David J. Bradford (*pro hac vice*)
Lisa T. Scruggs (*pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash, Suite 4700
Chicago, Illinois 60611
Telephone: (312) 222-9350
Facsimile: (312) 840-7375

Kenneth E. Keller (State Bar No. 71450)
KRIEG, KELLER, SLOAN, REILLEY & ROMAN, LLP
114 Sansome Street, Ste. 400
San Francisco, California 94104
Telephone: (415) 249-8330
Facsimile: (415) 249-8333

Robert S. Coldren (State Bar No. 81710)
HART, KING & COLDREN
200 East Sandpointe, 4th Floor
Santa Ana, California 92707
Telephone: (714) 432-8700
Facsimile: (714) 546-7457

Attorneys for Plaintiffs
MHC Financing Limited Partnership and
GRAPELAND VISTAS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MHC FINANCING LIMITED PARTNERSHIP, an Illinois limited partnership, and GRAPELAND VISTAS, INC., an Illinois corporation,

Plaintiffs,

vs.

CITY OF SAN RAFAEL, a municipal corporation,

Defendant,

CONTEMPO MARIN HOMEOWNERS ASSOCIATION, a California corporation,

Defendant-Intervenor.

Case No. C 00-3785 VRW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO RECOVER ATTORNEY'S FEES AND COSTS

Hon. Vaughn R. Walker

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On February 12, 2008, the Court issued an order specifically requiring the parties to "submit their authorities with respect to the prevailing party . . . , as well as their bills of costs and motions to tax costs and motions to recover attorney's fees." Pursuant to the Court's Order, Plaintiffs MHC Financing Limited Partnership and Grapeland Vistas, Inc. (together, "Plaintiffs" or "MHC") submit the following Memorandum of Points and Authorities in Support of Its Motion to Recover Attorney's Fees and Costs.

INTRODUCTION

Approximately eight years ago, MHC filed this lawsuit for one purpose: to secure a determination that the San Rafael Mobilehome Rent Stabilization law (the "Ordinance") constituted an unconstitutional taking. In 2001, MHC agreed to compromise that objective by entering into a Settlement Agreement, approved by this Court, that would have eliminated only one of the restrictive elements of the Ordinance: vacancy decontrol. The City chose, in response to pressure from the Association, to eschew that Settlement Agreement and to make this case an "all or nothing" contest over the constitutionality of the Ordinance.

On January 29, 2008, this Court issued an Order, with extensive findings of fact and conclusions of law, holding that the application of the Ordinance violates MHC's constitutional rights and, both on its face and as applied, constitutes a private taking in excess of the City's police power. *See* Findings of Fact and Conclusions of Law and Order Thereon (the "Order"). The Court's determination that the Ordinance gives rise to an unconstitutional regulatory and private taking was unequivocal. (*See* Order at ¶¶ 105, 108.)

MHC has succeeded completely in achieving the goal of this lawsuit. It has prevailed on the merits, changed the legal relationship between the parties, and vindicated fundamental constitutional claims. Therefore, the Court should find that MHC is the prevailing party in this case and grant its Motion to Recover Attorney's Fees and Costs.

LEGAL STANDARD

42 U.S.C. § 1988(b) provides that "[I]n any action or proceeding to enforce a provision of section[s] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable

attorney's fee as part of the costs. . . ." 42 U.S.C. § 1988. "[A] prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (*quoting* S. Rep. No. 94-1011, p. 4 (1976)). "At a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (*citing Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)).

The Ninth Circuit has stated that a plaintiff becomes the prevailing party only when: (1) it wins on the merits of its claim, (2) the relief received "materially alters the legal relationship between the parties by modifying the defendant's behavior," and (3) that relief "directly benefits the plaintiff." *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 806 (9th Cir. 2005) (plaintiffs are prevailing party because they obtained the relief they sought – a permanent injunction against enforcement of a California law). A plaintiff may be considered the prevailing party for attorney's fees purposes if he or she succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433; *Watson v. County of Riverside*, 300 F.3d 1092, 1095 (9th Cir. 2002); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 (9th Cir. 1986).

Prevailing defendants, on the other hand, may only be awarded attorney's fees pursuant to 42 U.S.C. § 1988(b) when the plaintiff's civil rights claim is "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978).

ARGUMENT

MHC is the prevailing party in this litigation because it has succeeded on the merits in establishing that the entire Ordinance is unconstitutional and unenforceable, and thereby materially changed the legal relationship of the parties and vindicated fundamental constitutional rights.

The City's successful defense of state law settlement agreement claims, that arose only because the City decided not to effectuate a judicially-approved settlement of this litigation, has no bearing on MHC's ability to recover attorney's fees under 42 U.S.C. § 1983 (through 42 U.S.C. § 1988) for *all* legal services rendered during this case. The City achieved, at most, a hollow victory in a battle, but lost the war completely. In fact, extensive evidence presented in connection with the Settlement Agreement claim was relevant to and helped to demonstrate the merits of MHC's constitutional claims. When the litigation is viewed as a whole, as it must be, MHC achieved its primary goal: to invalidate an unconstitutional Ordinance. In contrast, the City failed to achieve its primary goal – to defend and preserve the Ordinance. Therefore, MHC must be considered the prevailing party in this litigation and should be allowed to recover all of its attorney's fees.

I. MHC IS THE PREVAILING PARTY IN THIS LITIGATION.

In *Garland*, the Supreme Court granted plaintiff prevailing party status in circumstances similar to those present here, following a trial on constitutional claims. *See Garland,* 489 U.S. at 793. The Court held that plaintiffs "prevailed on a significant issue in the litigation and have obtained some of the relief they sought" and are thus "prevailing parties" within the meaning of § 1988. *Id.*; *see also Hodges v. El Torito Rest., Inc.*, No. C-96-2242 VRW, 1998 WL 95398, at *1 (N.D. Cal. Feb. 23, 1998) ("the relevant inquiry concerns the likelihood that plaintiffs would have succeeded in obtaining the results they sought").

In its complaint, MHC specifically sought "a declaration that the Rent Control Ordinance is unconstitutional, invalid and constitutes an uncompensated regulatory taking in violation of the Takings Clause of the Fifth Amendment of the United States Constitution . . . and an injunction against continued enforcement of the Rent Control Ordinance." (Sec. Am. Compl. at 35.) Following a full consideration of the law and facts presented, the Court found that:

> Because the assertion of a public purpose is pretextual and without reasonable basis and because the Ordinance has been amended and enforced for the singular purpose of transferring the value of land from one private party to another, the City's enforcement of the Ordinance constitutes a taking not for public use and, therefore, constitutes a 'private taking.'"

(Order at ¶ 158.) In addition, the Court held that "the application of the Ordinance to Contempo Marin gives rise to a regulatory taking under the standards set forth in *Penn Central*." (Order at ¶ 105.) As in *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (appellees who succeeded on a "significant issue in litigation, which achieve(d) . . . the benefit the parties sought in bringing suit" were the prevailing party), *Garland* and *Hodges*, this is precisely the relief that MHC sought when it filed suit back in 2000.

This Court's Order fundamentally changes the legal relationship of the parties by determining that the Ordinance is unenforceable. It vindicates fully MHC's constitutional rights. Therefore, this Court should find that MHC is the prevailing party in this matter and grant its Motion to Recover Attorney's Fees and Costs.

II. THE FINAL AWARD SHOULD INCLUDE ALL OF MHC'S ATTORNEY'S FEES AND COSTS.

MHC should recover *all* of the attorney's fees it has expended in this litigation. When, as in this case, the prevailing party succeeds on some, but not all of its claims for relief, a court should focus on the results obtained to determine what fee is reasonable. *Hensley*, 461 U.S. at 434. In *Hensley*, the Supreme Court instructed trial courts to consider whether the plaintiff's successful and unsuccessful claims involve a common core of facts or are based on related legal theories. If so, where a high level of success is achieved, a court should allow plaintiff to recover a fully compensatory fee, including time spent on the unsuccessful claim. *Id.* at 435. The Court reasoned as follows:

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation . . . In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit . . . The result is what matters.

Hensley, 461 U.S. at 435.

The Ninth Circuit has expressly recognized that "the test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief granted [was] premised." *Odima v. Westin Tuscon Hotel*, 53 F.3d 1484, 1499 (9th Cir. 1995). "The fact that [a] plaintiff failed to recover on *all* theories of liability is not a bar to recovery of attorney's fees." *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005); *see also Watson*, 300 F.3d at 1095 (district court abused its discretion in denying § 1983 plaintiff's request for attorney fees after the plaintiff prevailed on only one of numerous claims).

Here, MHC sought to remedy the same evil, an unconstitutional Ordinance, with all of its claims. MHC sought similar relief on all of its claims – an amendment to or elimination of the Ordinance. It achieved full relief against the Ordinance in its entirety and thus prevailed in connection with the litigation as a whole.

A. MHC Is Entitled To Recover For Time Spent On The Pre-*Lingle* Takings Claims, Substantive Due Process Claim And Physical Taking Claim.

Because MHC's pre-*Lingle* takings claims, substantive due process claim and physical taking claim sought to address the same conduct as the successful takings claims, and because the evidence relevant to each claim or theory was substantially similar, any attorney time spent on these alternative claims should be compensable. *See Rivera v. City of Riverside*, 763 F.2d 1580, 1582 (9th Cir. 1985) ("[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised") (internal citation omitted). In *Gerling Global Reinsurance Corp. of Am.*, 400 F.3d at 806, the Ninth Circuit held that plaintiffs who obtained a permanent injunction against continued enforcement of a law were prevailing parties, even though the relief was based on only one of two alternative grounds. The court so held in large part because, as here, the injunction against enforcement of the law was precisely the relief plaintiffs had sought to obtain when filing suit. *Id.* at 806.

B. MHC Should Be Compensated For Time Spent On The Settlement Agreement Claims.

MHC is also entitled to be compensated for time spent on the Settlement Agreement claims because those claims also sought to achieve the same objective as the successful constitutional claims, *i.e.*, relief from the effects of the Ordinance. Evidence presented on the Settlement Agreement claims was directly relevant to and helped to prove the constitutional claims. "So long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994).

The Settlement Agreement was intended to remedy, by compromise, the very conduct at issue in this litigation – a draconian Ordinance. In pressing for enforcement of the Settlement Agreement, MHC effectively sought a modification of that Ordinance. The Settlement Agreement was directed at mitigating the effects of the very wrongful conduct, the enactment and enforcement of the Ordinance, that was at the heart of the constitutional claims.

Additionally, the Settlement Agreement claims arose out of this lawsuit. In fact, the Settlement Agreement was submitted to and approved by this Court, as an enforceable resolution of the constitutional claims. The Settlement Agreement and the claims related to it also served to give the City an opportunity to compensate MHC for the taking of its property. The City's defense of the Settlement Agreement claim further exhausted a state law remedy for the taking.[1]

In this respect, MHC's Settlement Agreement claims were similar to the plaintiff's unsuccessful state law retaliation, constructive discharge and wrongful termination claims in *Odima*, 53 F.3d at 1499. The Ninth Circuit court in *Odima* held that because the plaintiff's unsuccessful state tort claims were based on the same core set of facts and were sufficiently related to his successful Title VII and 42 U.S.C. § 1981 claims, plaintiff was entitled to recover attorney's fees for work done

[1] See also *Grant v. Martinez*, 973 F.2d 96, 100 (2d Cir. 1992), where the Court held that time counsel spent defending a settlement agreement was compensable under 42 U.S.C. § 1988.

on all claims. *Id.* In *Odima*, the plaintiff's unsuccessful state law claims grew out of his original federal unlawful discrimination charge. Similarly, in this case, MHC's filing of its Section 1983 takings claims led directly to the Settlement Agreement and ultimately to the state law Settlement Agreement claims. Like *Odima*, MHC achieved the objectives of the lawsuit it originally filed and obtained significant overall relief.

Additionally, as in *Odima*, here the evidence presented on the state law claims and constitutional claims was inextricably intertwined. The parties expressly stipulated that the evidence presented during the trial of the Settlement Agreement claims could be considered in conjunction with the constitutional claims. The presentation of evidence was "phased" only because the state law claims were submitted to the jury while the constitutional claims were submitted to this Court. In connection with the Settlement Agreement issues, MHC presented extensive evidence that proved its constitutional claims. As but a few examples, MHC submitted the following facts which were presented during evidence related to the Settlement Agreement as part of its Proposed Findings of Fact and Conclusions of Law:

- numerous admissions made by various City officials in conjunction with the Settlement Agreement that the Rent Control Law was not serving its stated purposes (12/27/02 FOF ¶¶ 126-133);
- evidence that the City Council expressly rejected rent control as a means of providing affordable housing for other forms of housing (12/27/02 FOF ¶¶ 111-15);
- evidence of the City Council meetings at which the Rent Control Law was considered and which reflected that the City conducted no study or analysis of whether it was rationally related to any valid purpose (12/27/02 FOF ¶¶ 62, 70-76, 100-02);
- evidence of the City's support for and interest in possibly condemning the park and transferring it to the residents (12/27/02 FOF ¶¶ 59, 66-69, 76);
- evidence that the City sought to transfer value to the Association members without regard to the effects on the general public (12/27/02 FOF ¶¶ 62-63,136);
- evidence of the difficulties that MHC would face in seeking to change the use of the Contempo Marin Park (12/27/02 FOF ¶¶ 57-59, 116-125, 133, 136);
- evidence of the severe impact the Rent Control Law has on the value of MHC's land, presented by Professor Fischel both as damage evidence and as evidence relevant to the constitutional claims (12/27/02 FOF ¶¶ 104-10); and
- evidence that the Rent Control Law was ineffective in providing more affordable housing (12/27/02 FOF ¶¶ 85-99, 341-46).

In fact, as this Court recognized, the City's failure to effectuate the Settlement Agreement also constituted a "decision" that was relevant to the ripeness of MHC's constitutional claims and that served to demonstrate that the City was enforcing the law for purely pretextual reasons. (Order at ¶¶ 60, 50-51.)

Thus, MHC's constitutional and state law claims are inextricably intertwined. The City gained nothing in this litigation by defeating the Settlement Agreement claim. It had an opportunity, through the Settlement Agreement, to salvage a portion of the Ordinance that it sought to defend; it disserved its own litigation interests by "prevailing" on the Settlement Agreement claim. Instead of ending this litigation with a settlement that had been approved in closed session by the City Council, the City chose to litigate everything and, as a consequence, the entire Ordinance was found unconstitutional.

Because MHC achieved its ultimate goal in this litigation and had "excellent success" within the meaning of the case law, MHC should recover *all* of the attorney's fees and costs it has expended in vindicating its constitutional rights, including those incurred in connection with the Settlement Agreement claims.

III. THE CITY SHOULD NOT BE PERMITTED TO RECOVER ANY OF ITS ATTORNEY'S FEES AND COSTS.

MHC expects the City to request an award for attorney's fees based on the jury verdict in its favor on MHC's Settlement Agreement claims. The City is not entitled to those fees because: (1) the Settlement Agreement does not authorize an award of fees in this circumstance; (2) the City should be estopped and/or equitably foreclosed from benefiting from a Settlement Agreement that it characterized as unenforceable and chose not to honor; and (3) the City did not prevail by defeating the Settlement Agreement claim. Alternatively, the Court should award both parties their fees related to the Settlement Agreement claims.

A. The City Is Not Entitled To Fees As A Prevailing Party On The Settlement Agreement.

This Court should hold the City was not a "prevailing party" on the Settlement Agreement and not entitled to its attorney's fees in connection with the Settlement Agreement for three reasons.

First, the Settlement Agreement, by its express terms, authorizes an award of attorney's fees to a prevailing party only if an independent lawsuit was brought to enforce or interpret the Settlement Agreement. Section 2.14 of the Settlement Agreement reads: "If any *action* at law or in equity including an *action* for declaratory relief is *brought* to enforce or interpret the terms or provisions of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs, in addition to any other relief to which it might be entitled." (Settlement Agmt. at 6 (emphasis supplied).) This *action* was not *brought* to enforce or interpret the Settlement Agreement; it was brought to remedy an unconstitutional Ordinance. The Settlement Agreement issues arose in 2001, over a year after the action was brought in 2000. Thus, Section 2.14, by its terms, does not apply to this case, and the City cannot be awarded attorney's fees under the Settlement Agreement.

Second, as a matter of both equity and estoppel, the City should not be permitted to benefit from a Settlement Agreement that it eschewed and refused to perform. The City effectively contended that the Settlement Agreement was a mere "option" for the City to amend the law, if it chose to do so. The City is estopped thereby from contending that the Settlement Agreement is a mutually enforceable contract. Under the City's theory, as accepted by the jury, any agreement was illusory, without consideration, and unenforceable. The City should not be permitted to recover financial benefits under an "agreement" that provided no consideration to MHC and that proved to be unenforceable.

Third, under California Civil Code § 1717, which authorizes fee awards to "prevailing" parties in certain contract disputes, the City was not the "prevailing party" in connection with the Settlement Agreement claims. To the contrary, at most, it obtained a formalistic and hollow victory that disserved its interests in this litigation.

Section 1717 provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs . . ." Cal. Civ. Code § 1717(a) (West 2008). Under Section 1717, the prevailing party is ordinarily the one "who recovered a greater relief in the action on the contract." *Sears v. Baccaglio*, 60 Cal. App.4th 1136, 1143 (Cal. Ct. App. 1998). Courts are given wide discretion to determine which party, if any, prevailed sufficiently to justify the award of attorney's fees. *See Acree v. General Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 400 (Cal. Ct. App. 2001).

Courts do not simply rely on the form of the judgment to determine the outcome of the prevailing party analysis. *See Sears*, 60 Cal. App. 4th at 1153. Instead, they interpret Section 1717 to require that equitable considerations be taken into account when determining which party prevails for attorney's fees purposes. "[T]he section reflects legislative intent that equitable considerations must prevail over both the bargaining power of the parties and the technical rules of contractual construction." *Nasser v. Superior Ct.*, 156 Cal. App. 3d 52, 59 (Cal. Ct. App. 1984) (*citing Bank of Idaho v. Pine Ave. Assoc.*, 137 Cal. App. 3d 5, 17 (Cal. Ct. App. 1982).)

Significantly, Section 1717 expressly permits a court to find that no party prevailed on a state law claim. *See* Cal. Civ. Code § 1717(b)(1) ("[t]he court may also determine that there is no party prevailing on the contract for purposes of this section"); *see also Sears*, 60 Cal. App. 4th at 1152. Courts will find no prevailing party "when the ostensibly prevailing party receives only a part of the relief sought." *Hsu v. Abbarra*, 9 Cal. 4th 863, 875 (Cal. 1995).

When equitable and practical considerations are taken into account, as they must be, it is apparent that the verdict on the Settlement Agreement claims did not serve the City's objective in this litigation. Had the City not contested the Settlement Agreement, it would have salvaged a significant part of the Ordinance. By contesting the Settlement Agreement, the City exposed the entire Ordinance to a successful constitutional challenge. The City effectively lost the war by choosing to fight this battle. And much of the evidence presented in support of the Settlement Agreement claims

helped to prove the constitutional claims. It would exalt form over substance to determine that the City was a "prevailing party" by reason of its defense of the Settlement Agreement claims.

This Court should find either that MHC prevailed on the Settlement Agreement claims or that there was no prevailing party as to those claims. A finding that no party prevailed on the Settlement Agreement claims is consistent with awarding MHC all of its attorney's fees, including fees in connection with the Settlement Agreement claims. For all the reasons set forth above, MHC is entitled to all of those fees under Section 1988 (because it prevailed on the litigation as a whole), independent of any entitlement to those fees under the Settlement Agreement, and the City is not entitled to any fees.

B. Alternatively, The Court Should Conclude That Both Parties Are Eligible To Recover Their Attorney's Fees On MHC's Contract Claims.

Alternatively, if the Court finds that Section 2.14 of the Settlement Agreement and Section 1717 apply in this case, that the City was the prevailing party on the Settlement Agreement claims, and that the City is entitled to its fees in connection with the Settlement Agreement, then this Court should permit *both* MHC and the City to recover their attorney's fees for work done on the Settlement Agreement claims. Under those circumstances, this Court may award MHC its fees for the entirety of the case, including the Settlement Agreement claims under Section 1988 and award the City its fees on the Settlement Agreement claims. This Court may also exercise equitable discretion to treat any entitlement by the City to attorney's fees under the Settlement Agreement as "costs" of this action and award MHC an amount sufficient to pay those costs.

IV. THIS COURT SHOULD AWARD MHC ENHANCED ATTORNEY'S FEES GIVEN THE DURATION AND COMPLEXITY OF THIS MATTER.

The total amount of attorney's fees and costs incurred by MHC for this litigation is $5,120,512.24 of which $3,846,456.87 is legal fees and $1,274,055.37 is costs, including expert fees. (Affidavit of David Bradford at ¶ 17.) In the past, this Court has utilized current billing rates for all professional time spent on a case that simplify "the calculation and accounts for the time value of

money in that counsel has not been paid contemporaneously with their work in this case." *See Young v. Polo Retail, LLC*, 2007 WL 951821, at * 6 (N.D. Cal. Mar. 28, 2007). Based on the information presented in Mr. Bradford's Affidavit and supporting documentation, in addition to its Bill of Costs, MHC should receive the total fee award of $6,800,860.25, based on an application of current rates to professional time spent on the case and the legal research costs. (Affidavit of David Bradford at ¶ 19.) This enhancement to current market rates for the actual attorneys involved is particularly appropriate given the complexity of this case and the nearly eight year duration of this case, so as to compensate for the time value of MHC's expenditures. Counsel were particularly qualified with respect to these issues because they had litigated similar issues for MHC in other federal cases.

Alternatively, MHC requests an attorney's fee award in the amount of no less than $4,277,860.95, which is based on total professional hours multiplied by adjusted billing rates that reflect a *Laffey* matrix adjustment, coupled with legal research costs. (*Id.* at ¶ 22). In addition to the foregoing, MHC should be awarded its costs as set forth in the Bill of Costs.

CONCLUSION

Having prevailed fully in achieving the fundamental goal of this litigation – a determination that the entire Ordinance is unconstitutional – MHC is the only prevailing party in this litigation. For this reason and those set forth above, the Court should grant MHC's Motion to Recover Attorney's Fees and approve its bill of costs in its entirety.

Dated: March 14, 2008

Respectfully submitted,

JENNER & BLOCK LLP

By: _____

One of the Attorneys for Plaintiffs
MHC FINANCING LIMITED
PARTNERSHIP and GRAPELAND
VISTAS, INC.