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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., et al.,

Plaintiffs,

v.

CITY OF SAN DIEGO, et al.,

Defendants.

Case No. GIC 821191

CLASS ACTION

PLAINTIFFS' REPLY BRIEF REGARDING CLASS COMPENSATION OWED BY CITY OF SAN DIEGO, FINAL RULINGS NEEDED TO ISSUE JUDGMENT AND PERMANENT INJUNCTION, AND OBJECTIONS TO CERTAIN OF THE SPECIAL MASTER'S RECOMMENDATIONS

Date: **May 6, 2014**
Time: **1:00 p.m.**
Judge: **Hon. Charles R. Hayes (Ret.)** by Special Appointment
Dept: **Presiding Department (SD-P)**

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Introduction

One of the City's themes—echoed again in its Opposition Brief—focuses on the "unfair burden" to the taxpayer if the City has to pay such a "staggering" relocation sum all at once. Rarely has history been so contorted to make the tortfeasor look like the victim. In fact, the City failed to contest several key facts that reveal that the City's financial difficulties are traceable to the number of times the City has invaded funds earmarked for relocation and spent the money on other projects, or simply mismanaged this particular real estate asset. For example, the City did not deny it:

- has collected millions of dollars in past rent revenue from De Anza;
- has projected future development revenues in excess of $100 million;
- has had the opportunity to receive *over $45 million* in park-wide revenues from De Anza homeowners…*just during the time that this case has been pending;* and
- has already ransacked the De Anza revenue fund <u>again</u> and used the money for other things.

At what point does the City have to stop blaming the homeowners and accept its responsibility for creating this mess? How many times can the City raid the mitigation piggy bank while bemoaning the lack of remaining funds to pay for relocation? It just isn't right.

Other critical facts that the City does not contest include the following:

- The most significant adverse impact of the De Anza Cove park closure is the <u>total loss</u> of every home in the Park.
- OPC told the Special Master, this Court, and all counsel that mitigation payments are made in a lump sum, and that it would be highly unusual and administratively expensive to allow the City to make payments over time.

And, other than evidentiary objections that Plaintiffs will address separately, the City did not offer any evidence to contest the following facts:

- City staffers were prepared to deny Archstone's closure permit in MVV unless the park owner agreed to pay 84 months' of rent differential, payable in a lump sum. (Ex. 29, Barrs Decl., ¶ 2.)
- The 2010 Housing Commission policy update and amendments to the Guidelines clarified that regardless of the number of months of rent differential that's warranted, the entire amount must be paid in a lump sum. (Ex. 37, O'Neil Decl., ¶ 4.)
- Residents of the La Mesa Terrace mobilehome park were paid mitigation in a lump sum.

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(Ex. 39, Emig Decl., ¶ 4.)

- The appropriate discount rate in this circumstance is 0%. (Ex. 18, Kennedy Decl., ¶ 14.)
- OPC's math errors result from statistical assumptions that are not supported by the data or common practice. (Ex. 18, Kennedy Decl., ¶ 23.)

Moreover, several of the Special Master's recommendations have not been challenged and are therefore deemed acceptable to both parties, as follows:

- 7% Prejudgment Interest shall accrue from the date of move-out on the relocation benefits and compensation owed to those homeowners who have already vacated the Park prior to entry of judgment.
- The date of class membership should be modified to include residents who were members of the Class as of September 4, 2007, but were later evicted. (Ex. 3, Spec. Mstr.'s 1st Rpt., pp. 20-21.) (This modification was already incorporated into the Stipulation and Order signed by the Court on February 14, 2014.)
- Disabled Class members are eligible for modifications to a replacement home if the modifications are part of the resident's mobilehome. (Ex. 4, Spec. Mstr.'s 2nd Rpt., p. 14.)
- The City will pay for the services of a relocation consultant to assist the Class. (Ex. 4, p. 17.)
- Class members who are renters are entitled to relocation benefits as set forth in OPC's Tenant Impact Report. (Ex. 4, pp. 29-31.)
- Rent differential calculations will not be affected by any alleged "profits" made by Class members who rented their homes after 2003. (Ex. 4, pp. 33-34.)

As to those issues that *were* contested, the City employs its standard three-pronged attack: (1) it sidesteps the main issue, thereby avoiding ever having to answer the question of how much it will cost to relocate Class members to comparable housing; (2) it makes unsupported assertions and then condemns Plaintiffs for providing evidence that reveals those assertions to be false; and (3) it sets up phantom, straw-man arguments the Plaintiffs didn't make—like Plaintiffs are seeking fair market value and rely on the California Relocation Assistance Law—and then proceeds to knock them down.

In this Reply, Plaintiffs will demonstrate that the City's counter-points are without merit and that proper mitigation will require:

1. At least 84 months' rent differential, and up to 109.7 months' rent differential, paid in a lump sum;
2. The correction of OPC's math errors, including the elimination of the arbitrary 15% markup and the addition of the missing home-size tier;

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3. The denial of the City's request to artificially increase the space rents;

4. 7% Prejudgment Interest from the date certain Class members already vacated the Park;

5. Temporary Lodging of 4 nights at $139 per night per household; and

6. Statutory Penalties of $14,000 per Class Member based on the City's myriad willful violations of the MRL.

This Reply is organized into seven sections. Section A addresses the City's straw-man arguments and reaffirms why replacement cost is the appropriate measure of mitigation. Section B dispenses with the City's attempt to avoid paying the judgment in a lump sum. Section C addresses OPC's math errors, and Section D tackles the City's request to artificially increase space rent so it can short-change homeowners on deserved rent differential benefits, despite the uncontradicted evidence that shows the actual value of space rent decreased 10% per year since the City denuded the park. Section D tackles the City's attempt to minimize the gaping mathematical errors in OPC's report—particularly the ones that Plaintiffs and the City jointly asked OPC to fix. Section E reviews the purpose of this Court-ordered TIR process to accomplish final park closure, and Section F discusses a reasonable amount of temporary lodging to provide the Class. Lastly, Section G shows the legal and evidentiary support for assessing statutory penalties against the City for its violations of the MRL.

Discussion

A. Plaintiffs advocate for mitigation sufficient to enable class members to acquire replacement homes in another park—not "fair market value" as the City erroneously repeats—an approach deemed consistent with the reasonable cost of relocation under State law.

Plaintiffs contend that the cost of replacement housing is the economic harm the City is required to mitigate under the Mobilehome Residency Law. The City repeats over and over that Plaintiffs are still "seeking fair market value" and that the issue is moot. But that's merely the City's recurring straw-man, as there is a distinct and substantial difference between fair market value—which Plaintiffs are not seeking—and the cost of replacement housing—which we are seeking.

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At trial, Plaintiffs presented evidence of the fair market value of the homes at De Anza Cove. The Court rejected this approach, and instructed the City "to prepare a Relocation Impact Report addressing the mitigation of the park residents' economic hardship resulting from the closure of the park." (SOD, p. 11, Ex. 52.) Accordingly, the post-trial focus shifted to the calculation of those economic hardships, the largest of which is the cost of finding another home somewhere else.

California's Mobilehome Residency Law addresses the park owner's obligation "to mitigate any adverse impact of the conversion, closure, or cessation of use **on the ability of displaced mobilehome park residents to find adequate housing in a mobilehome park**." (Gov't Code § 65863.7(e) (emphasis added).) This is the standard to which the Court holds the City in this case, as ordered in the Statement of Decision: "The Court…orders the City of San Diego to fully comply with the California Mobilehome Residency Law…." (SOD, p. 11, Ex. 52.) As discussed, the City fails to rebut the stated intent of the MRL to ensure displaced residents are able to find replacement housing in a comparable mobilehome park.

As the City explained: "The purpose of these post-trial proceedings is to determine the steps to be taken by the City to mitigate any impacts of closure on the De Anza residents." (City's Opp., p. 1.) We agree. And, in light of the fact that every De Anza household will need to find replacement housing, Plaintiffs quantified those impacts in terms of economic harm, and did so with real-world numbers. (See Brabant Decl., ¶ 21.) The City, by contrast, continues to rely on an artificial construct that will not enable the Class to acquire replacement housing. **The City's proposal is to strip the Class of homeownership, put them in apartments, and have them wait for their mitigation check every month as it dribbles out over the next 4-9 years.** Obviously, this proposal falls far short of what is required here.

1. Despite the City's unsupported claims to the contrary, replacement housing does not exceed the "reasonable cost of relocation."

As the following table demonstrates, the weight of examples favor replacement housing as a permissible measure of mitigation, and one that realizes the legislative intent of the MRL:

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The City argues 48 mos. of rent differential is sufficient mitigation, even though:	Here's the truth about relocation:
- the City has never accepted as sufficient 48 mos. of rent differential in any other case.	- the MRL recognizes the high cost of relocation upon park closure, and the resulting special protections homeowners need. Civ. Code § 798.55.
- The City in the MVV park closure required 84 months.	- the Park owner must mitigate all adverse impacts on the displaced residents' ability to find replacement housing in another park. Gov. Code § 65863.7.
- the San Diego City Council confirmed that 48 mo. is the minimum starting point and that it can be increased as needed. (Ex. 31)	- the City in MVV looked at the true replacement costs and bumped up the amount of mitigation required. (Ex. 29, Barrs Decl., ¶¶ 8-17.)
- the City's relocation consultant Thomas Kerr admitted that in his tenant impact report for a mobilehome park in Los Gatos, he determined that fair market value was within the reasonable cost of relocation—meaning that neither fair market value nor replacement cost exceed the reasonable cost of relocation. (Ex. 66, Rptr.'s Trans., dated Nov. 1, 2007, pp. 27:19–28:3.)	- other municipalities have determined that either Fair Market Value or Replacement Cost are within the reasonable cost of relocation.
	- **no park owner has ever successfully challenged Replacement Cost as exceeding the reasonable cost of relocation.**
	- La Mesa Terrace: that city used the City of San Diego's Guidelines and required rent differential plus additional mitigation based on the size of each home.
	- the professional experience of James Brabant (mobilehome expert) is that replacement cost is the proper method here to mitigate loss of home.
	- the professional experience of Phillip Schwartze (relocation expert) is that replacement cost is the proper method here to mitigate loss of home.

Moreover, the City's own ordinance makes it clear that the City, as park owner, "**shall** provide for the relocation of tenants who will be displaced by the discontinuance of the use of the property as a mobilehome park…." (SDMC § 143.0630 (emphasis added).) That mandate echoes the objective of the MRL to help displaced resident secure replacement housing. By contrast, the City

has not cited one case holding that mitigation based on replacement housing exceeds the reasonable cost of relocation. The mobilehome park owners of California are well organized, employ powerful lobbyists, and have armies of lawyers at their disposal. If providing the cost of replacement housing violated the MRL (by exceeding the reasonable cost of relocation), the park owners would have supporting caselaw by now. Moreover, the fact that the City's own relocation consultant (Kerr) has allowed fair market value in another park closure case (Los Gatos)—which involves an even higher valuation approach—and testified that it did *not* exceed the reasonable cost of relocation there, adds additional credence to Plaintiffs' approach here, which is more modest than the fair market value approach Kerr used.

2. Buttressing the need for replacement housing costs, Mr. Brabant's survey provides a realistic snapshot of the economic hardship Class members face as they try to reenter the housing market now.

The City portrays Mr. Brabant's 2014 survey as "problematic" and not representative of homes comparable to those at De Anza. But the City's objections are misinformed. The purpose of the survey was to demonstrate the real-world costs that Class members will be facing when they are forced to leave their homes at De Anza. And while the City criticizes the inclusion of Orange County parks, resident-owned parks, or those that allow seniors only, Mr. Brabant explained why these parks are appropriate to include: "…the list of mobile home listings in the Relocation Impact Report (RIR) prepared by Overland Pacific & Cutler, Inc., dated December 2011, included a number of resident-owned parks," so that characteristic is not a disqualifier. (Brabant Decl., ¶ 23, Ex. 21.) Moreover, "the residents of De Anza Cove include many "seniors" who are over 55 years of age. It is also obvious that no single park would have enough homes for sale to accommodate all of the residents at De Anza Cove, and no single park would even appeal to *all* of the residents. That is why I have included a range of parks that, in my opinion, would reflect reasonable alternatives for De Anza residents. It would make no sense to exclude age-restricted parks from that list." (Brabant Decl., ¶ 23, Ex. 21.) The City actually raised the same objection when the issue was briefed to the Special Master. Ironically, when we removed from the survey those parks to which the City objected, the average cost per square foot actually increased. So it's surprising that the

City is resurrecting the issue again here.

The illogic of the City's indictment of the Brabant survey culminates in the City's astounding conclusion that "none of Brabant's listed mobilehome parks are truly comparable to De Anza, as none are scheduled for closure." (City Opp., p. 11.) That statement, perhaps better than any other, shows the City's contempt for the MRL's relocation provisions when the City is financially responsible for the cost of relocation. If comparative values could only be derived from homes in parks under the dark cloud of pending closure, then no one would ever receive enough mitigation to find a home in a park that was not closing (and thus where the home values are higher). **Nowhere in the Mobilehome Residency Law does it say that the park owner can mitigate the economic harm of park closure by relocating residents to another park that's about to close**. What better way to minimize the disruption to the lives of the elderly then to pack them up, move them to another park that's closing, then pack them up again and move them to another park that's about to close—making the last years of their lives a hellish game of musical chairs.

3. The eye-witness account of the MVV HOA President provides the only testimonial evidence of how the City conditioned park closure on the park owner's payment of 84-months' rent differential in a lump sum—testimony that the City did not contest.

The City contends that, in the MVV park closure, there is no proof that the City Council considered the cost of replacement housing or required a lump sum payment, and, therefore, the park owner must have simply volunteered to pay extra mitigation. The totality of the City's argument is based on nothing more than the DVD of one of the open Council hearings on the matter and the transcript of same. Not surprisingly, however, the most important details of the MVV deal occurred behind the scenes. And Plaintiffs provided an account of those communications with City representatives from someone who was actually there—Homer Barrs. Mr. Barrs, as representative of the other MVV homeowners, met multiple times with City staffers and with aides of the various council members—even during breaks at the hearing—and many of the final deal points were advanced in this fashion. For example, Mr. Barrs explained that:

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> Towards the end of the hearing…the Council brokered a deal between us (the MVV HOA) and Archstone [the park owner] during separate meetings with the Councilmembers' staffers that took place as the hearing was progressing, and during a break in the hearing. The staffers relayed to me that the City Council was prepared to deny Archstone's park-closure application—particularly since the City Attorney had determined that the criteria justifying the request to remove the park from the mobilehome park overlay zone had not been met. But the staffers indicated that **the City Council would instead approve the application if the HOA would agree to the Council's proposal to require 7 years' rent differential (84 months), along with** other significant deal points. These points—designed to help mitigate the negative impacts of park closure—included allowing the homeowner to get the full 84-months' rent differential even if it were feasible to move the mobilehome to another site, and that the full 84-months' compensation would be paid in **a lump sum**, not over time. I conferred with the MVV HOA Board Members and residents present at the hearing, and ultimately relayed our consent to the Council's proposal via their staffers. (Barrs Decl., ¶ 2 (emphasis added).)

Thus, not only was the additional mitigation (increasing 48 months to 84 months) not a "gift" by Archstone, the City Council was prepared to deny the closure permit without the park owner's willingness to pay the entire 84 months in a lump sum. The City has not submitted a single counter-declaration by anyone at the City or by anyone from Archstone, whom defense counsel also represented. So, apart from evidentiary objections, which Plaintiffs address separately, the City has not contested Mr. Barrs' testimony, the thrust of which is that: 1) the City *did* require additional mitigation in light of the homeowners' position and evidence that 48 months would not sufficiently allow them to find replacement housing; and 2) the City *did* require that the mitigation be paid in a lump sum.

4. The Special Master's recommendation that the City pay 84-months' rent differential was based on the holding the City to the same standard that the City applies to other mobilehome park owners.

The City confusingly argues that the Special Master's recommendation of 84-months' rent differential should be thrown out if the City Council required the MVV park owner to pay 84 months based on the cost of replacement housing. But this bizarre premise misconstrues the Special Master's recommendation. After carefully reviewing the MVV hearing and transcripts, the Special Master concluded that the City Council ultimately "determined that the mitigation benefit of 48-month rent differential…was inadequate…causing [the park owner] to agree to enhance those benefits by providing 84 months of rent differential to displaced MVV residents in order to obtain

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approval of park closure…." (Sp. Mstr. 1st Rpt., p. 20, Ex. 3.) **This conclusion by the Special Master—far from supporting the City's position—actually eviscerates the City's ongoing contention that the MVV park owner voluntarily gifted additional funds that were not required**. The Special Master took the next logical step as well, recommending that 84 months of rent differential be provided to De Anza residents—in keeping with the Court's stated intent to hold the City to the same relocation standards the City holds other park owners to: "'The City ought to be treated the same as anybody else. No better, no worse.'" (Sp. Mstr. 1st Rpt., p. 15 (quoting Statement of Decision), Ex. 3.)

Nowhere in the Special Master's lengthy assessment of this issue does he say that he is basing his recommendation on the cost of replacement housing. Rather, the Special Master is simply confirming that because the City required 84 months of rent differential from the park owner in MVV, the City should not be allowed to compensate De Anza residents anything less than that amount.

5. The Court never rejected Replacement Housing Costs as boldly claimed by the City because that issue was not presented by Plaintiffs at trial and was never addressed by the Court.

The City erroneously declares that the Court already ruled that replacement housing is beyond the scope of appropriate mitigation. (City's Opp., pp. 4-5.) The City cites the Statement of Decision, but nowhere in the SOD does it even mention Plaintiffs seeking replacement-housing costs during trial. Indeed, the Statement of Decision flowed from a bench trial that focused entirely on fair market value, which involves the value of the homes as they sit at De Anza. The cost of replacement housing in a comparable community is a different, and significantly lower, valuation measure that was not presented at trial. So it's understandable why neither the theory of replacement housing nor the actual costs to acquire replacement housing is addressed in the Statement of Decision.

In the Statement of Decision, the Court deemed unpersuasive the relocation ordinances from other municipalities. At trial, Plaintiffs had referred to these other ordinances to support the calculation of fair market value, which was at issue at that time. However, that has no bearing on

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the current analysis, as Plaintiffs are relying on State law, the City of San Diego's relocation ordinance and minimum guidelines, and prior orders of this Court—not on the ordinances of other cities. In fact, the other ordinances cited by the City now as another straw-man are irrelevant to the instant calculation of what it will cost to mitigate all the economic hardships facing the Class. Thus, contrary to the City's assertions, Plaintiffs do not rely on the ordinances of other cities, nor do they rely on the California Relocation Assistant Law, which the City actually raised in *its* briefing to the Special Master.

B. The City does not effectively challenge the bases for ordering the City to pay relocation benefits in a lump sum, nor does the City's track record for utilizing Park funds warrant any City discretion over the mitigation payment.

In the opening brief, Plaintiffs laid out all the authorities and common sense reasons for paying mitigation in a lump sum—including the compelling fact that OPC, the City's contracted authority on how to close a mobilehome park, confirmed for all counsel, the Special Master, and Judge Hayes that OPC has always seen mitigation paid all at once. (Ex. 34, Tatro Decl., ¶¶ 2-3.) Even the Special Master noted that "**[P]laintiffs' argument for a lump sum payment is appealing," because it would provide Plaintiffs more housing options, eliminate additional costs to the City, and "eliminate the dependence of plaintiffs on the City and effectiveness of the City's process in ensuring that plaintiffs receive monthly payments in a timely fashion."** (Ex. 4, Sp. Mstr. 2nd Rpt., p. 12, lines 1-6.) In response, the City regurgitates its arguments that the Housing Commission guidelines do not require lump sum payments, that the park owner in MVV *voluntarily* paid residents in a lump sum, that a steep discount rate is warranted, and that, in any event, the City should be allowed to periodicize its payments over 10 years. But none of these contentions survive scrutiny.

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1. All parties agree that the Housing Commission Guidelines provide a minimum floor for determining the appropriate mitigation package and that the reviewing authority has the right to require significant enhancements to accomplish the goals and requirements of the MRL.

Both Plaintiffs and the City agree that the Housing Commission Guidelines provide a bare-minimum starting point for formulating an appropriate mitigation package. However, the City contends that the Guidelines do not require a lump sum payment. The City cites to the OPC draft report, which merely parrots back the language of the Guideline itself, but which does not render any independent interpretation of that policy.

More significantly, the 2010 amendment to the Housing Commission policy and Guidelines clarify that a lump sum payment *is* required, and nothing in either the 1995 or the 2010 version of the policy prohibits the reviewing authority—in this case the Court—from requiring additional mitigation measures, including the manner in which the relocation will be paid.

Similarly, in addressing the Federal Relocation standards, the City relies on the provision that allows the reviewing authority, under special circumstances, to determine that a payment should be made in installments. (City's Opp., p. 16.) But that provision is the *exception* to the rule, which otherwise requires that mitigation be paid in a lump sum. (42 U.S.C. 4624, Ex. 38.) And the Federal language cited by the City simply underscores the fact that the reviewing authority—the Court—has the discretion to determine whether the relocation payments should be made all at once—the default standard—or whether circumstances necessitate that the payments be made in installments. On the latter point, the City has offered NO evidence to justify making installment payments. (See also Section B(6), below.)

Moreover, like OPC's Vince McCaw did at the January hearing, Plaintiffs' relocation expert, Phillip Schwartze, emphasized how unusual it would be to allow mitigation to be paid in installments: "**In all of my work involving mobilehome park closures over the course of three decades, I have never seen relocation benefits paid out over time, much less over several years**." (Ex. 55, Schwartze Decl., ¶ 9.) Other than evidentiary objections, the City has proffered nothing to counter Mr. Schwartze's testimony in this regard. Nor did the City offer any declarant to contest the testimony of Michael O'Neil, one of the members of the City's Mobile Home

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Community Issues Committee (MHCIC) that was responsible for shaping the 2010 clarifications to the Housing Commission guidelines. Mr. O'Neil testified: "relocation benefits were to be paid up front to residents in a lump sum, even though rent differential was calculated over a period of 42, 48, or some other number of months. This clarification was important because, generally, a mobilehome owner's mobilehome is their only asset, so they do not have the funds to secure replacement housing when forced to relocate." (Ex. 37, O'Neil Decl., ¶ 4.)

The City is simply advancing—without evidence—an extreme minority position (monthly payments), the real-world implementation of which has never been done by the City and has never been seen by any of these professionals that have been involved in dozens of mobilehome park closures over the course of more than thirty years.

Lastly, the City did not contest the fact that, even assuming, hypothetically, that the City *could* have paid rent differential on a monthly basis for 84 months, that period of time began no later than November 2003, and elapsed 84-months later in November 2010. Thus, all mitigation—even if it had been paid monthly—would already be due in full at this point.

2. Contrary to the City's assertion, OPC does NOT recommend monthly payments in lieu of a lump sum.

Almost in passing, and relegated to a footnote, the City claims that OPC actually recommended that relocation payments by made monthly for 48 months. (City's Opp., p. 16, fn. 6.) This representation is categorically <u>false</u>. First, and most compellingly, **Vince McCaw, the point-person for OPC on this project**, **confirmed** for all of us at a hearing in January 2014 **that mitigation is *always* paid in a lump sum**, and that it would be extremely unusual to see mitigation paid monthly over the course of several years. (See Ex. 34, Tatro Decl., ¶¶ 2-3.) Immediately after Mr. McCaw's comments above, the Court asked if the Special Master wanted the opportunity to make any changes to his reports based on this new information we had all just received from OPC. The Special Master declined, perhaps reasoning that the Court would factor in Mr. McCaw's statements in deciding whether to adopt the Special Master's prior recommendation to allow for monthly payments.

Second, the text of OPC's draft report had simply restated what the Guidelines say in regards to

the rent differential being paid "over 48 months." The report does not state that OPC recommends that the payments should actually be made on a monthly basis. Third, the spreadsheets accompanying the impact report lay out the rent differential amount as one total sum, not as a series of monthly payments—further demonstrating that OPC envisioned that mitigation would be paid all at once. (See Ex. 23, "total" column.)

3. Regardless of whether the Court uses the 1995 or the 2010 Housing Commission Guidelines, the outcome is the same because both sets of guidelines merely establish a bare-minimum relocation package.

Although the City criticizes Plaintiffs for "using" the 2010 updated Housing Commission Guidelines—which expressly call for lump sum payments—Plaintiffs referred to them to demonstrate that the City Council, itself, clarified any confusion: it expects park owners to may mitigation all at once at the time of park closure. And the fact that the Housing Commission reduced the minimum rent differential from 48 to 42 months is of no great moment because, again, **it's undisputed that these reference points are merely minimum baselines and that the reviewing authority may increase the mitigation as needed to meet the severity of the resulting impacts of park closure**. Although the City tries to compel Plaintiffs to essentially choose between 84 monthly payments (under the 1995 guidelines) or 42 months in a lump sum (under the 2010 amended guidelines), the City presents a false choice. In reality, the 2010 Guidelines do not limit Plaintiffs to 42 months of rent differential. So if the City is agreeable to using the 2010 guidelines, Plaintiffs are fine with that because the amended policy does provide additional clarity on the lump sum issue without restricting in any way this Court's ability to craft the appropriate mitigation level at 84 months, 109 months, or whatever level in between that the Court deems appropriate.

4. The City offers no evidence to support its extreme requested discount rate (4.75%), and fails to contest Plaintiffs' evidence that the proper discount rate should be 0%.

The City's fallback position is that, if the Court does award relocation benefits in a lump sum, that sum should be discounted to present value using a stiff 4.75% discount rate. While the Special

Master felt that some discount mechanism would be reasonable to facilitate a lump sum payment, no percentage was articulated. Typically in litigation, when future damages are discounted to present value, an economist will look at several factors and determine the appropriate discount rate. Here, Dr. Patrick Kennedy determined that a 0% discount rate would be appropriate because the projected investment returns on a current lump sum payment are lower than the future growth rate in the rent differential. (Ex. 18, Kennedy Decl., ¶ 4.)

Against the detailed analysis of this declarant with a doctorate in economics, the City pits…no one. The City has a designated economist, Dana Basney, who could have analyzed Dr. Kennedy's work and tried to challenge his opinions—if possible—or at least tried to formulate an alternative discount rate. But the City did not do that. Instead, the City simply represents—without declarations or any other evidentiary support—that a whopping 4.75% should be used as the discount rate based on the City's erroneous assertion that the mitigation paid by Archstone in the MVV case was allegedly discounted by that discount rate. However, that assertion is untrue. The City's only citation is to Plaintiffs' Exhibit 46, which is the MVV settlement agreement, and specifically, to the tables of payments on page two. But reading that page, or any of the surrounding pages, does not reveal any reference to a 4.75% discount rate. In fact, what that agreement *does* reveal is that the parties specifically agreed that the tables "are intended to be fixed forever, **are not subject to cost-of-living, present value**, **and/or any other adjustments**, and will not increase or decrease over time." (Ex. 46, MVV Settlement Agr., p. 3, ¶ 1(b) (emphasis added).) Thus, the City is just dead wrong asserting that *any* discount rate was agreed to or applied to the lump sum payment made by Archstone in the MVV case. It is also worth noting—and is probably consistent with the Court's trial experiences—that even under the most favorable economic conditions for the City, a discount rate would rarely breach even 2%, much less jump all the way to 4.75%. Not even the City's expert economist Mr. Basney could be cajoled into opining to such a wild, unsupportable position. The City is truly grasping at straws here.

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5. The City has a poor track record for "safeguarding" funds, and the judicial oversight implicated by a multi-year payment plan would keep this litigation open for an additional 7-10 years.

Without any supporting evidence or declarations from City staff, the City touts its ability to make monthly relocation payments to hundreds of recipients over a period of many years, concluding that there is no administrative advantage to making a lump sum payment. But this assertion defies both the opinions of OPC's spokesman regarding the superiority of paying mitigation in a lump sum, and the City's own history of mismanaging De Anza Park funds.

First, the City does not dispute that Vince McCaw stated that mitigation is always paid in a lump sum or that the potential liability and the prohibitive liability and financial burdens of administrating monthly payments for several years would be untenable. So Mr. McCaw's statements—and the Tatro Declaration in which they are memorialized—remain unchallenged, because they are the truth. (See Ex. 34, Tatro Decl., ¶¶ 2-3.)

Second, the City's financial problems over just the last 10 years are legendary. Between pension under-funding, the controversial retirement DROP program, and enormous budget shortfalls, the City has struggled to repair the damage done to its municipal bond rating. Even looking just at the De Anza Cove property as a stand-alone asset, the City has pilfered the De Anza revenue account at will multiple times, draining funds earmarked for relocation. For example, in 2009, the Mayor identified some $7,500,000 in profits generated by the De Anza Cove mobilehome park just since November 2003. The City, by fiat, took that money from the De Anza Operating Fund and put it in the General Fund to use for other purposes. (See Ex. 57, Indep. Budget Analyst Rpt., dated Dec. 4, 2009, p. 5.) Plaintiffs protested this action, particularly since the City had been crying poverty from the beginning of the case and Plaintiffs felt strongly that keeping the De Anza funds segregated and available to help fund *at least a small part of* the relocation of the Class was vital. But the City took the money anyway. The same thing happened with the additional rent revenue collected by the City after amending the Master Lease in 1982 to allow the City to build up greater reserves for the relocation costs anticipated in the future. "The City collected millions of dollars of rents from De Anza Park for at least two decades following City staff reports advising the City that park tenants were entitled to substantial relocation benefits." (Ex. 52, Stmnt. of Decision,

pp. 11-12.))

In light of the way that the City has freely usurped De Anza-related funds for other purposes, over the legitimate objections of the residents, and often in violation of the City's own prior resolutions, agreements, and stated intent, it's difficult to take the City seriously when it states, essentially, that we can trust them to get it right.

It's hardly surprising that OPC has never seen an approved relocation plan where mitigation was paid monthly over multiple years. It's just too fraught with peril for the homeowners, and is too unwieldy, expensive, and open-ended to oversee.

6. The City cannot pay the judgment in 10 annual installments because the City has not and cannot meet the requisite elements of Government Code section 970.6.

Plaintiffs analyzed the applicable code provisions addressing the circumstances under which a municipality could seek to pay a judgment over time. Plaintiffs demonstrated why neither of those circumstances—medical malpractice cases and undue hardship—applies here. (POB, p. 29.) In response, the City cites the undue hardship provision (Gov't Code § 970.6) and claims, summarily, that "the City will be allowed to pay any judgment against it in annual installments over 10 years." (City's Opp., p. 21.) However, this provision requires that two separate elements be satisfied—neither of which has occurred. First, the City Council has not adopted an ordinance or resolution finding that an unreasonable hardship will result from the payment of mitigation in a lump sum; and second, this Court has not found that a 10-year installment plan "is necessary to avoid an unreasonable hardship." (Gov't Code § 970.6 (a)(1)&(2).) Thus, the City's attempt to defer payment is both fatally premature and wholly unjust to the De Anza Cove homeowners.

C. OPC failed to correct a few simple math errors despite the parties' joint request—errors that take compensation away from the Class.

The parties and the Special Master sought to correct the mathematical, statistical, and methodological errors that arose during OPC's initial comparable rent survey in 2011. The Court

and Special Master held hearings in January and February 2014, heard twice directly from OPC, and the Court and Special Master helped guide OPC to update its comparable rental survey to more authentically assess the realities facing the De Anza residents. During February and March, with the parties' cooperation, OPC eradicated a number of math errors and anomalies, which neither party took issue with here. On March 20, 2014, the parties notified the Court of the agreed-upon briefing schedule, and jointly instructed OPC as to the final adjustments needed. On March 21, 2014, OPC e-mailed its 2014 updated survey and OPC's application of the survey to De Anza via its updated TIR spreadsheet.

As Plaintiffs previously briefed, one residual error was the omission of the last home-size tier that encompasses the largest De Anza homes; the second error was OPC's subjective and incorrect application of a 15% markup to only one side of the comparable rent equation. The City now opposes Plaintiffs' requests to correct these errors, which we genuinely did not anticipate because of the parties' previous, jointly-approved requests and instructions to OPC to make the corrections. Because any purported issue as to OPC's omission of the largest home-size tier is easily dispatched, Plaintiffs address it first.

1. The last tier for the largest De Anza homes *is* missing.

OPC simply failed to include the last tier of home sizes, which corresponds to the largest De Anza homes (that range from 1,412 to 2,140 sq.ft.), and has a slightly higher comparable rent of $3,598. Contrary to the City's attempt to distance itself by claiming that "these purported corrections are being requested by Plaintiffs, not 'jointly' as contended by Plaintiffs," (City Opp., p. 33:4-5), the parties noted, discussed, and jointly agreed on how to address the missing home-size tier. Regardless, the undeniable fact remains that the home-size tier beginning at 1412 sq.ft.—and its corresponding $3,598 comp rent—is missing.

On March 19, OPC confirmed for the parties that the median comp-rent tiers are: "$1,300 / $1,750 / $2,600 / $3,395 / **$3,598** based on properties that provided the square footage of the available units" and attached its data showing the median size—**1412 sq.ft.**—for the larger De Anza homes. (Pl.'s Ex. 26 to NOL (emphasis added).) The next day, on March 20, 2014, the parties

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expressly instructed OPC during their joint teleconference to add the missing 1412 sq.ft. home-size tier to its final spreadsheet, which instruction was further confirmed in the e-mail jointly sent by the parties to OPC:

> The parties again thank you very much for your time and effort to date. This will confirm from our joint teleconference this morning the following:
>
> * * *
>
> 4. **You will add the final De Anza home-size tier to the spreadsheet (median De Anza 4 BR home is 1412 sqft**, subject to OPC's determination based on the mark-up issue, above) and input the corresponding 2014 comp rent amounts for all tiers. (Pls.' Ex. 27 to NOL (emphasis added).)

The City's sole tactic in opposing any correction of the missing home-size tier consists of pretending the mistake never happened: "Finally, as requested by Plaintiffs, OPC has already included the data for the 4 bedroom and larger homes, but at the correct 1380 square footage and over cut-off." (City Opp., p. 35:4-5.) OPC did not. OPC confirmed that the next De Anza home-size median is 1412 sqft. And OPC confirmed the accompanying median comp rent for that break-point is $3,598. (Ex. 26.) It cannot be genuinely disputed that the last home-size tier—1412 sq.ft. with corresponding comp rent of $3,598—is missing from the OPC spreadsheet. (See grey-shaded tier, labeled "Missing Tier" on table, below.)

	A	B	C
	De Anza home sizes (based on actual median midpoints)	De Anza home sizes + *OPC's arbitrary 15% markup*	Median rents for apartments of comparable size and location (Feb 2014)
	1-575 sf	1-664 sf	$1,300
	576 sf	665 sf	$1,750
	920 sf	1060 sf	$2,600
	1202 sf	1380 sf	$3,395
Missing tier =>	1412 sf	1700 sf	$3,598

The net impact of this omission is a preventable loss of rent differential benefits for the Class members with larger homes who would be clumped into the home-size tier associated with smaller

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homes. Thus, Plaintiffs respectfully request that the Court order that the missing tier and corresponding comparable rent be added, as previously requested of OPC by both parties.

2. OPC applied an arbitrary 15% mark-up in break points for each tier.

Rather than using the median, or midpoints, consistently on both sides of the equation here—the De Anza home sizes (Column A) and comparable rents (Column C)—OPC injected a mathematically and statistically unsupportable 15% markup only on the De Anza home-size break points for each tier—as shown in Column **B**, below.

	A	**B**	C
	De Anza home sizes (based on actual median midpoints)	De Anza home sizes + *OPC's arbitrary 15% markup*	Median rents for apartments of comparable size and location (Feb 2014)
	1-575 sf	1-664 sf	$1,300
	576 sf	665 sf	$1,750
	920 sf	1060 sf	$2,600
	1202 sf	1380 sf	$3,395
Missing tier =>	1412 sf	1700 sf	$3,598

These elevated break points in Column B cause many De Anza homes to fall artificially into lower comparable-rent tiers than they otherwise naturally would, and the homeowners suffer a corresponding decrease in rent differential benefits. OPC's "markup" error then gets compounded when multiplied by 84 months to calculate the total rent differential. As explained here and in Plaintiffs' opening brief, a 15% mark-up in the break points finds no basis in mathematics, statistics, the Relocation Guidelines, or State law.

The City opposes correcting this error on two grounds: (a) The City says "it is too late to raise" an objection and asks the Court to strike Dr. Kennedy's declaration—an uncontested, authoritative declaration that explains why this mark-up is an error; and (b) The City reasons that the statistical error must remain because OPC "exercised its discretion to determine appropriate square-footage tiers for the purposes of calculating relocation benefits." (City Opp., p. 34:10-11 n. 11, p. 34:22-23,

respectively.)

First, the City's attempt to exclude evidence concerning important factual issues at this final juncture amounts to asking this Court to discard the realities surrounding OPC's evolving process as it updated its survey, methodology, math, and rationale over the first three months of this year, and turn a blind eye to the massive statistical error that robs the class of much-needed relocation funds—as documented in the uncontested analysis by Dr. Kennedy.

As more thoroughly briefed in the Plaintiffs' accompanying Opposition to Defendant City's Motion to Exclude and/or Strike Certain Exhibits and Evidentiary Objections, and incorporated herein, the law does not support the City's move to strike the evidence presented. After consideration of the Special Master's report, the Court is justified "in taking further evidence to bring out and determine the actual facts of the case." *San Diego Fruit & Produce Co. v. Elster* (1954) 127 Cal.App. 2d 80, 86; *Dynair Electonics, Inc. v. Video Cable, Inc*. (1976) 55 Cal.App.3d 11, 20 (court's consideration of additional evidence after review of Special Master's advisory recommendations was proper). There is no statutory prohibition on providing additional evidence in support of an objection to a Special Master's report. (E.g., Civ. Proc. Code §§ 639 *et seq*.; Cal. Rules Ct. 3.922 *et seq*.) Otherwise, objections could be based only on rhetoric, not actual facts. Caselaw confirms that Plaintiffs' submission of facts and evidence here is proper: "Within reasonable limits, **it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed**." *Coit Drapery Cleaners, Inc. v. Sequioa Ins. Co.* (1993) 14 Cal.App.4th 1595, 1611-1612 (internal citations omitted, emphasis added). "A court is not caught in the legal straight-jacket of a particular legal theory and unable to permit a party to present evidence upon another theory which supports his case…certainly the court here correctly permitted full presentation of the relevant facts, whether adduced before or after submission; the court was not bound by any immutable formality as to the chronology of exposition." *Baker v. City of Palo Alto* (1961) 190 Cal.App.2d 744, 755-756.

Here, OPC had never before performed an actual comparison of the De Anza home sizes, medians, and ranges to the comp-unit sizes, medians, and ranges. So, based on the newly available information, on March 20, 2014, the parties jointly instructed OPC via email to do so and tasked

OPC with reassessing whether any markup, let alone a 15% markup, was mathematically or statistically justifiable:

> The parties again thank you very much for your time and effort to date. This will confirm from our joint teleconference this morning the following:
>
> 1. OPC had originally placed a 15% mark-up on the median De Anza home sizes. Now that OPC has square-footage data on all De Anza homes and the 2014 Comp Rent properties, and now knows the corresponding size ranges, **OPC will: (a) consider and compare the ranges of the De Anza Cove home sizes relative to the ranges of the 2014 Comp Rent home sizes; and (b) assess whether a markup, if any, is mathematically / statistically appropriate on any of the median De Anza home-size tiers**.
>
> 2. You agreed to provide the parties a written explanation of OPC's mathematical/statistical rationale for its ultimate decision on the mark-up issue.
>
> 3. You will update the spreadsheet's De Anza median home-size tiers according to your decision on the mark-up issue. (Ex. 27, Joint E-mail to OPC dated March 20, 2014.)

Unfortunately, after comparing the size ranges and medians of the De Anza homes versus the comp units, OPC did not change its faulty conclusion to markup only the De Anza home sizes as previously agreed. (Ex. 28.) Plaintiffs' expert economist, Patrick Kennedy, Ph.D., analyzed OPC's survey, the presentation of data, the manner in which OPC created its tiers for compensation, and OPC's stated rationale for continuing on with a 15% markup on the De Anza home-sizes. After careful study, Dr. Kennedy opined that, while OPC's methodology was sound insofar as the establishment of tiers based on the median sizes of the De Anza homes and corresponding median comp rent, OPC's artificial mark-up to the De Anza median home sizes lacked merit and was scientifically unsupportable: "**It is my opinion that OPC's approach has substantial limitations and does not appear to be based on an underlying statistically accepted methodology or process…. The 15% markup of the De Anza median home sizes suggested by OPC lacks a statistical foundation or methodology and introduces counter-intuitive results.**" (Ex. 18, Kennedy Decl., ¶¶ 21, 23.)

Dr. Kennedy articulated that the natural median break points reflected in Column A are the statistically correct delineations for each tier: "the De Anza median home sizes should be used without any markup to those tiers: the median 1-bedroom De Anza Cove home was 576 square feet, the median 2-bedroom home was 920 square feet, the median 3-bedroom home was 1202 square

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feet, and the median 4-bedroom home was 1412 square feet…. These median figures provide a consistent, objective statistical measure of the cut-off for each of OPC's rent tiers. The median is a common statistical concept that reflects the midpoint of the underlying distribution. The underlying data reflecting the median size of the De Anza Cove homes should therefore govern the cut-offs for each tier." (Ex. 18, Kennedy Decl., ¶¶ 21-27.)

Dr. Kennedy pointed out how OPC's mark-ups, though, make no sense at all when one actually compares the home sizes to the comp-unit sizes: "[OPC increased the De Anza 2-bedroom tier] from 920 square feet to 1,060 square feet. OPC's suggested cutoff for 2-bedrooms is therefore 160 square feet *larger* than the median two-bedroom unit in its survey. Despite the fact that the median De Anza Cove 2-bedroom home is *larger* than the median 2-bedroom in OPC's survey (920 square feet versus 900 square feet in the survey), OPC still includes a markup [resulting in a tier artificially elevated at 1060 sqft]. **The cutoff for the 2-bedroom tier should be adjusted *downward*, *not upward*, if OPC's process was accepted.**" (*Id.*, ¶ 26 (emphasis added).) OPC's erroneous statistical underpinnings are exposed for what they are because the mark-up far surpasses even the median sizes of the comp units that OPC purported to be comparing. (*Id.*, ¶ 25.) "These markups lack a statistical foundation or methodology and introduce counter-intuitive results." (*Id.*, ¶ 26.)

OPC's experience is in relocation, not statistics and mathematics; whereas, applying proper, objective statistical and mathematical methodology is *precisely* Dr. Kennedy's profession and expertise (doctorate in Economics from Stanford University, bachelor's degree in Economics from the University of California, San Diego, and testified as an expert witness in the trial of this case). OPC undeniably has the discretion in how it collected comp-rent information and how it does its job as a relocation coordinator, but it does not have the discretion—whether knowingly or not—to take statistical liberties or apply erroneous mathematics to the results here.

Notably, the City retained their own economist/accounting expert, Mr. Dana Basney, and used him as their designated expert in this case. At all times, the City was able to consult with Mr. Basney to assess if OPC's mark-up method was supportable or if Mr. Kennedy's opinions were incorrect. Tellingly, the City did not submit any declaration from Mr. Basney. The City instead asks the Court to disregard the uncontested facts and analysis highlighting the mistakes made in

OPC's spreadsheet.

The missing home-size tier and the artificial 15% markup errors are not trivial when they are applied class-wide and multiplied by 84 months: $18,290 would be taken away from each homeowner for no justifiable reason. Now is the last time for these mistakes to be remedied. And the Court has the capacity to remedy them easily. For example, the Class TIR spreadsheet, which is Exhibit 2, corrects the two errors. Plaintiffs, therefore, respectfully request that the Court order that the natural median break points be used throughout, without any markup, and that the missing tier representing the larger homes and corresponding comparable rent be added:

	De Anza home sizes (based on actual median midpoints)	Median rents for apartments of comparable size and location (Feb 2014)
	1-575 sf	$1,300
	576 sf	$1,750
	920 sf	$2,600
	1202 sf	$3,395
Missing tier added ==>	1412 sf	$3,598

D. The Court should reject the City's request to artificially increase the space rent because, as the City does not dispute, the evidence shows that actual space rent value *decreased* 10% per year since the City denuded the Park.

The City persuaded the Special Master to recommend artificially increasing the base rents at the Park by CPI annually in order to "make up for" the fact that rents at De Anza have remained unchanged since 2003. The effect of such an artificial increase is dramatic, as it gouges away a large chunk of the Class' rent differential. Rent differential is calculated as the difference between the current space rent and the rent for a comparably-sized apartment in a coastal area. Inflating the current space rent decreases the resulting rent differential, thereby shrinking the amount of mitigation the Class receives to find replacement housing. The City does not dispute that **OPC**

never recommend artificially inflating space rents for purposes of calculating the rent differential amounts owed by the City. OPC applied the current space rent as called for in the Guidelines when in calculated rent differential.

Allowing CPI adjustments to the base rent is wrong for several reasons: (1) it punishes residents who've done nothing wrong, resulting in a $17,000 reduction in benefits per household; (2) the decline in the condition of the Park since the City took over operations in November 2003 actually supports a 10% *decrease* in space rent; and (3) the City never sought from this Court a modification of the Preliminary Injunction to allow a rent increase, which it could have requested anytime through a properly-noticed motion. But the City never requested a rent increase during this case because the actual market rent value at De Anza does not support either a real rent increase or an artificial increase. After destroying or removing all the services, amenities, storage areas, laundry facilities, trees, clubhouse amenities, parking, and community playground, the City has the gall to ask for a rent increase based on the space rents that corresponded with the beautiful condition of the Park—before the City began its destruction. Plaintiffs have provided evidence showing what the effective market rent at De Anza would be after November 23, 2003—one that is decreased by 10% per year.

First, rent has remained unchanged because the Preliminary Injunction preserved the *status quo*, including the rent rolls as of November 23, 2003. But the Preliminary Injunction was only necessary because the City proceeded to close the Park without sending the proper notices, without commissioning a Tenant Impact Report, without holding hearings on the sufficiency of the report, and without paying any mitigation before forcing residents out of the Park. Had the City adhered to its relocation duties under state and local laws, De Anza residents would have been paid and relocated in late 2003. Even contemplating a rent increase at that time would have been out of place, as the Park was closing. Moreover, the legal position taken by the City forced the Class to litigate—a process that has taken more than a decade to complete through no fault of the Class. In sum, space rent remains at 2003 levels *because* the City trampled all over the residents' rights and this Court enjoined the City from eviscerating what little the residents had left at the Park. The City has dirty hands and cannot seek what amounts to equitable relief at the financial expense of the

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Class. The economic impact of allowing the City to artificially raise space rents retroactively amounts to about $17,000 per home based on 84 months of rent differential. (Ex. 18, Kennedy Decl., ¶ 20.) That's an enormous loss for the Class.

Second, in support of its effort to increase space rent (in order to decrease relocation benefits), the City argued to the Special Master that current space rent is below market value. Of course, the City provided no evidence for this assertion. The City pushes for what amounts to a 27.6% rent increase, based on annual CPI adjustments from 2003 to present. However, the space rent in November 2003 reflected the state of the Park, the quality of the amenities, and resident access to the common areas as they existed before the City took over. And, as the Court will recall, upon assuming control of the Park on November 23, 2003, the City quickly set about tearing down the Park piece by piece.

These violations occurred, not because of an innocent mistake, but as part of the City's measured decision to side-step State law and manufacture additional motivation for residents to abandon the park. The City Attorney, himself, admitted as much in open court: "Your Honor, I think the concern is…that **Real Estate Assets was using the management company [Hawkeye] to pressure the residents to** basically try to **get out of the litigation by departing from the scene**, and I think that's what I can't come down and pretend that that didn't happen, and I'm not going to." (Ex. 20, Rptr. Trans., July 28, 2005, pp. 12:27–13:6 (emphasis added).)

Not surprisingly, when these dramatic changes are taken into account, no rent increase is warranted. In fact, having investigated similar situations at other parks, and having testified as an expert in other such cases, Plaintiffs' expert, James Brabant, concluded that the destructive changes the City brought about to De Anza Cove would justify a **rent reduction of about 10% per home per month**! (See Ex. 21, Brabant Decl., ¶¶ 6-10.) In other words, the base rent used for calculating rent differential should actually be adjusted downwards, not upwards. However, in the interest of simplicity, Plaintiffs are not seeking a rent reduction, but are merely asserting that, at best for the City, the issue is a wash. So no artificial CPI adjustment should be made to the base rent for purposes of calculating (and thus artificially decreasing) the rent differential owed. The City offered nothing to dispute or contradict the facts presented by Mr. Brabant as to the actual

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market rent that applies to De Anza over the last decade. **The City had their opportunity to have their mobilehome expert, Mr. Kerr, provide some sort of opinion to support the City's claim that current space rent is below market and that it's use for determining rent differential is unreasonable here. Instead, there is no factual basis to allow the City to artificially increase the space rent that existed when the Park was in pristine condition before the City denuded it**.

If the City truly felt that rents were below market, the City could have tried to persuade the Court accordingly anytime along the way. But, although the City suggested years ago to Plaintiffs' counsel it might do so, the City never did. The City undoubtedly considered that any such attempt by noticed motion would have been met with a formidable opposition, highlighting the degree to which the City's actions had stripped away so much of the value that had previously justified the rents charged by the prior operator. Truth be told, the City's request to fictitiously increase space rent just for the blatant purpose of undermining the compensation that it owes to the residents who are losing their homes, is no different (or less offensive) than any other park operator trying to ask a City Council at the time of park closure to approve a retroactive rent increase just so it can siphon necessary relocation funds away from the people who are losing their homes. This is the same tactic Archstone attempted to do—raising rents so it could decrease the rent differential component—which resulted in a lawsuit culminating with Archstone being forced to provide a rent refund and calculate the rent differential based on the original space rent charged back on the day it had sent its notice of park closure…which was more than 5 years before the actual closure of the park.

When the City brought up the *Abbit* abuse case to the Special Master, it claimed that the settlement there controlled the rent charges and compensated for the lost rent. Plaintiffs in the Opening Brief provided the Court with the actual settlement agreement and showed how all rent-related items had been expressly preserved. Simply put, there was no diminished rent claim made by the individual plaintiffs for which they were compensated in that separate lawsuit. Instead of pointing to anything that developed during the actual case, like an expert opinion, discovery responses, or somewhere in the settlement agreement, the City puts forward a yeoman's effort in making arguments and trying to proclaim that the original complaint is controlling. The individual

plaintiffs in *Abbit* were compensated for the emotional distress and personal injuries they suffered as a result of the City's abuses. The residents were scared and anxious living at the park, and the *Abbit* settlement compensated them for the damage the City caused to their *personal* interests. On the other hand, **this Class was not a participant in the *Abbit* case**. The relocation benefits the City will pay to the entire Class, which is 273 households in size, will redress a very different harm—the total loss of one's home due to park closure and the need to acquire a comparable replacement home in another park (the residents' *property* interests). Again, the *Abbit* settlement itself expressly reserved the City's and the De Anza homeowners' rights to enforce their continuing property rights:

> Plaintiffs and the City of San Diego recognize that many Plaintiffs presently reside in the De Anza Cove mobilehome park and will continue to reside in the park after the execution of this Agreement. Plaintiffs and the City of San Diego agree that nothing in this Agreement is intended to affect Plaintiffs' existing rental obligations or the City's rights to collect rents and utilities that are or may be in the future due and owing, or otherwise impair the City's rights to enforce rental agreements, the provisions of the Mobilehome Residency Law, and park rules and regulations. (Ex. 22, *Abbit* release agreement, ¶ 12.)

As the Court personally experienced throughout this case, there truly can be no just cause to grant the City's request to fictitiously increase the space rent for purposes of decreasing the rent differential component of relocation benefits. OPC didn't even suggest such a thing. If the Court were to genuinely consider granting the City's request for a fictitious space rent increase, which would cause the Class to lose $17,000 in needed benefits per home, then—based on the uncontradicted evidence supplied by Mr. Brabant as to the actual space rent value—the Court should likewise grant a decrease of 10% per year. Otherwise, the Court will need to increase the number of months of rent differential to compensate for the disparity created in order to meet the MRL's mandates of ensuring replacement housing in other parks. Instead, Plaintiffs respectfully request that the Court deny the City's request to artificially increase the base rents for purposes of calculating rent differential.

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E. The purpose of this TIR process is, as the Court instructed the Special Master, "to accomplish the closure of De Anza"—and bring this case to an end.

The City's zealous advocacy during the Special Master phase was impressive as it did convince the Special Master into believing that the Court had not found that the park closure date had occurred back on November 23, 2003, and that rent differential benefits are some hypothetical future, indeterminable event for those who still live at the Park under this Court's injunctive protection. But, as the Court ordered when it provided instructions appointing the Special Master about this process, "the Relocation Impact Report required by the Mobilehome Residency Law shall fully address the impact of the closure of De Anza upon the homeowners and residents and shall be consistent with the provisions of State law as interpreted by this Court. The Special Master's duties include but are not limited to: [¶] E. Submit a proposed Order(s) for this Court regarding: (i) mitigation of economic hardship, (ii) adopting a final Relocation Plan, and (iii) **as necessary and required to accomplish the closure of De Anza**." (Order Appointing Referee, filed June 29, 2012, p. 2 (emphasis added).) This whole process over the last three years was not a hypothetical exercise, but instead was designed to make final determinations of the mitigation compensation owed and bring about the actual, final closure of the Park.

After determining the key issues raised in this briefing, the Court will provide a final move-out date set and ensure that the finalized TIR is distributed in advance and that the funds are in an independent, protected account to accomplish the final closure of De Anza. To that end, there are two subsets of homeowners that the parties agree are entitled to full compensation: those who have already voluntarily vacated the Park, and those who live at the Park and are awaiting the mitigation compensation so that they can move.

Class Homeowners Who Vacated the Park. The parties and the Special Master agree with the overall procedure that applies to those homeowners who already vacated the Park. They are undisputedly entitled to: (1) their rent differential benefits as of the date they moved out, and (2) prejudgment interest of 7% accruing from the date they moved out. (Clearly, Plaintiffs' dispute any artificial rent increase component, discussed *supra*.) In response to the Special Master's recommendation and the cooperation of the parties, on April 10, 2014, the City provided its

finalized list of class homeowners who had vacated the Park so that these computations could be make. (Ex. 59.) As shown in the accompanying supplemental declaration of expert economist, Dr. Kennedy, rent differential has been calculated to the precise date that each homeowner household vacated the park. (Suppl. Kennedy Decl., included as Ex. 63 for convenience, ¶¶ 3-4, and Exs. A & B thereto.) Exhibit B thereto details each class homeowner's rent differential owed on the exact date that they moved out. As agreed by the parties, 7% prejudgment interest was then calculated starting from the date of the move-out on that amount. (*Id.*, at p. 2 and Ex. B, Column H.) Plaintiffs provide this information now because (a) the move-out dates were not provided by the City until April 10th, so we couldn't get it done any sooner, and (b) it provides evidentiary proof that the calculations based on real-world, objective standards can and will be efficiently created for the Court in finalized form once the Court issues its overarching decisions as to the number of months of rent differential owed, etc.

Class Homeowners Awaiting Mitigation Compensation. Plainly, Plaintiffs absolutely, positively disagree with the City's approach that attempts to drag out this process indefinitely. Plaintiffs have shown that determination of the rent differential based on the updated 2014 survery can and will result in a final judgment. Judgment, along with the Court's corresponding orders / permanent injunction, will be prepared with the assistance of counsel in conformity with the Court's rulings at issue now. All Class Members will then know exactly how much they will be provided and can plan their future moves accordingly. Once judgment is entered, all amounts will accrue post-judgment interest and will forever protect the Class from potential changes in comparable rent, the City's attempts to hike rents anew, or the City's failures to act in their best interests. Instead, the Court will, through its upcoming order/permanent injunction, order the City to make payment into a protected trust account fund that is administered and overseen by an independent third-party class action administrator, such as Gilardi or Simpluris. Those who have already vacated the park will then be immediately paid for the amounts that have been due and owing to them for years. And those who live at the Park can then make plans to find homes in other nearby parks, make arrangements to move out of De Anza, and coordinate receipt of payment with the class administrator. This whole process will then conclude, at long last, the way it was supposed to long

ago in November 2003.

F. Four nights of Temporary Lodging allows a realistic and reasonable amount of time for hundreds of residents to relocate to their new homes.

OPC determined that a reasonable allowance for temporary lodging in today's dollars would be $139 per night. (The 2010 Housing Commission Guidelines call for $147 per night (Ex. 36); the 1995 Guidelines call for $40 per night (Ex. 33).) However, OPC interpreted the Guidelines as allowing temporary lodging benefits *only* for those with a mobilehome capable of being moved to another park. The Special Master adopted OPC's interpretation of the Guidelines as the basis for his recommendation.

Unlike OPC's supposition that the Guidelines only allow temporary lodging benefits to flow to homeowners who can move their homes to another park, the Guidelines actually require temporary lodging benefits *without regard to the feasibility of moving the mobilehome*. It applies to all households. Beneath the section that details rent differential benefits owed to *all households that cannot be relocated* to another mobilehome park (which is the situation for all De Anza homes), the Guidelines state a separate section applicable to all tenants: "2. During relocation, the park owner (or lessee in the case of a leasehold) shall pay to each mobilehome tenant hotel or temporary lodging cost in the amount of $147 per night up to seven nights." (Ex. 36, 2010 Guidelines, ¶ 2; Ex. 33, 1995 Guidelines, ¶ 2 ("During relocation the park owner…shall pay hotel or temporary lodging cost in the amount of $40 per night up to seven nights.").) The Guidelines do not limit temporary lodging payments to only those whose mobilehomes can be moved to other parks. To accept the position espoused by the City, the express words in the Guidelines—"shall pay to *each* mobilehome tenant hotel or temporary lodging"—would have to be re-written to: "only in the case where it is feasible to relocate a mobilehome to another park, the park owner may determine, on a case-by-case basis, if it should pay hotel or temporary lodging in the amount of…." But that is not how the policy reads. The Guidelines, on their face, require payment of a temporary lodging amount regardless of whether one can or cannot relocate a home to

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another park. The Court should make this express finding, then rule on: (a) the daily lodging amount, and (b) the appropriate number of days.

OPC suggested $139 per night. Plaintiffs agreed, and the City does not object to that amount. (City Opp., p. 35:9-12.) Therefore, $139 per night is appropriate.

The remaining issue for the Court to decide is how many days of temporary lodging is reasonable here (per the Guidelines, between 1 and 7 days). Based on the circumstances of this case—like the fact that a bit more than 70 class households of the approximately 275 class households have already voluntarily vacated the park (see Ex. 59, City memo re: class household move-outs), the need for finality and certainty, along with the need for a final judgment that doesn't put off any mathematical calculations for some future hypothetical day—Plaintiffs requested that the Court grant a reasonable middle ground within the range of 1 to 7 nights: **4 nights of temporary lodging at $139 per night** for a total of $556 per household. (Pl's Opening Brief, p. 25:16-17.) The City opposes, asserting "the SDHC Guidelines still only require the City to pay the lodging benefit to homeowners as needed on a case-by-case basis, and for a period not to exceed seven nights." (City Opp., p. 36:5-6 (underscoring in original).) Like the MVV case, OPC did initially draft a tenant impact report where, in the text of that written report like here, it relayed the same "up to seven nights" language. But the final compensation paid to all MVV homeowners was concrete, not hypothetical: every homeowner—whether resident or non-resident, whether able to move their home to another mobilehome park or not, whether they needed to pay for actual hotel costs or not—every homeowner automatically received the full seven nights of temporary lodging and that amount was included in the lump-sum they were paid.

There is not a fixed number of days that the Guidelines require. The Guidelines, though, give the reviewing authority the discretion to award from 1 day to 7 days. So, under the particularities of this case, 4 nights allow a realistic amount of time for hundreds of residents to relocate to their new homes, and provide fair compensation for those class households who already voluntarily vacated the park. Plaintiffs, therefore, reiterate their request that the Court find that **4 nights of temporary lodging at $139 per night** is appropriate in this case for a total of $556 per class household.

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G. The City's numerous, already-proven violations of the MRL warrant the assessment of Statutory Penalties.

The City has two main objections to the Court awarding statutory penalties. First, the City claims that Plaintiffs did not raise the issue of statutory penalties at trial or submit supporting evidence. In support, the City argues: "As a threshold matter, Plaintiffs presented no evidence on the issue of statutory penalties at trial." (City Opp., p. 36:27-28.) The City continues, "However, if Plaintiffs had in fact submitted that evidence on the issue of statutory damages, that fact was never made known to the parties or the City at trial, and therefore the City had no opportunity to respond." (City Opp., p. 37:4-6.) The City concludes: "Therefore, no findings by the Court are required." (City Opp., p. 37:10.) But the City's main argument is disproven and belied by: the evidence admitted at trial, the trial transcripts, Plaintiffs' Request for Statement of Decision and Proposed Statement of Decision, the City's Objections to Plaintiffs' Proposed Statement of Decision, and, ultimately, the Court's express ruling in its Statement of Decision.

The best evidence of why it is appropriate for the Court to decide the statutory penalties issue at this junction of the case comes from the express ruling from the Court after trial in its Statement of Decision: "Finally, **the Plaintiffs' claim for statutory penalties under the Mobilehome Residency Law shall be held in abeyance and will be subject to further hearing after receipt of the Special Master's report and recommendation regarding mitigation**." (Ex. 52, Stmt. of Decision, p. 15:20-22.) The Court reiterated in its Order After Statement of Decision, "The issue of statutory penalties under the Mobilehome Residency Law will be subject of further hearing after receipt of the Special Masters' report and recommendation and prior to entry of Judgment in this action. IT IS SO ORDERED." (Ex. 53, Order After Stmt. of Decision, p. 4:1-4.) Contrary to the City's claim that it did not know about Plaintiffs' prayer for statutory penalties at trial and did not have an opportunity to respond, the record reveals that the City has not only been aware of the issue for a long time, but has had the opportunity to espouse many of the same arguments it's raising again here:

- Plaintiffs requested penalties in their Trial Brief (see section entitled "Plaintiffs Are Entitled to Statutory Penalties for the City's MRL Violations", Pl.'s Trial Brief, pp. 9-10, City's Ex. 105 to Suppl. NOL.)

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- Evidence was admitted at trial, and Plaintiffs specifically reiterated their request for statutory penalties during closing argument, and described in detail the City's conduct and knowledge, spanning *four pages* of the transcript beginning with: "Third, statutory penalties under Civil Code 798.86, the MRL, provides for a civil award of up to $2,000 per person per violation which is in addition to mitigation…." (Rptr. Trans., Nov. 13, 2007, pp. 52:13-56:7.)

- The City's lawyers responded during closing argument: "There was no evidence whatsoever that was presented in this trial in terms of any willful violations, and therefore there cannot be any recovery for any willful violations in this case…." (Rptr. Trans., Nov. 13, 2007, pp. 60:17-61:22.)

- Plaintiffs in closing argument rebutted: "Counsel indicated that there's no evidence in this case that His Honor has before it on the statutory violations, the willfulness of the City, the willful violations, no testimony, no evidence, et cetera. We would simply refer the Court to one -- these following exhibits, 79, 80, 81, 82, and 83. They are the notices that were given to these residents that addressed those very issues. And even more specifically, Exhibits 118, which is the declaration of Mr. Ruffato, 119, Mrs. Anthony's declaration, and 120, Mr. Epstein's declaration. Those are in evidence. Those are part of this case and they clearly show the duress that these families were under by the City to get them out of this park. They demonstrate clearly the willfulness that was behind the violations that the City engaged in in order to remove these people." (Rptr. Trans., Nov. 13, 2007, pp. 107:22-108:9.)

- After trial, Plaintiffs submitted their Request for Statement of Decision and Plaintiffs' Proposed Statement of Decision, asking the Court to award statutory penalties. (Pl.'s Req. for Stmt. of Decision, pp. 12-13, City's Ex. 106 to Suppl. NOL.)

- The City responded to Plaintiffs' request for statutory damages in the "Defendant City of San Diego's Objections to Plaintiffs' Proposed Statement of Decision" dated April 9, 2008: "E. Objections to Plaintiffs' Issue #4—Statutory Penalties. [¶] The City objects to Plaintiffs' proposed finding regarding statutory penalties…" (*Id.*, at p. 8:18-22 (bold omitted).)

- The Court issued its Statement of Decision and informed the parties that the Court would have a further hearing on the statutory penalties issue after the Special Master issued his recommendations. (Ex. 52, Stmt. of Decision, p. 15:20-22.)

Not only did the Court expressly instruct the parties that the statutory damages issue will be subject to further hearing after the Special Master issued his recommendations, the parties, the Special Master, and the Court agreed to briefing this issue in the very manner in which this has been done. The Special Master long ago confirmed: "With respect to the issue of statutory penalties under the MRL, Judge Hayes wishes to hear that matter directly, and you are not required to brief that issue to me." (Ex. 64, Special Master E-mail, Dec. 12, 2012.) Now, with the City's first argument dispatched, and with Plaintiffs having properly filed their Opening Brief addressing the

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statutory penalties, the law interpreting the MRL's statutory provisions, and the supporting evidence, we turn to the City's second rationale in opposition: "Finally, even if the Court deems it appropriate to consider new evidence on the issue of statutory penalties for the first time in the briefing process, Plaintiffs still have not shown, nor can they show, that the City willfully violated the MRL." (City Opp., p. 38:6-8.)

The City provides a quick mention of the *Patarak* case for the definition of the term "willful" before quickly launching into a vast array of the City's past actions to hopefully dissuade the Court from finding a "willful" violation of the MRL. (See City Opp., p. 38:8-11, citing *Patarak v. Williams* (2001) 91 Cal.App.4th 826, 829.) **The *Patarak* decision was published two years before the City's park closure here, providing a warning shot across the bow as to the more relaxed meaning of the term "willful" under the MRL**. The term "willful" used in the MRL does not require a showing of malice as may be required for punitive damages under Civil Code section 3294. Rather, the *Patarak* case teaches that a finding of "willfulness" is supported by a park owner's deliberate actions and decisions: "consequences [that] were reasonably foreseeable to follow from the park owner's deliberate decision" and "occurrences [that] resulted not from accident or simple negligence." (*Patarak v. Williams* (2001) 91 Cal.App.4th 826, 830.) As long as the City took action with "knowledge or consciousness of its probable results," that is a "willful" violation. (*Id.*, at p. 829.)

In *Patarak*, the park owner failed to properly maintain the park septic system. Over the park owner's objections, the court assessed statutory penalties for willful violations of the MRL even absent evidence that the owner intended to cause flooding, contamination, or sewage back-ups. The *Patarak* court reasoned that those consequences were reasonably foreseeable to follow from the park owner's deliberate decision not to tend to septic maintenance: "for example, landlord willfully did not maintain the septic system with knowledge or consciousness that it would probably fail with malodorous and unsanitary consequences. While landlord did not have the specific intent to achieve septic system failures, these occurrences resulted not from accident or simple negligence." (*Id*. at p. 830.) And, directly on-point to the factual assertions made by the City here, the *Patarak* court ruled that willfulness does not require "any intent to violate the law, or to injure another, or to

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acquire any advantage." (*Id.*, at p. 830.)

The City culminates its argument with an absolute: "there is no evidentiary support for a finding, as contended by Plaintiffs, that the City 'knew' the MRL applied to De Anza, 'knew' that its local ordinance exempting De Anza from the SDHC relocation guidelines would be preempted by the MRL, or 'knew' that a tenant impact report 'should have been done.'" (City Opp., p. 39:16-10.) The City's decades-long actions were not mere clerical errors or accidents. While the City attempts to shield itself from liability by asserting "the City has maintained a consistent position that the requirements of the MRL did not apply to the park" (City Opp., p. 39:12-13), the MRL has always applied, as a matter of law, to every mobilehome park in California. (Civ. Code §§ 798 et seq.) And the MRL's park-closure provisions specifically apply to every charter city in California. The Legislature couldn't have been more succinct or clear when it declared: "(h) This section is applicable to charter cities." (Gov't Code § 65863.7(h).) The undisputed facts again belie the City's hollow claim that "it didn't know":

- The De Anza Long Term Rental Agreements expressly state the MRL governs. (Ex. 40, MSA Order, ¶ 7(o).)
- The City's own internal memoranda shows the City calculated in advance the total amount of relocation benefits the City would have to pay if the City decided to maintain land use control of De Anza and undertake the concomitant relocation obligation. (Ex. 40, MSA Order, ¶ 7(k).)
- The City also knew that a tenant impact report should have been done. In fact, as this Court found, the prior park operator "advised the City that a tenant impact report was advisable and offered to prepare and pay for the report. **The City said no**." (Ex. 40, MSA Order, ¶ 7(q) (emphasis added).) The City decided not only to *not* do an impact report, but to reject the prior operator's offer to commission the report at no charge to the City. That was a willful act, and the consequences were foreseeable.

And Plaintiffs are seeking penalties based on the fact that the following seven actions/failures to act violated the MRL willfully, meaning the City deliberately acted and made decisions that resulted in reasonably foreseeable consequences even if done without "any intent to violate the law, or to injure another, or to acquire any advantage":

Violation #1: Park-Closure Notice dated Nov. 15, 2002 (12-month notice), violates Civ. Code § 798.56 and Gov't Code § 65863.7 (Ex. 5, Trial Ex. 43)

Violation #2: Park-Closure Notice dated May 6, 2003 (6-month notice), violates Civ. Code § 798.56 and Gov't Code § 65863.7 (Ex. 6, Trial Ex. 82)

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Violation #3: Park-Closure Notice dated Sept. 22, 2003 (60-day notice), violates Civ. Code § 798.56 and Gov't Code § 65863.7 (Ex. 7, Trial Ex. 44)

Violation #4: Eviction Notice to Residents dated Oct. 22, 2003, violates Civ. Code § 798.56 and Gov't Code § 65863.7 (Ex. 8, Trial Ex. 85)

Violation #5: Failing to prepare a Tenant Impact Report and provide the TIR to all homeowners and residents, violates Gov't Code § 65863.7 and Civil Code § 798.56(h): "The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government Code shall be given to the homeowners or residents at the same time notice is required pursuant to subdivision (g) of this section."

Violation #6: Failing to hold public hearings regarding the sufficiency of the TIR, or lack thereof, violates Gov't Code § 65863.7(d)

Violation #7: Failing to mitigate the adverse impacts of park closure by first providing reasonable mitigation for the massive loss of homes *prior to* initiating the park closure process and attempting to evict the entire Class, violates Gov't Code § 65863.7(e),(i).

For example, the City *intended* to send out its October 2003 eviction notice. The City *decided* not to prepare a tenant impact report. The City's decisions did not occur by accident or through clerical error. And the foreseeable consequences of the City's violations and threats to evict were timely documented in the midst of November 2003 in numerous resident declarations. (See Decls. of Peltcher, Ruffato, Anthony, Epstein, Stevens, Smithwick, and Gloudeman, collectively Ex. 42**.) All of these violations relate exclusively to** this class action case and **the City's unlawful, willful attempt to avoid properly compensating residents as required prior to initiating park closure**.

Accordingly, under Civil Code section 798.86, the Court has discretion to assess a penalty of up to $2,000 per violation per resident each time such violation occurred. From the vast array of actionable violations, many of which were repeated multiple times, Plaintiffs focused only on the above seven—all related to the pre-November 23, 2003 time frame. Plaintiffs, accordingly, request that the Court rule that Plaintiffs are entitled to Statutory Penalties of $14,000 (7 violations x $2,000) per Class Member based on the City's violations of the MRL.

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Conclusion

The Class requests that the Court rule as follows:

1. The Park Closure date was November 23, 2003, and compensation is presently owed to all Class Members based on the updated 2014 survey.

2. The Class is entitled to 109.7 months' rent differential (or at least 84 months' rent differential), paid in a lump sum.

3. OPC's mathematical / clerical errors shall be corrected: the 15% markup is eliminated and the missing home-size tier shall be added.

4. The City's request for an artificial space rent increase, which would decrease the rent differential owed to the homeowners, is denied.

5. Temporary Lodging of 4 nights at $139 per night is awarded per household.

6. Plaintiffs are entitled to Statutory Penalties of $14,000 per Class Member based on the City's willful violations of the MRL.

Once the Court issues this final ruling regarding Class compensation, Plaintiffs will prepare the proposed Judgment and accompanying Permanent Injunction. The Permanent Injunction will require the City to deposit the judgment amount into a protected fund with a Court-appointed trustee/independent third-party class action claims administrator (such as Simpluris, Gilardi, or Rust) and relocation coordinator (such as OPC or another qualified company), and will set forth additional details for the precise order of events towards final closure of the Park. Class Notice will be prepared and sent with the Judgment, Permanent Injunction, and the final Tenant Impact Report based on the Court's rulings.

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Respectfully Submitted,

DATE: April 25, 2014

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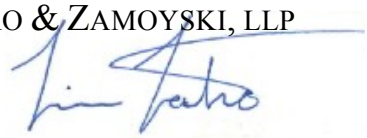

By: _____
Timothy J. Tatro, Esq.
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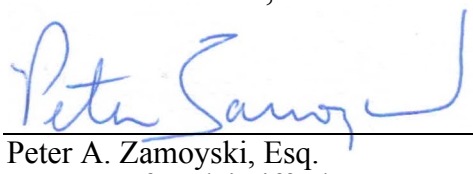
DATE: April 25, 2014

TATRO & ZAMOYSKI, LLP

By 

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