating to the legal rights and duties of the respective parties, bring an original action  
19 or cross-complaint in the superior court for a declaration of his or her rights and  
20 duties....”

21 Through this motion, LRC seeks to enforce their written Settlement Agreement with the City.  
22 One essential part of this enforcement action is a declaration of the rights and duties of both parties  
23 under that Settlement Agreement. Thus, declaratory relief is appropriate.

24 In addition, the fact that LRC seeks additional injunctive relief is immaterial. The existence  
25 of other remedies does not deprive a court of power to grant declaratory relief. *Bess v Park* (1955)132  
26 Cal App 2d 49, 53. Finally, it is clear that declaratory relief is appropriate against municipalities. *Los*  
27 *Angeles v Glendale* (1943) 23 Cal 2d 68, 82.

28 **2. Injunctive Relief**

Injunctive relief is appropriate where “pecuniary compensation would not afford adequate  
relief.” Cal Civ. Code Sec. 3422. Here, LRC seeks to enforce their Settlement Agreement

1 concerning the City's flood protection project. Because the Project has not been initiated, there is as  
2 yet no damage and thus no way to compensate. Further, LRC seeks to prevent harm to the  
3 environment, and monetary damages can not compensate for such harm. "Environmental injury, by  
4 its nature, can seldom be adequately remedied by money damages and is often permanent or at least  
5 of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms  
6 will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co.*  
7 *v. Village of Gambell*, 480 U.S. 531, 545 (1987). Thus, injunctive relief is appropriate in this case.

8 LRC seeks an order from the Court forbidding the City from implementing the 2006 Plan to  
9 the extent it includes the 2006 Refinements, which violate the express terms of the Settlement  
10 Agreement.

### 11 3. Specific Performance

12 LRC also seeks specific performance under both the express terms of Settlement Agreement  
13 (See Lippe Decl. Exh 1, Settlement Agreement, ¶ p at p. 21 of 23) and under Code Civ. Pro. § 3384.<sup>3</sup>

14 The requisites (for specific performance) include: A showing by plaintiff of (1) the  
15 inadequacy of his legal remedy; (2) an underlying contract that is both reasonable and  
16 supported by adequate consideration; (3) the existence of a mutuality of remedies; (4)  
contractual terms which are sufficiently definite to enable the court to know what it is to  
enforce; and (5) a substantial similarity of the requested performance to that promised in the  
contract.

17 *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal. App. 3d 571, 575.

18 The inadequacy of legal remedies is discussed above in section 2. Second, the underlying  
19 contract (the Settlement Agreement) is reasonable because it was drafted by both LRC and the City,  
20 and approved by this Court. It is supported by adequate consideration in that both LRC and the City  
21 have substantial and significant obligations under the Settlement Agreement that bind both parties.  
22 Third, there are in fact mutual remedies in that either party can enforce the agreement through a  
23 motion (such as this) or through a separate action under a contract theory. Fourth, the terms of the  
24 Settlement Agreement are sufficiently definite for the Court to determine what to enforce. LRC has  
25 previously laid out the relevant terms of the Settlement Agreement and the parts of the 2006 Plan that  
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27  
28 <sup>3/</sup> Code Civ Proc § 3384 states: "Specific performance: Except as otherwise provided in this article, the  
specific performance of an obligation may be compelled."

1 violate the Agreement. Finally, LRC seeks enforcement of the exact terms of the Settlement  
2 Agreement, i.e., the City's obligation to modify the EMP-A/2004 Plan only with the project  
3 components set forth in the Settlement Agreement, thus easily meeting the standard of "substantial  
4 similarity of the requested performance to that promised in the contract."

5 **IV. CONCLUSION**

6 For the forgoing reasons, the Court should grant this motion to enforce and find the 2006 Plan  
7 in violation of the Settlement Agreement.

8 DATED: August 8, 2006

LAW OFFICES OF THOMAS N. LIPPE

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By: \_\_\_\_\_  
Thomas N. Lippe  
Attorney for Petitioner

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