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6 DE ANZA COVE HOMEOWNERS
ASSOCIATION, INC
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10 DE ANZA COVE HOMEOWNERS
ASSOCIATION, INC., a California non-profit
11 corporation,

12 Plaintiff,

13 v.

14 CITY OF SAN DIEGO, a California
municipality; and DOES 1-100, inclusive,

15 Defendants.
16

17 AND RELATED CROSS ACTION
18

Case No. GIC 821191

**PLAINTIFF'S EX PARTE
APPLICATION RE: CITY'S REFUSAL
TO PAY OR REIMBURSE TAXES
THAT HAVE ALREADY PAID BY THE
DE ANZA COVE RESIDENTS
THROUGH THEIR MONTHLY RENT**

DATE: December 8, 2004
TIME: 8:30 a.m.
DEPT: 66
I/C JUDGE: Hon. Charles Hayes

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20
21 **Issue**

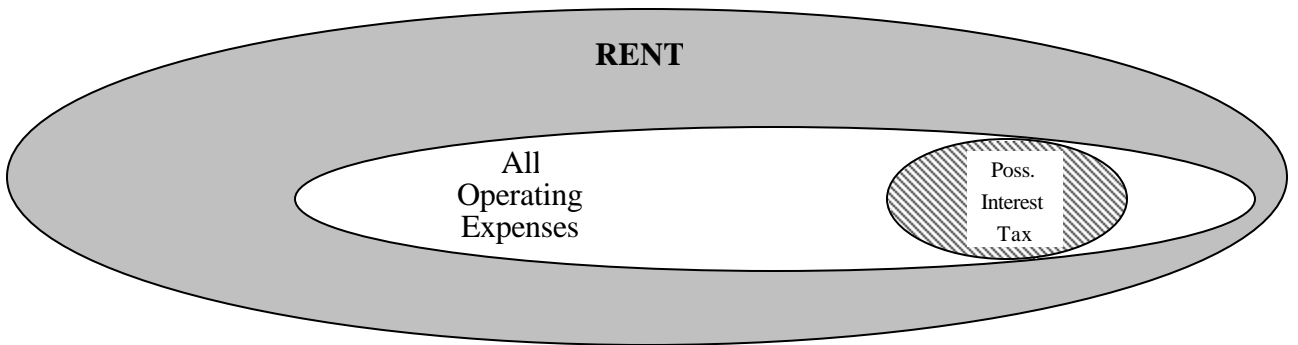
22 Plaintiff De Anza Cove Homeowners Association, Inc. applies *ex parte* for enforcement of the
23 Court's "status quo" Preliminary Injunction order. The issue concerns taxes that the residents have
24 always paid through their rent—and have been paying to the City as part of their rent during the
25 past year under the Court's status quo order—but which the City now refuses to pay to the County.
26 Ex parte relief to compel the City to pay the tax—or to allow residents to deduct the tax payment
27 from their rent—is needed because the tax payment deadline is December 10, 2004.

28 ///

1 **1. History of the County’s possessory interest tax.**

2 As confirmed in the attached declaration submitted by De Anza Cove’s prior property
3 management company, DHRG, the residents’ rent payments included a portion to pay the County
4 of San Diego’s ‘possessory interest’ tax. See Gelfand Decl., ¶¶ 3-5. This tax is akin to a property
5 tax, but is assessed instead based on a possessory interest over the public lands. The residents have
6 paid the County tax through their rent payments at least since the time they entered into Long Term
7 Rental Agreements—over a decade ago. Gelfand Decl., ¶ 3.

8 The County Assessor’s Office provided declarations and documents indicating that it has
9 assessed DHRG and its predecessors a possessory interest tax for the mobilehome park dating back
10 to 1952. Newell Decl., ¶ 3. The mobilehome park’s residents always paid this tax through their
11 rent payments to DHRG. DHRG then paid the County directly in one lump sum. DHRG never
12 paid the County tax as a gift for residents—rather, the tax was always paid from the residents’ rent.
13 Gelfand Decl., ¶¶ 5, 8. So, in graphic form, residents have always paid the possessory interest tax
14 in their rent, as follows:



22 **2. City takes over management of the mobilehome park in November 2003.**

23 When the City took over the mobilehome park, this Court ordered that the status quo be
24 preserved. Rent payments were to continue exactly as before. And they have.

25 But when DHRG left, the City didn’t ask DHRG if it was using the residents’ rent payments to
26 pay the County’s possessory interest tax. Instead, the City contacted the County more than one
27 year ago in October 2003 to begin its efforts to simply avoid paying the tax. The first notice that
28 any of the residents at the mobilehome park got was a tax bill from the County in late October

1 2004. Before then, the City never communicated with the Homeowners Association, the HOA's
2 attorneys, or the Park's residents that the City would not pay the County's possessory interest tax
3 that the residents had already paid in rent to the City.

4
5 **3. The County Assessor himself asks the City to reconsider its actions.**

6 After the City's Director of Real Estate Assets, Will Griffith, requested that the County assess
7 and bill the possessory interest tax to each mobilehome resident, Gregory Smith, the County
8 Assessor, personally wrote to Mr. Griffith and the City. In the letter, dated June 18, 2004—almost
9 half a year ago—the Assessor lays out the common sense rationale for the City to pay the tax. See
10 Exhibit 2 to Butler Decl.

11 The Assessor noted: "In the past, we have assessed the master lessee, who probably in turn
12 prorated the tax bill to the tenants as part of their monthly rent. We can continue this practice by
13 the City allowing us to send a single bill to them or to Hawkeye Management Company." (As
14 noted above, DHRG confirms under penalty of perjury that it paid the tax from residents' rent.)
15 Mr. Smith continued: "There is ample precedent for this type of arrangement with other cities who
16 own mobilehome parks. Specifically, we send a single possessory interest tax bill to the cities of
17 Escondido, Poway, and San Marcos for the mobilehome parks they own. The cities, in turn, prorate
18 this bill to the park tenants as part of their monthly rent. **The reason they do this** is that they do
19 not want the residents to receive the possessory tax interest bills **because of the confusion and**
20 **hostility that it would cause.**" Exhibit 2 to Butler Decl.

21 The Assessor added poignantly, "your demand will result in an additional workload for our
22 office...[sending] out over 500 tax bills when we used to send out a single one. This will result in a
23 huge number of phone calls just trying to explain what a possessory interest tax bill is, as well as
24 significant collections issues for the Tax Collector's Office.... Your request will result in adverse
25 publicity to the City as well as a large and unnecessary workload for my staff." Exhibit 2 to Butler
26 Decl.

27 The City again refused.

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1 **4. The HOA gets flooded with calls and asks for the City’s cooperation.**

2 When residents’ mailboxes filled in late October with the never-before-received possessory
3 interest tax bills and “escape assessments”, the phones began ringing at the HOA board members’
4 homes, the HOA’s attorneys’ offices, and the County Assessor’s office. When our office got up to
5 speed with the issue, we wrote to the City’s attorneys, explained the situation, and asked for the
6 City’s prompt communication on the issue: “homeowners who have always had this particular tax
7 paid through their rent are upset and confused over the situation—especially those who live on
8 fixed incomes and do not have hundreds of extra dollars available to pay this unexpected bill. ¶¶
9 In the past, DHRG collected rent from the residents and then used the rent monies to pay the
10 property tax directly to the County.... We’ve confirmed this with DHRG, and confirmed that
11 DHRG paid such property taxes in the amount of approximately \$65,000 annually.” Letter dated
12 Nov. 12, 2004, attached as Exhibit 1 to Zamoyski Decl.

13 We also noted: “In light of the preliminary injunction requiring that the City abide by the *status*
14 *quo*—e.g. if DHRG previously used residents’ monthly rent payments to pay these property taxes
15 then the City must do so too—can you please inform us and the residents that the City will:
16 (1) agree to communicate with us on this issue and discuss why and how this happened, (2) get the
17 tax bills to individual residents set aside with the County, and (3) use the residents’ regular monthly
18 rent to pay the property taxes exactly as DHRG did in the past?” Exhibit 1 to Zamoyski Decl.

19 Ms. Roppo phoned back ten days later on November 22, 2004. She stated that there is no
20 dispute that DHRG paid the tax, but she was not sure if the residents actually paid rent that included
21 the tax. I reiterated that we had been informed by DHRG that the possessory interest tax was
22 included in residents’ rent, as were all operating expenses. I told Ms. Roppo that I would seek a
23 factual declaration or other documentation from DHRG illuminating whether or not the tax was
24 included within residents’ rent payments.

25 Late last week, Ms. Roppo and I spoke over the phone to discuss Mr. Gelfand’s declaration that
26 confirms that residents’ rent payments were used to pay the possessory interest tax. This was no
27 gift from DHRG to residents. See Gelfand Decl., ¶¶ 5-8. Ms. Roppo disputed the factual content
28 of the Gelfand declaration. She asserted that, since there was no separate itemization of the tax on

1 monthly rent bills (just like I commented there is no separate itemization for all maintenance and
2 landscaping charges), she concluded that residents therefore must *not* have paid the tax through
3 their rent payments. Regardless of the rent already paid to and received by the City, regardless of
4 the Court’s status quo order, and regardless of the declaration by Mr. Gelfand, Ms. Roppo relayed
5 to us that the City would not agree to further discuss any of our suggestions, such as either the City
6 or Hawkeye paying one lump sum to the County from the rent already received, or agreeing to have
7 the residents simply deduct the tax amount from their next month’s rent. On December 6th, we
8 again asked the City to reconsider its position so that the “homeowners who have always had this
9 particular tax paid through their rent get the benefit of their bargain and none of us has to burden
10 the Court with another hearing.” Exhibit 4 to Zamoyski Decl.

11
12 **5. The County Assessor provides documents under a public records request.**

13 On Monday, December 6th, the County Assessor produced documents in accordance with the
14 HOA’s freedom of information act records request. (The City would not informally produce to us
15 all of its communications and e-mails between it and the County.) As shown in the Butler and
16 Newell Declarations and the attached correspondence and e-mails, the City has worked behind the
17 scenes for *over a year* on this issue. In fact, the City provided the resident information, rent
18 amounts, and other information to the County back in June. And critically, the City informed the
19 County Assessor that **all residents who did not sign the City’s settlement agreement should be
20 assumed to stay in possession until the end of 2008.** Newell Decl., ¶ 11. Not only is this a
21 critical admission, but this assumption also serves to punish the residents who didn’t sign the
22 settlement agreement. Why? Because the longer the assumed remaining lease term, the larger the
23 tax. As shown in the Tax Appraiser, Mr. Newell’s declaration, the possessory interest tax
24 *quadruples* if you assume a 48-month term rather than a 12-month term. Newell Decl., ¶¶ 8-11. So
25 a resident who is, for example, paying \$1,000 per month in rent, will be assessed an \$81.33 tax if
26 they signed a settlement agreement to stay one year, but will be assessed a \$282 tax if they didn’t!

27 The Assessor estimated that the total possessory interest tax for the entire mobilehome park
28 would be approximately \$100,000.

1 **6. As landlord, the City cannot blindsides residents with the possessory**
2 **interest tax.**

3 Under Revenue and Taxation Code section 107.6, no government entity can fail to notify
4 residents that a property interest might be subject to a possessory interest tax. “Failure to comply
5 with the requirements of this section shall not be construed to invalidate the contract. The private
6 party may recover damages from the contracting state or local public entity, where the private party
7 can show that without the notice, he or she had no actual knowledge of the existence of a
8 possessory interest tax.” *Id.* (attached as Exhibit 5 to Zamoyski Decl.) Here, the City never
9 notified residents that they would have to pay a separate possessory interest tax from the tax
10 payments that they were already making via their rent. Thus, the Court is empowered to order the
11 City or its management company to pay the tax to the County either under the Court’s prior status
12 quo order, or pursuant to Revenue and Taxation Code section 107.6(b).

13
14 **7. Relief Requested.**

15 Because the Court’s status quo order is in effect, DHRG previously paid the possessory interest
16 tax from residents’ rent, and the residents have already paid this tax amount to the City over the
17 past year, the HOA respectfully requests that the Court order one of two proposed solutions.
18 Either: (1) order the City or its management company to pay the County’s possessory interest tax
19 from the rent it has already received from residents; or (2) order that residents may deduct from
20 their rent an amount equal to the County’s possessory interest tax.

21
22 This application is based on the declarations of Mr. Gelfand, Mr. Butler, Mr. Newell, and
23 Mr. Zamoyski, the Second Amended Complaint on file in this case, the Preliminary Injunction
24 issued in January 2004, and any additional testimony and evidence presented or argument offered
25 at the hearing.

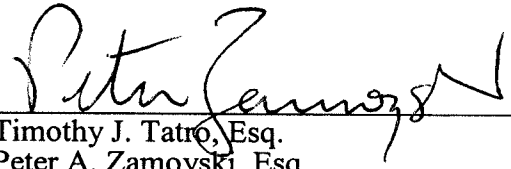
26 Aside from the Court’s Preliminary Injunction, which was granted in January 2004 in this case,
27 Plaintiff has not previously applied to any judicial officer for similar relief as requested herein.

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1 DATE: December 7, 2004

Respectfully Submitted,

TATRO & ZAMOYSKI, LLP

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4 By: 
5 Timothy J. Tatro, Esq.
6 Peter A. Zamoyski, Esq.
7 Attorneys for Plaintiff DE ANZA COVE
8 HOMEOWNERS ASSOCIATION, INC.

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