THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation; et al., Plaintiffs, vs. CITY OF SAN DIEGO; DE ANZA HARBOR RESORT AND GOLF, LLC, a California limited liability company; et al., Defendants. AND RELATED CROSS-ACTIONS.	Case No.: GIC 821191 ORDER VACATING AND AMENDING THE COURT'S MARCH 28, 2007 ORDER

The Court on its own motion and pursuant to the defendant City of San Diego's April 11, 2007 ex parte request for clarification, hereby vacates and modifies the Court's March 28, 2007 Order and issues the following Order:

The Court having read and considered the pleadings filed by the respective parties and having heard oral argument hereby grants in part and denies in part the plaintiffs' motion for summary adjudication of issues as follows:

1. Defendant City of San Diego's evidentiary objections are addressed in the proposed Order submitted by the City of San Diego in opposition to plaintiffs' motion for summary adjudication.

2. Plaintiffs' evidentiary objections to the declaration of Robert Collins offered in support of defendant City of San Diego's motion for summary judgment or in the alternative, summary adjudication are overruled. Opinions and estimates of the ground lease cited on page 3 of the declaration relating to tenants purported savings and loss of income are not received by the Court for the truth of the matter stated but for the limited purpose of explaining the conduct of the parties in response to those claimed opinions and estimates.

3. The first three of plaintiffs' evidentiary objections to the declaration of former City asset Manger William Griffith are sustained. The balance of plaintiffs' objections are overruled.

4. The Court declines to take judicial notice of any previously filed document that was not caused to be delivered to the Department prior to oral argument on March 19, 2007. [See California Rules of Court Rule 3.1306(c)(2)] The remainder of the requests for judicial notice are granted.

5. The Court declines to consider evidence not set forth in the parties' Separate Statements. [See North Coast Business Park v. Nielsen Const. Co. (1993) 17 Cal.App.4th 22]

6. The Court having carefully reviewed the issues presented to the Court in plaintiffs' motion for summary adjudication and having carefully reviewed all evidence cited by the respective parties in their Separate Statements in support of and in opposition to the plaintiffs' motion, the Court finds there exists no disputed issue of material fact as to the plaintiffs' first three issues and hereby grants summary adjudication of the following issues:

a. “De Anza Cove is a mobilehome park and the Mobilehome Residency Law (Civil Code §§ 798 et seq, Gov’t Code §§ 65863.7-65863.8) applies in full to De Anza Cove and the City of San Diego”;

b. “The City of San Diego is under a mandatory duty to comply with the Mobilehome Residency Law, including but not limited to Civil Code §798.56(g)-(h) and Gov’t Code §65863.7, which regulate closure of De Anza Cove, the timing and content of Notices to residents, and tenant-impact-reporting and relocation assistance requirements”;

c. “The City violated the Mobilehome Residency Law, Civil Code §798.56(g)-(h) and Gov’t Code §65863.7 by failing to prepare a tenant impact report and serve lawful Notices that complied with the MRL’s timing and content requirements”.

7. The Court’s summary adjudication of the foregoing three issues is based upon the undisputed evidence contained within the respective Separate Statements of the respective parties demonstrating no disputed issue of material fact exists as follows:

a. On June 29, 1945 the State Park Commission granted the property formerly known as Mission Bay tidelands to the City of San Diego to be held in trust and that “at all times be accessible and subject to the use and enjoyment of all of the citizens of the State of California.”

b. In May 1951 the City and Marian Fesler Purdy and Lila C. Witcher entered into 50 year Master Ground Lease with a commencement date of November 24, 1953 and an expiration date of November 23, 2003. This Master Ground Lease provided for use as a “tourist and trailer park area”. [plaintiffs’ Ex. 63, Ex. 5]

c. On May 1, 1954 Purdy and Witcher assigned the Master Ground Lease to De Anza Harbor, Inc. (DHI) The Master Ground Lease (MGL) required the lessee within five years to “complete and have ready for

occupancy" 500 trailer units. The MGL also provided that "the lessee agrees that the leased premises shall be used only and exclusively for the development and operation of a tourist and trailer park area with the accompanying facilities, businesses and concessions which may be necessary or desirable in the opinion of the lessee including those listed in paragraph "Fourth" of this lease. Whenever the lessee shall desire to install or operate any facilities, businesses and concessions other than those already listed in paragraph "Fourth" of this lease, they shall obtain the approval, in writing, of the City Manager of the lessor.".

d. A City document from the early 1960's describes the purpose of the Master Ground Lease as "Tourist & Trailer Park: Total Constructed Units 522 plus 160 to be constructed. 126 Vacation Units; 12 Transient Units; 384 permanent units; 160 permanent units to be constructed by June 15, 1963." [plaintiffs' exhibit 5]

e. The City was paid 5% percent of the revenues generated by the 544 permanent units, the 126 vacation units, the 12 transient units and various rates for the ancillary facilities including the convenience store and beauty shop operations, slip and boat rentals, gas and oil charges. DHI assigned the lease to De Anza Mobile Estates who in turn assigned the lease to De Anza Harbor Resort and Golf (DHRG). [plaintiffs' Ex. 63 – Master Ground Lease and amendments; Ex. 5, Ex 72 – Gelfand deposition p. 19-22, 52:14-18, 68:17-19, 69:15-17, 81:9-12, 101:13-25, 102:1, 12-16 103:2-5, 10-14, 131:18-24]

f. In 1978 the California Legislature enacted MRL.

g. In 1980 the State Lands Commission advised the City of San Diego that the operation of the mobile home park at De Anza Cove was inconsistent with the public use of State lands. The Commission wrote to the City Attorney stating "It is the opinion of the State Lands

Commission staff, that a phase-out of the residential use of the tide and submerged lands held in trust by the City of San Diego in Mission Bay is in the best interest of all parties involved At the time the original lease was entered into, trailer 'parks' were normally places to "park" trailers for limited (vacation) periods and were towed behind the owners' own vehicles. The evolution of De Anza from a trailer park for the transient-public into a permanent-type residential use is understandable but unacceptable on lands dedicated to public use."

h. In 1981, Assembly Bill 447, the Kapiloff Legislation, was passed by the California Legislature which provided that the De Anza mobile home park leases may continue only if the City of San Diego enacted a resolution by February 1, 1982 concurring in the specific findings of the Kapiloff Bill. These findings included permitting the nonconforming permanent sites at De Anza to remain until November 23, 2003. [plaintiffs' Exhibit 13].

i. Specifically, the Kapiloff Bill provided in Section 1(b) through (f) of AB 447 provide in part that, "The described lands were intended by the Legislature to be used for public recreation and public recreational support facilities, which uses could encompass transient-type guest housing. However, the described lands have in fact been developed with permanent sites for mobilehomes which can no longer be considered public guest housing facilities .In balancing the hardship of relocating tenants with current public needs for expanded recreational lands on Mission Bay sufficient lands are available or can be made available for recreational purposes on Mission Bay until the year 2003. In view of the foregoing, tenants should not be forced by reason of their residential use of the described lands, to relocate outside those lands before November 23, 2003 ." The State by virtue

of the enactment of the Kapiloff Legislation allowed the nonconforming permanent mobile homes to remain until November 23, 2003 so long as the City of San Diego agreed by formal resolution. [plaintiffs' Ex. 13, AB 447]

j. The concluding section of the Kapiloff Bill specifically provided that "If by February 1, 1982, the City of San Diego fails to concur in the findings and determinations set forth in Section 1 of this Act [extending Park operation until 2003], the provisions of this Act shall be inoperative." [plaintiffs' Exhibit 13, AB 447]

k. On April 16, 1981 the City Manager estimated relocation costs for the De Anza Park's residents in 2003 would be about $7 million. The City Manager projected total income to the City from the mobile home park under the then existing lease would be about $9,000,000 by the year 2003. The City Manager provided the City with two alternatives: "(1) Do not support AB 447, terminate the Lease in 1988, pay relocation costs and, the remaining value of improvements and solicit proposals for a new development. (2) Support AB 447 with the renegotiated lease rate and continue existing use until 2003." [plaintiffs' Exhibit 10]

l. On January 22, 1982 City Manager's Report 81-476 recommended in part the execution of the 10th Amendment to the lease agreement. The 10th Amendment would increase the rental rate and "allow De Anza to submit a plan for development of a hotel on the area of the leasehold not utilized by mobile homes ." This plan "would generate revenues to the City on the order of $50-$60 million by the year 2003". [plaintiffs' Ex. 11]

m. On January 25, 1982 the City by resolution endorsed the Kapiloff Legislation (AB 447) extending operation of the mobile home park until 2003 contingent upon execution of the 10th Amendment to the Master

Ground Lease increasing De Anza Park's rental rates. [plaintiffs' Ex. 12]

n. In August 1982 the City sent out Notices to Tenants at De Anza Harbor Resort providing each tenant with a copy of the Kapiloff Legislation. Notwithstanding the provisions of the MRL prohibiting contractual waiver within leases of the protections of the MRL, the City notified the tenants that the 10th Amendment to the Lease provided in part that "all present and future occupants of mobile home spaces shall not be entitled to and may not claim: a. Any relocation allowances .by reason of, or arising out of, the provisions of the said Assembly Bill 447 or by virtue of any action or inaction of Lessee or Lessor pursuant to said Bill The date of expiration of the basic lease is November 23, 2003, .under no circumstances shall any occupant's term be extended beyond November 23, 2003 " [plaintiffs' Ex. 14 – copy of the Notice]

o. In September 1989 residents entered into long term rental agreements ("LTRAs") [plaintiffs' Ex. 16] These agreements provided that they were expressly governed by the MRL and limited relocation benefits only if the City approved DHRG's hotel redevelopment plan. "De Anza and/or The City of San Diego will not provide homeowner, .permitted sublessees, .any additional benefits when the term of this agreement expires other than as provided in Article 20. It is understood that any benefits as provided in Article 20 are received in full satisfaction of any relocation costs and relocation costs advances, and homeowner does hereby agree that such compensation benefits are fair, proper and equitable under the provisions of Calif. Govt. Code 65863.7, and all related benefit compensation statutes." The LTRAs also provided that "Homeowner now has a month-to-month tenancy or a one-year lease

as a subtenant of De Anza. Homeowner's tenancy will terminate no later than November 23, 2003. Homeowner hereby is given notice that De Anza intends to close the park on November 23, 2003. Subject to this Agreement, De Anza is giving up its right to close the park after giving one year's notice, and is instead giving in excess of fifteen (15) years notice ..Homeowner acknowledges that the current use of the Community by De Anza and Homeowner is inconsistent with the purposes of the trust for the lands upon which the community is located as stated in the statutes of California 1945, Chapter 142. The California Legislature, however, passed Assembly Bill No. 447, Chapter 1008 in 1981 .to allow De Ana to continue the present use of the land until November 23, 2003." [plaintiffs' Ex. 16 p. 4 sections 5 and 8, p. 14, Article 8, pp. 18-28, Articles 17-20 and Special Conditions Precedent]

p. In 1997 the City exempted the closure of De Anza Cove from the City's Mobilehome Park Overlay Zone, S.D. Muni Code §101.1002(A)(9) which required a relocation plan that evaluates the impact of displacement on all residents. [plaintiffs' Ex. 24 – SD Muni Code §143.0615(b); plaintiffs' Ex. 17 and Ex. 25 – SD Muni Code §143.0610]

q. On July 27, 1999 the City and DHRG entered into a Memorandum of Understanding wherein DHRG would be able to negotiate with the City regarding potential redevelopment of De Anza Cove. [plaintiffs' Ex. 27] DHRG advised the City that a tenant impact report was advisable and offered to prepare and pay for the report. The City said no. [plaintiffs' Ex. 72 – Gelfand Deposition 77:12-25, 78:1, 82:22-84:12]

r. On November 15, 2002 Michael D. Gelfand, President of Terra Vista Management, Inc. sent notice to each Park resident reaffirming the "legally mandated need to discontinue the residential use of Harbor

Resort on November 23, 2003" and stating that "Under the circumstances present here, Management believes the expiration of Harbor Resort's ground lease with the City and the expiration of your LTRA do not constitute a closure of the mobilehome park as defined by California law. Furthermore, Management is not proposing a change in use or closure of the mobilehome park and does not intend to prepare a tenant impact report as might otherwise be required if there was a change in use or closure ." [plaintiffs' Ex. 33]

s. On May 6, 2003 DHRG notified the City and the Park residents that DHRG had abandoned its efforts to develop a hotel. The MOU expired on May 23, 2003. [plaintiffs' Ex. 34 – Supplemental Notice Regarding Harbor Resort's Discontinuance as a Mobile Home Park sent to each resident]

t. On September 15, 2003 a Notice of Termination of Tenancy was sent to each resident once again informing the residents that "DHRG will not be renewing your LTRA or your mobile home tenancy after the expiration of the ground lease and your LTRA on November 23, 2003 DHRG's ground lease to operate the property as a mobile home park will expire on November 23, 2003, your LTRA will expire on that date, and the use and operation of the property as a mobile home park cannot continue thereafter under current applicable State and City law." No tenant impact report was provided and no relocation costs were tendered to any De Anza Cove owner or tenant. [plaintiffs' Ex. 35]

u. On October 22, 2003 City's Director of Real Estate Assets presented the City's "Transition Plan" to the park's residents. [Lewan Dec ¶ 4; Abbit Dec ¶ 9]

v. The City and various owners and occupants of the Park entered into settlement agreements regarding the rights and obligations of the parties under the MRL. [plaintiffs' Exhibit 50]

Based upon the foregoing, the Court finds that while the City has the right to close the Park at the expiration of the Master Ground Lease and pursuant the Kapiloff Bill to change the use of the property, the City in 1982 by formal resolution adopted the findings of the Kapiloff Bill and decided to continue the operation of the mobile home park until 2003 conditioned upon receiving increased rents. The City thereafter accepted the benefits of ownership in the form of increased rental revenues for over two decades and is correspondingly obligated to accept legal obligations for having operated the Park. In 1981 and 1982 as a part of its decision to continue the operation of the mobile home park, the City contemplated the cost of tenant relocation that would be required in 2003 and the income stream resulting from the continued operation of the mobile home park until 2003 and chose to endorse the Kapiloff Legislation contingent upon execution of an amended ground lease increasing rental income to the City. Plaintiffs' contention that the expiration of the Master Ground Lease and the Kapiloff Bill are not valid reasons authorized under CC §798.56 for Park closure is without merit. Likewise, the City's position that this is a simple expiration of lease and that the City did not terminate the leases or close the Park also lack merit. Clearly, the City made an informed decision on January 25, 1982 to permit the Park to remain open under the terms of the Kapiloff Bill until 2003 when the City adopted Resolution R-255718.

Plaintiffs' summary adjudication raises the question is whether the termination notices caused to be issued by the City to owners and occupants of De Anza Cove complied with CC §798.56. The answer is in the negative in that no tenant impact report

was provided the plaintiffs as is required by subsection (h) which states that the tenant impact report "shall be given to the homeowners or residents at the same time that notice is required .". It is undisputed that none of the notices were accompanied by the mandatory tenant impact report.

The Court denies plaintiffs' motion for summary adjudication of the following issue: "The protections afforded by the Mobilehome Residence Residency Law cannot be waived by contract and all such purported waivers in the City's settlement/rental agreements are void and unenforceable". The Court finds that while any contractual waiver contained within the terms of any lease of mobile homes are by statute void as contrary to public policy, settlement agreements between parties following notice of closure of a park regarding any disputes that may exist are not per se violative of public policy nor contrary to the provisions of the Mobilehome Residency Law. Were that the case, settlement agreements by and between litigants regarding such issues would be void and such disputes could only be resolved by trial. The Legislature certainly did not contemplate such a result when they enacted the MRL. Accordingly, settlement agreements regarding the closure of mobilehome parks are not as a matter of law unenforceable and the MRL does not preclude the parties from entering into settlement agreements.

The Court denies plaintiffs' motion for summary adjudication of the following issue: "Judgment in plaintiffs' favor on defendant City of San Diego's affirmative defense nos. 1, 10, 12, 13, 23, & 24." Plaintiffs' failure to specifically identify each of the City's affirmative defenses improperly requires the Court to seek out the City's Answer

//

in order to ascertain the nature and exact language of each enumerated defense. For instance, plaintiffs in their Amended Separate Statement filed with the Court on January 26, 2007 seek "judgment in plaintiffs' favor on defendant City of San Diego's affirmative defense no. 10 (City not liable because termination of use as mobilehome park consistent with Kapiloff Bill and tidelands trust)" while the City's affirmative defense no. 10 states, "[t]he termination of the nonconforming use of the Property as a mobilehome park was based on and is consistent with the terms of the 1945 tidelands grant by the State of California to defendant, and State of California Assembly Bill 447, 1981 Statutes, Chapter 1008 (the 'Kapiloff Legislation') and other applicable laws." [City's Answer to Third Amended Complaint page 3 lines 7 through 10]

The Court having carefully reviewed the issues presented to the Court in defendant City of San Diego's motion for summary judgment or in the alternative for summary adjudication and having carefully reviewed all evidence cited by the respective parties in their Separate Statements in support of and in opposition to the defendant's motion, the Court denies defendant City of San Diego's motion for summary judgment pursuant to the Court's findings and evidence cited above in reference to the Court's granting of plaintiffs' motion for summary adjudication of issues a, b and c. No disputed fact cited by the defendant in its opposition to the plaintiffs' summary adjudication motion sets forth any disputed issue of fact that would prevent denial of plaintiffs' motion as a matter of law. The City's specific grounds asserted in favor of its summary judgment motion are unsupported in fact or law.

The Court declines to rule upon defendant City of San Diego's alternative request for summary adjudication on the grounds that (1) the issues set forth in the City's notice

of motion are unintelligible as pled and (2) defendant made no attempt to comply with California Rules of Court Rule 3.1350(b) which requires the issues set forth in the notice of motion to be repeated verbatim in the supporting separate statement. For example, defendant's notice of motion seeks "an order adjudicating the First Cause of Action for Violation of the Mobilehome Residency Law I (Park Closure & Relocation) on the grounds that there is no triable issue of material fact, and that the final judgment in this action shall, in addition to any matters determined at trial, award judgment as established by such adjudication." [Notice page 3 line 26 through page 4 line 1] Not only is this issue unintelligible but it is not repeated verbatim in the City's Separate Statement. Issue #1 in defendant's Separate Statement states that "the City is entitled to summary adjudication of the First Cause of Action because certain plaintiffs are not homeowners under the MRL." [Separate Statement page 25 lines 14-15] Even if the Court were able to adjudicate the City's issues relating to "certain plaintiffs" as is requested in issues 13, 14 and 16, these issues do not dispose of the entire First and Third Causes of Action nor does the City carry its burden is establishing as a matter of law that the term homeowners as used in the MRL does not also refer to occupants. [See Civil Code §§ 798 et seq, Gov't Code §§ 65863.7-65863.8]

The confusion created by the divergent language as to what the notice identifies as the issues to be adjudicated and the language of what purports to be the subject of the summary adjudication set forth in the separate statement is further compounded by the defendants' failure to identify with any specificity what evidence precludes the finding of any disputed material fact. The defendant merely incorporates in each of the issues sought to be summarily adjudicated each and every one of the 141 undisputed

facts cited in the separate statement in support motion for summary judgment. The Court is called upon to sift through all of the facts cited in the separate statement in support of the summary judgment to determine those that may have application to the issue sought to be summarily adjudicated. While the Rules of Court generally permit a litigant to rely upon undisputed facts set forth in a separate statement in support of a summary judgment motion, the wholesale incorporation of all facts in the summary adjudication portion of the separate statement merely compounds the discrepancy between the language in the notice and the language in the separate statement of issues to be summarily adjudicated.

Defendant City of San Diego's motion for leave to submit a tardy expert designation is granted.

IT IS SO ORDERED.

Original signed document is in the Court File.

Date: April 20, 2007

/S/
HONORABLE CHARLES R. HAYES,
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO ❑ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 ❑ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 ❑ FAMILY COURT, 1555 6TH AVE., SAN DIEGO, CA 92101-3296 ❑ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105 ❑ KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 ❑ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 ❑ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 ❑ RAMONA, 1428 MONTECITO RD., RAMONA, CA 92065-5200 ❑ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649 ❑ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792	
PLAINTIFF(S)/PETITIONER(S) DE ANZA COVE HOMEOWNERS ASSOCIATION INC.	
DEFENDANT(S)/RESPONDENT(S) CITY OF SAN DIEGO, et al.	Judge: CHARLES R. HAYES Dept.: 66
CLERK'S CERTIFICATE OF SERVICE VIA ELECTRONIC TRANSMISSION (CCP 1010.6/CRC 2.260)	CASE NUMBER GIC821191

I, **MICHAEL M. RODDY**, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

ORDER VACATING AND AMENDING THE COURT'S MARCH 28, 2007 ORDER

on the designated recipient(s) below by causing said document(s) to be prepared in portable document format (*.pdf) for e-mailing and served **via electronic transmission** as file attachment through the San Diego Superior Court e-mail system and the transmission was reported as complete and without error.

Executed at:
[X] San Diego [ ] Vista [ ] El Cajon [ ] Chula Vista [ ] Oceanside [ ] Ramona, California.

NAME	e-mail
Thorsnes Bartolotta & McGuire APC	
Vincent J. Bartolotta, Jr.	Bartolotta@tbmlawyers.com
Karen R. Frostrom	frostrom@tbmlawyers.com
Aran J. Wong	wong@tbmlawyers.com
Tatro & Zamoyski LLP	
Timothy J. Tatro	tim@tatrozamoyski.com
Peter A. Zamoyski	peter@tatrozamoyski.com
Office of the San Diego City Attorney	
Robert J. Walters	RWalters@sandiego.gov
Gordon & Rees LLP	
William M. Rathbone	wrathbone@gordonrees.com
Timothy K. Branson	tbranson@gordonrees.com
Allison F. Borts	aborts@gordonrees.com
	klasky@gordonrees.com

MICHAEL M. RODDY
CLERK OF THE SUPERIOR COURT

Date: April 20, 2007 By: /s/ , Deputy
D. LIM