Timothy J. Tatro, Cal. State Bar No. 175633
Peter A. Zamoyski, Cal. State Bar No. 185579
TATRO & ZAMOYSKI, LLP
12264 El Camino Real, Suite 400
San Diego, CA 92130-3063
TEL: (858) 244-5032 FAX: (858) 847-0032
WEBSITE: www.tatrozamoyski.com

Attorneys for Plaintiffs DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., ETHEL MURPHY, DORCAS TUROSKI, MILDRED RUBIN, ROBERT RUFFATO, EILEEN COFER, LISA BOCK, JAMES GIACOLLI, and ALL OTHERS SIMILARLY SITUATED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., a California non-profit corporation;
ETHEL MURPHY, an individual;
DORCAS TUROSKI, an individual;
MILDRED RUBIN, an individual;
ROBERT RUFFATO, an individual;
EILEEN COFER, an individual;
LISA BOCK, an individual; and
JAMES GIACOLLI, an individual,
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

CITY OF SAN DIEGO, a California municipality;
CONCORDIA ENTERPRISES, INC., a California corporation;
HAWKEYE ASSET MANAGEMENT, an unknown business entity type which is allegedly a wholly owned subsidiary of CONCORDIA ENTERPRISES, INC.;
METROPOLITAN PUBLIC SAFETY, a California corporation; and
DOES 1-50, inclusive,

Defendants.

Case No. GIC 821191

CLASS ACTION

PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF SAN DIEGO'S DEMURRER TO THIRD AMENDED COMPLAINT

DATE: October 28, 2005
TIME: 11:00 a.m.
DEPT: 66
I/C JUDGE: Hon. Charles R. Hayes

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Tatro & Zamoyski, LLP
12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

Introduction

Twice before, the City of San Diego has challenged the pleadings in this matter, attacking virtually every cause of action with many of the same arguments extended in its current demurrer. In particular, the Court twice previously denied the City's demurrer to what are currently the 1st, 2nd, 3rd, 4th and 5th causes of action. Ironically, the Third Amended Complaint ("TAC") was drafted in response to the City's desire to treat this case as a class action in order to provide finality as to all affected homeowners and residents. It was precisely to address the City's concern regarding the HOA's standing that Plaintiffs agreed to file the TAC as a class action. Now, the City has utilized the new filing as a chance to take a third bite at the apple.

Overall, the City's demurrer fails for three reasons: (1) it recycles unsuccessful arguments from the past—same wine, different bottle; (2) it raises factual and legal issues that cannot be adjudicated at the pleading stage; and (3) it fails to include key statutory sections and case law that unravel the very underpinnings of the City's position. After addressing these issues in detail below, plaintiffs will ask the Court to deny the City's demurrer in its entirety.

Standard for Demurrer

A demurrer will be sustained only where the pleading is defective on its face.[1] It is well established that "a demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleadings that are judicially noticeable."[2] A demurrer tests the sufficiency of a pleading, but not the evidence or the facts alleged therein.[3]

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[1] *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.

[2] *Blank v. Kirwan* (1985) 160 Cal.App.3d 23.

[3] *City of Atascadero*, 68 Cal.App.4th at 459.

Tatro & Zamoyski, LLP
12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

Argument

1. The City's demurrer to the second cause of action for Violations of the Mello Act is improper because the City failed to comply with the requisite notice provisions, never took action under the Mello Act, and challenges the relief requested, not the cause of action itself.

The City tries to utilize—against the Plaintiffs—the procedural requirements found within the Mello Act while contending that it does not have to follow the Act itself. The City cannot have it both ways. It has taken the position from the beginning that the Mello Act does not apply and has failed to comply with the mandatory notice provisions of the Government Code.

A. Even if it might have applied, the City is estopped as a matter of law from asserting the Exhaustion Doctrine because the City failed to comply with the mandatory notice provisions of the Mello Act.

The City is estopped from raising the exhaustion-of-administrative-remedies doctrine because the City failed to comply with the notice provisions of the Government Code. Government Code section 65009 requires the City, prior to a public hearing, to advise the public that all anticipated challenges need to be raised at the hearing or submitted in writing before the end of the hearing. Specifically, the Code requires:

> If a public agency desires the provisions of this subdivision [exhaustion doctrine] to apply to a matter, **it shall include in any public notice** issued pursuant to this title a notice substantially stating **all of the following:** 'If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public agency conducting the hearing) at, or prior to, the public hearing.'[4]

The City failed to post any such notice.

Because the City failed to comply with the notice provisions of the Government Code, it cannot rely upon the exhaustion doctrine as a defense. This is precisely the holding of the *Kings County* case, which the City failed to cite for the Court: "Appellants did not receive notice of the exhaustion requirement. Accordingly, the exhaustion requirement of Government Code section 65009 does not apply…. **A public agency cannot claim the protection of the exhaustion**

[4] Gov't Code § 65009(b)(2).

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

doctrine [when the agency failed] to provide notice of the doctrine's application."[5]

The agenda that the City made available to the public for the November 18, 2003 public hearing stated only that the City Council would be considering adoption of a resolution that made "findings relating to the Discontinuance of Non-Transient Residential Use at De Anza Point; authorizing the City Auditor and Comptroller to appropriate $2,000,000 from the San Diego Housing Commission to implement the transition plan; and related actions." (Agenda for Council Meeting; City Manager's Report; City Resolution; and Minutes of Council Meeting attached to Tatro Decl. as Exs. 1-4.)

There was absolutely no mention of the Mello Act, the need to raise all concerns at the hearing as a prerequisite to legal action, or the consequences of not doing so. Even if a lay person could digest the meaning of "Discontinuance of Non-Transient Residential Use," he or she would never infer that this hearing supposedly was their only opportunity to lay the foundation for a legal claim based on violations of the Mello Act—an act that most people have never even heard of.

B. The Exhaustion Doctrine also does not apply because Plaintiffs are challenging the City's attempted self-exemption from the Mello Act—not a planning decision.

The thrust of Plaintiffs' claim is not that the City's compliance with the Mello Act was inadequate, but that the City's summary decision to attempt to exempt itself from the Act altogether was unlawful. Normally, for example, if a public agency completed a feasibility study—as required under the Mello Act—and then decided that replacement dwellings are not required because of an over-abundance of affordable housing in the area, then a plaintiff would be challenging a planning decision under the Mello Act. Under that scenario, a plaintiff would arguably have to exhaust his administrative remedies first. Here, however, the City took the legal position that the Mello Act did not apply at all and so it took no action—planning or otherwise—under that Act. The City overlooks this distinction and the consequences are fatal to its demurrer.

Because Plaintiffs are attacking the City's lack of any action under the Mello Act, Plaintiffs'

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[5] *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 740 (emphasis added).

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

challenge is not subject to the exhaustion doctrine. In the *Venice Town Council* case, which is directly on point, the Court of Appeal recognized that the plaintiff was not required to exhaust its administrative remedies where plaintiff challenged, not a planning decision per se, but the City's interpretation of its responsibilities under the Mello Act.[6]

Here, Plaintiffs are likewise challenging the City's interpretation of its responsibility under the Act. Specifically, Plaintiffs take issue with the City's interpretation that closing the mobilehome park to develop another use was not a "conversion or demolition by the City of San Diego or the Lessee within the meaning of [the Mello Act] or any other provision of law." (TAC, ¶ 77.) The City clearly took the position that its closure of the De Anza Cove mobilehome park fell outside the scope of the Mello Act and, therefore, the City conducted no feasibility studies and provided no replacement housing. For this reason, Plaintiffs were not required to exhaust administrative remedies potentially available under an act that the City chose not follow. In fact, the City's failure to operate under the Mello Act at all was one of the bases for requesting injunctive relief. (TAC, ¶ 79.)

C. A demurrer is not the proper tool for challenging the relief requested.

Next, the City attacks Plaintiffs' prayer for a writ of mandate to compel the City to comply with the Mello Act. This portion of the City's demurrer, however, does not attack the Mello Act cause of action itself, but rather, the relief requested—a tactic that runs afoul of established precedent. A demurrer may test the sufficiency of the factual allegations of the complaint, but cannot challenge the prayer.[7]

Even so, if the Court deems it necessary, Plaintiffs are willing to cure any perceived defect by simply filing a verification of that portion of the Third Amended Complaint that supports the request for a writ of mandate.[8]

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[6] *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal. App. 4th 1547, 1567-1568.

[7] *Siciliano v. Fireman's Fund Insurance Co.* (1976) 62 Cal. App. 3d 745, 751; *Grieves v. Superior Court (Fox)* (1984) 157 Cal. App. 3d 159, 166.

[8] Weil & Brown, CAL. PRACTICE GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2005) ¶ 6:313, p. 6-68.2.

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Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

D. Plaintiffs' claim for Mello Act violations is timely.

The City's contention that the Mello Act claim is time-barred is completely without merit. Not only are the City's statutory violations subject to a three-year statute of limitations, but even if a 90-day limitations period applied, Plaintiff filed this lawsuit *the same day* that the City adopted its resolution purportedly exempting the City from compliance with the Act.

1. The City's failure to act is subject to a three-year statute of limitations.

Because Plaintiffs seek to enforce an obligation created by statute, the three-year statute of limitations applies.[9] According to the *Venice Town Council* case, the "90-day statute of limitations for review of administrative decisions is inapplicable" where the complaint does not challenge a specific planning decision made under the Mello Act.[10] Again, the City opted not to operate under the provisions of the Mello Act at all. That is the action challenged in the Third Amended Complaint. As the duty to comply with the Mello Act is created by the statute itself, the three-year statute of limitations controls.

2. Even assuming that the Mello Act claim was subject to a 90-day limitations statute, plaintiff filed suit well within that time frame.

Even assuming, hypothetically, that the City's interpretation of its responsibilities under the Mello Act triggered a 90-day limitations period, plaintiff originally filed suit the same day that the City adopted the resolution finalizing its decision not to follow the Mello Act. The original complaint, filed November 18, 2003, and the first amended complaint, filed on January 20, 2004, contained a cause of action based on violations of the Mello Act. Both were filed comfortably within 90 days of the City's decision on November 18, 2003. The applicable limitations statutes were tolled the instant plaintiff originally filed suit in November 2003. There is no statute of limitations issue as to the Mello Act.

Because the exhaustion-of-administrative-remedies doctrine cannot apply here and the lawsuit

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[9] Civ. Proc. Code § 338.

[10] *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal. App. 4th 1547, 1567-1568.

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(858) 244-5032

was timely filed, the second cause of action in Plaintiff's TAC—the City's violation of the Mello Act—is properly pleaded. The City's demurrer should be overruled.

2. Plaintiffs' third cause of action for failure to discharge a mandatory duty is ripe for adjudication because the duties imposed by the Mobilehome Residency Law and the Mello Act are mandatory.

The City cannot validly demur to a violation of a mandatory duty cause of action simply by arguing that the Court hasn't yet ruled that the City owed the mandatory duty and violated it. The City's "ripeness" argument is purely circular. If the City's logic prevailed, public entities would eviscerate every lawsuit at the pleading stage simply by denying the validity of the duty alleged.

Once the MRL and the Mello Act are found to be applicable here as a matter of law, then the City will be liable for its failure to fulfill these mandatory duties. There is no authority requiring Plaintiffs to wait to file this cause of action for some day in the future. And worse yet, if Plaintiffs waited until these questions of law are first resolved as the City implores, the Statute of Limitations may have run on the claims stemming from the violation of those mandatory duties. (Indeed, the City raises a statute of limitations defense several times in its demurrer.)

Ultimately, this cause of action turns on the Court's determination that the City is duty-bound to comply with the various statutes alleged in the TAC—an analysis that the Court will have an opportunity to engage in at the summary adjudication stage. If the Court truly desires to evaluate the mandatory-duty issue at this premature procedural juncture, then Plaintiffs request that the Court review Plaintiffs' Motion for Summary Adjudication which discusses the City's mandatory duties in great detail.[11]

3. Plaintiffs properly alleged their fourth cause of action for inverse condemnation—a compensable government taking of personal property for a public use.

Plaintiffs have adequately pled: (1) a recognizable "taking"; (2) for a public use; and

[11] See HOA's Motion for Summary Adjudication, filed Oct. 4, 2004, P&A pgs. 20-34.

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Del Mar, CA 92130-3063
(858) 244-5032

(3) resulting economic harm. But the City contends in its demurrer that Plaintiffs cannot state a viable claim for inverse condemnation because the City is allegedly not taking Plaintiffs' property for a public use and the claim is not ripe because the taking has not yet occurred. However, in addition to the erroneous factual assumptions underlying these arguments—none of which can be entertained at the demurrer stage—the City's analysis lacks persuasiveness or authority.

First, the City misplaces its focus only on "real property." Under California law, both real *and* personal property can be "taken" for the purposes of an inverse condemnation claim.[12] Thus, the fact that mobilehomes may be classified as personal—versus real—property is absolutely immaterial to the claim. **When there is, indeed, a "taking," the resulting damage to the Plaintiffs' mobilehomes is compensable irrespective of who owns the land underneath.**

Second, the City's actions in closing the Park constitute a "taking" for a public purpose and Plaintiffs have so alleged. (TAC, ¶ 87.) Indeed, from the very beginning of this litigation, the City has claimed that it is duty-bound to convert De Anza to "park and recreation use" under its interpretation of the Kapiloff Bill and City Charter. (See City Resolution, Ex. 2 to Req. for Judicial Notice, p. 11, ¶ G.)

Whether the City ultimately approves a hotel development, a picnic area, or any other use of the land, its stated justification for closing the mobilehome park has always been tied to public policies. It is simply ludicrous to argue that Plaintiffs have failed to allege a taking *for a public use*.

The City's reliance on *Selby*[13] does not alter the conclusion that Plaintiffs have properly pled an inverse condemnation claim. In *Selby*, the inverse condemnation claim failed because plaintiff did not allege an economic impairment to his property sufficient to justify a "taking." The plaintiff's property in that case was not directly or immediately affected by the county's plan to develop neighboring land at some point in the future.[14] Here, by contrast, Plaintiffs have pled a direct and immediate harm to their homes. The City stated that it will evict any residents who do not accept the City's "Transition Plan" and refuse to waive their legal rights. (TAC, ¶¶ 34, 37.) Eviction will

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[12] *Sutfin v. State* (1968) 261 Cal.App.2d 50, 53.

[13] *Selby Realty Company v. City of Buenaventura* (1973) 10 Cal.3d 110.

[14] *Selby*, 10 Cal.3d at 119-120.

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Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

lead—and has led—to the demolition of resident homes at the Park. (TAC, ¶ 41.) Demolition is an economic impairment to Plaintiffs' property, to say the least.[15]

Third, the City's assertion that this is not a "taking"—a farfetched notion that is too fact-intensive to consider on demurrer—deliberately overlooks the huge elephant in the middle of the room: these homes cannot be moved without destroying them. (TAC, ¶ 41.) If the City were not closing the Park, the homes would not have to be moved. Therefore, the City's "Transition Plan" is and will continue to be the direct and proximate cause of the destruction of the vast majority of homes in the Park.

Finally, the City's contention that the claim is premature makes no sense. The economic injury occurred from the moment the City announced its "Transition Plan" on October 22, 2003, if not earlier. Once it became clear that the City was moving ahead with its plan to close the mobilehome park—as opposed to extending the lease as had been discussed—the value of the homes at the park plummeted, as one would expect. (TAC, ¶ 87.) Realistically, what is the resale value of a home that is subject to immediate demolition? And once the home is detroyed, all equity in the home evaporates, magnifying Plaintiffs' economic injury. (TAC, ¶ 87.)

In sum, Plaintiffs have sufficiently pled that the City's actions have led to the destruction or substantial loss in value of their homes. Such damage is compensable under the law of emminent domain.[16] While the City pokes at the merits of Plaintiffs' claim and makes erroneous factual assertions related to private property, these factual challenges are not well-presented in a demurrer. To the contrary, all of Plaintiffs' factual allegations are deemed to be true as pled. The City's demurrer to the inverse condemnation cause of action fails.

4. Plaintiffs *are* "displaced persons" under the California Relocation Assistance Law—the City just didn't cite the other sections of the Law.

The City claims that Plaintiffs are not "displaced persons" under Plaintiff's fifth cause of

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[15] See *Greening v. Johnson* (1997) 53 Cal.App.4th 1223, 1226 (MRL provides unique rights for mobilehome owners due to the economic hardships of moving).

[16] *People ex rel. Dep't. Pub. Works v. Vounteers of America* (1971) 21 Cal.App.3d 111; *Harding v. State of California ex rel. Dep't. of Transp.* (1984) 159 Cal.App.3d 359.

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12264 El Camino Real, Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

1 action—the California Relocation Assistance Law (CRAL)—because "there are no allegations, nor
2 can there be, that the Plaintiffs are being displaced by reason of the **acquisition** of the property by
3 the City. In fact, at all relevant times, the City owned the subject property." (Demurrer P&A,
4 p. 11, lines 21-24 (bold text added).) Plaintiffs agree that the City has owned the property for over
5 fifty years and—if the definition of "displaced persons" under the CRAL actually hinged *only* on
6 "acquisition" of property—Plaintiffs would likely have no viable cause of action. But that is not
7 the law. Plaintiffs *do* qualify as "displaced persons," are entitled to relocation assistance, and
8 properly pleaded their fifth cause of action based on the City's violations of the CRAL.
9
10 **A. The Legislature expanded the CRAL to provide benefits *whenever* a public entity**
11 **displaces people, not just when it does so from acquiring property.**

12 As this Court may recall from Plaintiffs' opposition to one of the City's prior demurrers filed a
13 year-and-a-half ago, the CRAL (Gov't Code §§ 7260-7277) was amended in 1989 to *ease* the
14 criteria necessary for triggering relocation assistance. Unfortunately, the City accidentally cited
15 and discussed only "acquisition" of property by a public entity—which is only the first of *two*
16 provisions under which people qualify for relocation assistance as "displaced persons" under the
17 CRAL. (Gov't Code § 7260(c)(1)(A)(***i***).) Although the City mentions in passing that "the CRAL
18 was amended in 1989," it failed discuss *any* of those sweeping amendments which are incredibly
19 pertinent to this analysis. (Demurrer P&A, p. 11, lines 13-14.)

20 In 1989, the Legislature added a *second* definition of "displaced person," which includes
21 **anyone who is displaced due to "rehabilitation, demolition, or other displacing activity**, as the
22 public entity may prescribe under a program or project undertaken by a public entity, of real
23 property on which the person is a residential tenant…." (Gov't Code § 7260(c)(1)(A)(***ii***).) The
24 comprehensive amendments to the CRAL now **mandate relocation assistance** not only upon
25 "acquisition" of property, but also "**[w]henever a program or project to be undertaken by a**
26 **public entity will result in the displacement of any person.**" (Gov't Code § 7262(a) (emphasis
27 added).) These expansive amendments mean that, when a public entity's program or project
28 *displaces* any person, "the displaced person is entitled to payment for … actual and reasonable

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

expenses in moving himself or herself, his or her family . . . or his or her family's personal property." (Gov't Code § 7262(a).)

Why did the Legislature broaden the application of the CRAL, even though it would place additional burdens on the displacing entity? The answer lies in the amendments themselves wherein the Legislature expressed its concern for the welfare of displaced residents and highlighted the fact that there is more than one potential cause of displacement:

> (a) The Legislature finds and declares the following:
>
> (1) **Displacement** as a direct result of programs or projects undertaken by a public entity **is caused by a number of activities**, including rehabilitation, demolition, code enforcement, and acquisition.
>
> (2) Relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons.
>
> * * *
>
> (4) **Minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities.**
>
> * * *
>
> (b) This chapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a public entity. The primary purpose of this chapter is to ensure that these persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on these persons.[17]

With the adoption of this amendment over 15 years ago, the purpose of the CRAL evolved to include providing relocation benefits to people whenever a public entity's actions displace them, *in addition to* when displacement occurs as a result of a public entity's acquisition of property.

B. Without citing any of the significant amendments to the CRAL since 1989, the City continues to rely on the outdated *Stephens* case and the inapplicable *Kong* case.

The City once again bases its entire argument on *Stephens*[18]—an outdated case that failed to persuade this Court in prior demurrers. The *Stephens* court interpreted the CRAL as it existed back in 1982 before the Legislature significantly amended the CRAL. Nearly a quarter century ago when *Stephens* was decided, the language of the statute *did* require "acquisition" of real property by

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[17] Gov't Code § 7260.5 (emphasis added).

[18] *Stephens v. Perry* (1982) 134 Cal.App.3d 748.

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

the public entity before the CRAL provided mandatory relocation assistance and benefits.[19] But as detailed above, the Legislature changed everything in the years after *Stephens* was decided.

The CRAL now mandates relocation assistance not only upon "acquisition," but also "**[w]henever a program or project to be undertaken by a public entity will result in the displacement of any person.**"[20] In light of the Legislature's decision to amend the CRAL and provide *more expansive* protections, the *Stephens* case is of dubious precedential value for interpreting the amended CRAL. It certainly has no bearing whatsoever on the issues in this case, since Plaintiffs have alleged that the City violated the CRAL—not by acquisition of the underlying real property—but by the City's actions to close the Park that directly result in the displacement of the people of De Anza Cove.[21]

The City's reliance on *Kong v. City of Hawaiian Gardens Redevelopment*[22] is equally unavailing because *Kong* had nothing to do with the second prong of the CRAL's definition of displaced persons. In fact, it was stipulated in *Kong* that it was a classic case of a public entity acquiring property (a donut shop).[23] The City agrees: "there was no question in *Kong* that there was an acquisition of the property triggering the definition of 'displaced person.' This is not so in the case at bar." (Demurrer P&A, p. 11, lines 27-28, n. 4.) Therefore, there was no need to look to the second prong of the CRAL—*i.e.,* **anyone who is displaced due to "rehabilitation, demolition, or other displacing activity** . . . ."[24]

But, again, the City in its demurrer neither identified this second prong for the Court nor analyzed the facts of the De Anza Cove case within the context of the *amended* statute. If the City had provided the full text of *Kong*, rather than stopping at the bottom of page 1326, the court would have been provided with both prongs of the displaced person test—a displaced person is any person who moves because of *either*: (1) acquisition of real property by a public entity; or "(2) As a result

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[19] *Stephens*, 134 Cal.App.3d at 755.

[20] Gov't Code § 7262(a) and § 7260(c)(1)(A)(***ii***).

[21] *E.g.*, Gov't Code §§ 7260(c)(1)(A)(***ii***), 7262(a); TAC, ¶ 24.)

[22] *Kong v. City of Hawaiian Gardens Redevelopment* (1992) 101 Cal.App.4th 1317.

[23] *Kong*, 101 Cal.App.4th at 1327.

[24] Gov't Code § 7260(c)(1)(A)(***ii***).

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

of the rehabilitation, demolition or other displacing activity undertaken by a public entity…."[25]

As Plaintiffs have maintained all along, one looks at the result—displacement—as the key factor, not acquisition. So did the *Kong* court: "The bottom line is that petitioner was required to move and thus was displaced for a public project. Inasmuch as petitioner established that he was a 'displaced person' within the meaning of Government Code section 7260…, his petition should have been granted."[26] The *Kong* court then mandated the City of Hawaiian Gardens to pay relocation benefits.[27]

Unfortunately, the City failed to address the Legislature's amendments to the CRAL since 1989 or the effect of those amendments. And it mistakenly failed to address the critical second prong of the displaced person test. Plaintiffs *do* qualify as "displaced persons," are entitled to request relocation assistance, and sufficiently pled their fifth cause of action based on the City's violations of the CRAL. The Court should deny the City's demurrer to the fifth cause of action.

5. Plaintiffs' sixth cause of action for violation of the California Constitution is well-pled.

In seeking to eliminate Plaintiffs' sixth cause of action, the City alleges that Plaintiffs' constitutional claims are barred by the statute of limitations and prior court order, as well as for lack of a suspect class. But, as detailed below, the City's demurrer should be denied because Plaintiffs' Complaint was timely filed since its filing date relates back to November 2003, new individual Plaintiffs were added as parties to overcome any prior perceived defect with standing, and the municipal code at issue cannot survive review under either the strict scrutiny or rational basis tests.

A. There is no statute of limitations issue since, by stipulation and Court Order, the Third Amended Complaint's filing date relates back to November 2003.

On February 22, 2005, this Court entered the Stipulation to Stay Litigation and to Continue

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[25] *Kong*, 101 Cal.App.4th at 1327.
[26] *Kong*, 101 Cal.App.4th at 1331.
[27] *Kong*, 101 Cal.App.4th at 1331-1332.

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12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

Motion Hearing Dates; Order Thereon. The City of San Diego already formally stipulated to allow the addition of new parties and causes of action in an amended complaint, and—to avoid any statute of limitations argument—the amendments relate back to the date of filing the original complaint in November 2003. Paragraph 10 of the Stipulation and Order states verbatim:

> The City of San Diego agrees and stipulates that, within 45 days of the expiration or termination of this Stay of Litigation, Plaintiff may file, without leave of court, an amended complaint in this case, GIC 821191, to add new parties and causes of action and that said amendments will—if necessary to avoid statute of limitations issues—relate back to the date of the filing of Plaintiff's original Complaint in November 2003.

Plaintiffs' Third Amended Complaint and all of its causes of action, therefore, relate back—where necessary—to November 18, 2003, the filing date of the original complaint. The City's municipal code provision at issue promises that the City will "deal with any discontinuance and relocation issues involved with De Anza Mobilehome Park by separate ordinance or resolution because of the unique conditions applicable to the De Anza Mobilehome Park."[28] The City passed its resolution explaining how it would "deal with the discontinuance and relocation issues" under section 143.0615(b) on November 18, 2003. Since the City passed its resolution on November 18, 2003—and Plaintiff's Third Amended Complaint relates back where necessary to that the original filing date, November 18, 2003—even if there were a *one-day* statute of limitations, Plaintiffs timely presented their claims.

B. Plaintiffs added new individual plaintiff parties with proper standing to pursue the City's violations of the California Constitution.

Plaintiffs have added individual plaintiffs to seek redress for the City's violations of the California Constitution. The principal basis for granting the City's prior demurrer as to this cause of action was the Court's conclusion that the Homeowners Association, alone, lacked standing to raise the constitutional challenges. As noted above, by stipulation and Court Order, **Plaintiffs properly and timely added these individual parties and causes of action**. These new plaintiffs clearly have standing and are unquestionably able to pursue the City's constitutional violations.

[28] S.D. Muni. Code § 143.0615(b).

Tatro & Zamoyski, LLP
12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

And these individuals have properly pleaded the City's constitutional violations stemming from Municipal Code section 143.0615(b)—which expressly singles out and excludes the De Anza Cove mobilehome park from the City's Mobilehome Overlay Zone—thereby completely depriving Plaintiffs and the Class from the benefits of Municipal Code section 143.0610, benefits enjoyed by all other residents of mobilehome parks located within the City. The constitutional violations are distinctly pleaded for Equal Protection violations (TAC, ¶¶ 93-98), Due Process violations (TAC, ¶¶ 99-101) and State Preemption (TAC, ¶¶ 102-103).

Plaintiffs' Third Amended Complaint identifies the municipal code section at issue and the City's corresponding violation of each particular clause of the California Constitution at issue, and properly pleads the reasoning for each violation. And the individual Plaintiffs—who are properly added as new parties to this case—have standing to raise these constitutional challenges.

C. Plaintiffs correctly pleaded both heightened protection as a protected class, and ordinary protection afforded to any citizen under the Due Process and Equal Protection clauses.

Although the existence of a suspect class is only relevant to the standard of review—it has no bearing whatsoever on whether the City's violations of the California Constitution are adequately pled in the TAC—Plaintiffs nonetheless correctly pleaded both heightened protection as a protected class, and ordinary protection afforded to any citizen under the Due Process and Equal Protection clauses.

The City submits only one legal authority—AmJur—to make its assertion that poverty is not a protected class. (Demurrer P&A, p. 13, lines 6-7, and n. 6.) But AmJur is a federal authority, not a California authority. Unlike the Federal Constitution, under the California Constitution—and California Supreme Court precedent—**poverty *is* a suspect class and does trigger a "strict scrutiny" standard of review**.[29]

Plaintiffs pleaded their cause of action under the California Constitution and pleaded that some of the De Anza Cove residents are low income and fall within the classification of poverty. Thus, one day, when there is a substantive motion that touches on the facts and law of the case—like a

[29] *Serrano v. Priest* (1976) 18 Cal.3d 728, 760-766 (opinion suppl. (1977) 20 Cal.3d 25).

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Del Mar, CA 92130-3063
(858) 244-5032

summary adjudication motion and not a demurrer—the Court will be in position to strictly scrutinize Municipal Code section 143.0615(b) and the City's accompanying resolution and uphold it only if the Court determines that the legislation is narrowly tailored and furthers a compelling governmental interest.[30]

Similarly, even if there were no suspect classification, the Court would need to determine if the City's legislation were (a) reasonable, (b) not arbitrary, (c) having a fair and substantial relation to the object of the legislation so that all person similarly circumstanced are treated alike, or (d) rationally related the disparity of treatment with some other legitimate governmental purpose.[31] The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law.[32] And lastly, the Court would have the opportunity to determine that the municipal code section at issue duplicates or contradicts an area fully occupied by state law, either expressly or by implication, and is thus preempted by state law.[33] Obviously, none of these analyses can be tackled by the Court at the pleading stage.

6. Plaintiffs' claims for Negligent and Intentional Infliction of Emotional Distress are properly pled because the City cannot escape liability for the wrongful actions of its employees and independent contractors.

In its demurrer, the City argues that Plaintiffs' eighth and ninth causes of action for Negligent Infliction and Intentional Infliction of Emotional Distress, respectively, are not maintainable against the City due to the immunities found in Government Code section 815. But the City failed to mention that sections 815.2 and 815.4 statutorily extend tortious liability against the City for: (1) the acts of its employees and (2) the acts of its independent contractors—co-defendants Hawkeye Asset Management and Metropolitan Public Safety. And Plaintiffs pleaded in their Third

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[30] E.g., *Flynt v. California Gambling Control Com'n* (2002) 104 Cal.App.4th 1125.

[31] E.g., *People v. Rhoades* (2005) 126 Cal.App.4th 1374, 1383; *Flynt*, 104 Cal.App.4th 1125.

[32] E.g., *People v. Hall* (2002) 101 Cal.App.4th 1009.

[33] E.g., *Village Trailer Park, Inc. v. Santa Monica Rent Control Bd.* (2002) 101 Cal.App.4th 1133 (citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893).

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Del Mar, CA 92130-3063
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Amended Complaint that the City is liable for the negligent and intentional actions of its employees and independent contractors during the City's exclusive management of the mobilehome park since November 2003. There is no immunity for the City.

The City of San Diego is liable under the Government Code for the negligent acts of its employees. It is well known that Government Code section 815.2 provides that "a public entity *is liable* for injury proximately caused by an act or omission of the public entity's employee within the scope of his or her employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his or her personal representative."[34] This section imposes vicarious liability on public entities for the tortious acts and omissions of their employees committed during the scope of employment under circumstances in which the employees would be personally liable. Further, "a public employee *is liable* for injury caused by his or her act or omission to the same extent as a private person."[35] "Thus, a public employee's liability must be resolved according to principles of negligence that would apply if the employee were a private person. Consequently, a public entity's vicarious liability frequently depends on general negligence principles, such as duty of care, that would apply in evaluating the liability of a private person."[36] Similarly, the City is also liable for the negligent and intentional acts of its independent contractors.

Government Code section 815.4—dealing with "injuries by independent contractors"—expressly extends liability to a public entity "for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject of such liability if it were a private person."[37] Here, the City is made liable, by statute, for all tortious acts of Hawkeye Asset Management and Metropolitan Public Safety during the City's exclusive management of the mobilehome park since November 2003. For example, the TAC alleges, among other tortious acts:

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[34] Gov't Code § 815.2 (italics added).

[35] Gov't Code § 820 (italics added).

[36] CALIFORNIA TORTS, Matthew Bender § 60.21.

[37] Gov't Code § 815.4.

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12264 El Camino Real,
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- Threatening residents—who've paid their rent—with eviction through ex parte communication by the City's lawyers and on-site management company
- Illegally searching residents' homes and falsely imprisoning them
- Bringing in armed guards and instructing its guards to act more aggressively towards residents
- Towing and impounding residents' cars, trucks, and trailers
- Threatening and physically intimidating residents and their guests
- Brandishing firearms, effectuating false arrests, assaulting residents, trespassing, and creating an oppressive environment.[38]

Plaintiffs properly pleaded their causes of action for NIED and IIED against the City due to the tortious acts of the City's employees and independent contractors. The Court should overrule the City's demurrer as to these two causes of action.

Conclusion

This Court has twice previously denied the City's demurrers to what are currently the 1st, 2nd, 3rd, 4th and 5th causes of action. In large part, Plaintiffs drafted the Third Amended Complaint in response to the City's stated desire to treat this case as a class action and to satisfy the City's concerns regarding the HOA's standing. Instead of moving forward with the case, the City delayed the class certification process by bringing a demurrer. The City failed to include key statutory sections and case law that unravel the very underpinnings of the City's position. It also raised factual and legal issues that cannot be adjudicated at the pleading stage via demurrer.

Simply put, the Third Amended Complaint is a comprehensive pleading and Plaintiffs have correctly pled their causes of action. Plaintiffs, therefore, request that the Court overrule the City's demurrer in its entirety and establish a class certification hearing date.

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[38] TAC, pp. 30-31, ¶ 112.

Tatro & Zamoyski, LLP
12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
(858) 244-5032

Respectfully Submitted,

DATE: October 18, 2005

TATRO & ZAMOYSKI, LLP

By:________________________________

Timothy J. Tatro, Esq.
Peter A. Zamoyski, Esq.
Attorneys for Plaintiffs DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., ETHEL MURPHY, DORCAS TUROSKI, MILDRED RUBIN, ROBERT RUFFATO, EILEEN COFER, LISA BOCK, JAMES GIACOLLI, and ALL OTHERS SIMILARLY SITUATED

Tatro & Zamoyski, LLP
12264 El Camino Real,
Suite 400
Del Mar, CA 92130-3063
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