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1125 Shadow Lane  
3 Las Vegas, Nevada 89102  
Ph: (702) 385-1954  
4 Fax: (702) 385-9081  
*Attorney for Defendant, Robert Frank*

5 WILLIAM B. TERRY, ESQ.  
Nevada Bar No. 001028  
6 WILLIAM B. TERRY CHARTERED  
530 S. Seventh Street  
7 Las Vegas, Nevada 89101  
8 *Attorney for Defendant, Tim Stebbins*

**FILED**  
2011 JUL 27 P 1:20  
MUNICIPAL COURT  
CITY OF HENDERSON  
CM CLERK

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10 **MUNICIPAL COURT OF THE CITY OF HENDERSON**  
11 **IN THE COUNTY OF CLARK, STATE OF NEVADA**

12 CITY OF HENDERSON, NEVADA )  
13 )  
14 Plaintiff, )  
15 vs. )  
16 ROBERT EUGENE FRANK, )  
17 Defendant, )  
18 TIM STEBBINS, )  
19 Co-Defendant. )

CASE NO. 10CR2319 &  
10CR2318  
DEPT. NO.: 3

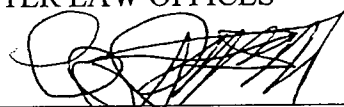
20 **MOTION TO DISMISS**

21 COMES NOW, the Defendants ROBERT FRANK and TIM STEBBINS by and through  
22 their respective attorneys CAL J. POTTER, III, ESQ., and WILLIAM B. TERRY, ESQ., and  
23 moves this Honorable Court pursuant to NRS 171.102 and the Due Process Clause of the  
24 Fourteenth Amendment to the United States Constitution.

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1 This motion is made and based upon the Amended Complaint on file herein. The IRS  
2 Audit of the Sun City Anthem Home Owner's Association and the resulting tax liability; the  
3 Points and Authorities attached hereto and the arguments of counsel at the time of the hearing.

4 DATED this \_\_\_\_ day of July, 2011. DATED this \_\_\_\_ day of July, 2011.


5 WILLIAM B. TERRY, ESQ. POTTER LAW OFFICES  
6 By: William B. Terry By:   
7 WILLIAM B. TERRY, ESQ. CAL J. POTTER, III, ESQ.  
8 Nevada Bar No. 001028 Nevada Bar No. 1988  
9 530 S. 7<sup>th</sup> Street 1125 Shadow Lane  
Las Vegas, Nevada 89101 Las Vegas, Nevada 89102  
*Attorney for Defendant, Tim Stebbins* *Attorney for Defendant, Robert Frank*

10  
11 **NOTICE OF MOTION**

- 12 TO: CITY OF HENDERSON, NEVADA; and  
13 TO: CLAUDIA AGUAYO, North Las Vegas City Attorney.  
14 TO: TIM STEBBINS, Co-Defendant, and  
15 TO: WILLIAM B. TERRY, ESQ., his attorney.

16 YOU AND EACH OF YOU, will please take notice that the undersigned will bring the  
17 foregoing MOTION TO DISMISS on for hearing before the above-entitled court on the 27<sup>th</sup>  
18 day of Oct., 2011, at the hour of 1:00 p.m., in the Henderson Municipal Court  
19 Department 3, or as soon thereafter as counsel maybe heard.

20 DATED this 27 day of July, 2011. DATED this \_\_\_\_ day of July, 2011.

21 WILLIAM B. TERRY, ESQ. POTTER LAW OFFICES  
22 By: William B. Terry By:   
23 WILLIAM B. TERRY, ESQ. CAL J. POTTER, III, ESQ.  
24 Nevada Bar No. 001028 Nevada Bar No. 1988  
25 530 S. 7<sup>th</sup> Street 1125 Shadow Lane  
Las Vegas, Nevada 89101 Las Vegas, Nevada 89102  
*Attorney for Defendant, Tim Stebbins* *Attorney for Defendant, Robert Frank*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **FACTS**

3 The Complaint and Amended Complaint charge the Defendants with filing a false police  
4 report concerning the Sun City Anthem Board Of Directors failure to refund excess/surplus  
5 revenues to the homeowners. In addition, the Amended Complaint further alleges:

6 “That the said defendants (s) on or about November  
7 21, 2009, did willfully and unlawfully report to a police  
8 officer, sheriff, district attorney, deputy sheriff, deputy  
9 district attorney or member of the Department of Public  
Safety.....that the Sun City Anthem Board of Directors  
committed forgery...when it failed to refund excess/surplus  
revenues to the homeowners”.

10 The criminal prosecution of these Robert Frank and Tim Stebbins as Sun city Anthem  
11 homeowners is suspect because it originated from a tainted investigation where the police  
12 department did not seek an independent forensic accounting opinion about the refund in question,  
13 but instead went to the Board itself to justify their compliance with IRS Rule 70-604. ( See  
14 Argument Infra).

15 In contrast Mr. Stebbins and Mr. Frank consulted with two District Attorneys and two Las  
16 Vegas Police Officers, as well as a retired Los Angeles Police Officer and a retired IRS agent  
17 prior to their filing of their Criminal Complaint. The IRS has now conducted an audit wherein it  
18 has found that the Sun City Anthem Board’s failure to refund the surplus in question is a taxable  
19 consequences.

20 The IRS’s finding of a taxable assessment confirms the allegation made by the defendants  
21 to the Henderson Police Department that the Sun City Anthem’s failure to refund the surplus of  
22 approximately \$3,000,000.00 was contrary to their board resolution to comply with IRS Revenue  
23 Ruling 70-604. In actuality, the Board would have been required to notify the members of the  
24 SCA Homeowner’s Association if it was going to hold the money surplus.

25 **THE MISCONCEPTION OF SGT. FARLEY**

26 Sgt. Farley the detective from the Henderson Police Department who submitted the  
27 affidavit for a warrant of arrest erroneously believed that there was an exception to the Revenue  
28 Ruling 70-604 and that SCA Board was not required to go directly to the homeowners to approve

1 their actions. However the issue is not about whether the board has the authority to decide on  
2 “how” to return the surpluses. Instead the defendant’s complaint to the Henderson Police  
3 Department was that the surpluses were never returned to the members as claimed by the board  
4 members.

5 The SCA Board misinformed Sgt. Farley that they claimed they had in fact credited the  
6 members with a return of the prior year’s surpluses. The Board never returned any retained  
7 surpluses for 2002-2009 and never filed amended income tax returns or board resolutions  
8 notifying the members that the board was overcharging on assessments and that there were large  
9 amounts of surplus at the end of each year.

10 **THE COMPLAINT AGAINST SCA BOARD BY DEFENDANTS STEBBINS AND**  
11 **FRANK**

12 The statement filed by the defendants on HPD form 0155 stated:

13 “After dozens of hours of personal research, analysis, and  
14 consultation with many local specialists in areas of law  
15 enforcement, Mr. Stebbins and I (Frank) are confident this case  
16 provides an example of forgery as defined in NRS 205.095.

17 I have first-hand knowledge that the accused board officers  
18 did knowingly sign what I believe can be proven to be a flagrantly  
19 false board resolution. I have alleged that document was  
20 subsequently used to deceive the community membership and  
21 government agencies concerning the improper disposition of  
22 millions of dollars of overcharged/surplus homeowners  
23 assessments.”

24 The defendant’s further reported to the Henderson Police desk officer their concerns and  
25 were referred to the Nevada Real Estate Division by the Henderson Police Department and met  
26 with chief investigator Alitt concerning the said surpluses. The defendant’s were informed that the  
27 Nevada Real Estate Division had no jurisdiction over the matter because the surplus in question  
28 happened outside of the one year statute of limitations. Mr. Alitt specifically told Sgt. Farley that  
he directed Mr. Frank and Mr. Stebbins to file reports with the police department if they believed  
a crime had been committed. The defendant’s, then went back to the Henderson Police  
Department and told the desk duty officer that Mr. Roger Cooper, Secretary and President  
Rosalyn Berman, President had signed a resolution that falsely claims that the resolution was

1 approved by the association members when in fact it was only approved by the board,  
2 Consequently, the defendant's informed the Henderson Police that Mr. Cooper and Ms. Berman  
3 have committed a "special type of published forgery." The Defendant's further advised that there  
4 has not been any fraudulent use of any funds only that the funds are being held in an account and  
5 not returned to the residents, ie. association members, as claimed by the board and two association  
6 officers.

7 **ARGUMENT**

8 **The Defendant's Had Probable Cause To File Their Criminal Complaint Concerning The**  
9 **Sun City Anthem Board Of Directors Failure To Refund Excess/Surplus Revenues To The**  
10 **Association Members.**

11 The defendant's, are charged with a violation of NRS 207.208, which states in pertinent  
12 part:

13 "Every person who reports to any police officer.....that a felony or  
14 misdemeanor has been committed....knowing such report to be  
false, is guilty of a misdemeanor."

15 Thus the statue requires that the defendant act with knowledge that the allegation is false.  
16 Likewise NRS 171.126 envisions the right to make an arrest for a public offense committed or  
17 attempted in his presence. Similarly, the predicate for any arrest is based upon the probable cause  
18 standard set forth at NRS 171.1231. In State v. Mc Kellips, 118 Nev. 465, 49 P.3d 655, (2002) the  
19 Court held that probable cause to arrest exists when police have reasonably trustworthy  
20 information of facts and circumstances that are sufficient in themselves to warrant a person of  
21 reasonable caution to believe that a crime has been committed by the person to be arrested. An  
22 officer has qualified immunity if the arrest is made in good faith. Likewise in a criminal case the  
23 question of whether a police officer had probable to make an arrest is a question for the Court to  
24 decide. See Weyant v. Okst, 101 F.3d 845, 852 (2nd Cir. 1996) holding that question of probable  
25 cause may be determined as a matter of law if there is no dispute as to pertinent events and  
26 knowledge of officers.

27 **FORGERY**

28 The Supreme Court in Winston v. Warden, 86 Nev. 33 464 P.2d 30, (1970) determined

1 that the “Essence of forgery is making of a false writing pursuant to NRS 205.090. Similarly,  
2 NRS 205.095 also states that every person who, with intent to injure or defraud shall: (1) Make  
3 any false entry in any public records or account. In Bratcher v. City of Las Vegas, 113 Nev. 502,  
4 937 P.2d 485 (1997) the Court noted that forgery involves a false document.”

5 In the case at hand the underlying complaints were made by lay people. Neither Mr.  
6 Stebbins nor Mr. Frank, are law enforcement officers, presently or in the past. Instead they are  
7 citizens filing complaints against the officers of their homeowner’s association challenging the  
8 fraudulent representations of a board resolution. The present criminal charges are analogous to a  
9 S.L.A.P.P. suit. See NRS 41.637, which protects, “a person who engages in a good faith  
10 communication in furtherance of the right to petition is immune from civil liberty for claims  
11 based upon the communication are immune civilly. Commonly defined as Strategic lawsuit  
12 against public participation (S.L.A.P.P) is a lawsuit that is intended to censor, intimidate and  
13 silence critics by burdening them with the cost of a legal defense until they abandon their  
14 criticism or opposition. In the instant case the defendant’s were told by the State of Nevada Real  
15 Estate Division which governs, Homeowners associations to file the criminal complaint if they  
16 thought they had a legal basis for the complaint. The determination of the validity of the forgery  
17 charges was never determined by a neutral and detached magistrate. Instead, the detective went to  
18 the accused and accepted their explanation of their interpretation of the IRS revenue ruling.

19 The IRS audit and assessment is supportive of defendant’s Stebbins and Frank  
20 interpretation that the surplus were not refunded and that the board’s failure to refund the said  
21 surpluses resulted in substantial tax consequence for the association. More specifically, the IRS  
22 completed their audit of the Sun City Anthem 2007 tax return and found that the surpluses had  
23 not been returned and were therefore taxable. (See exhibit A) November 2, 2009 letter from  
24 Department of Treasury cover letter; Statements of IRS auditor.

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1 CONCLUSION

2 Mr. Frank and Mr. Stebbins respectfully requests the motion be granted and the  
3 complaint dismissed.

4 DATED this \_\_\_\_ day of July, 2011.

DATED this \_\_\_\_ day of July, 2011.

5 WILLIAM B. TERRY, ESQ.

POTTER LAW OFFICES

6 **William B. Terry**



7 By:  
WILLIAM B. TERRY, ESQ.  
8 Nevada Bar No. 001028  
530 S. 7<sup>th</sup> Street  
Las Vegas, Nevada 89101  
9 *Attorney for Defendant, Tim Stebbins*

By:  
CAL J. POTTER, III, ESQ.  
Nevada Bar No. 1988  
1125 Shadow Lane  
Las Vegas, Nevada 89102  
*Attorney for Defendant, Robert Frank*

10  
11 CERTIFICATE OF SERVICE

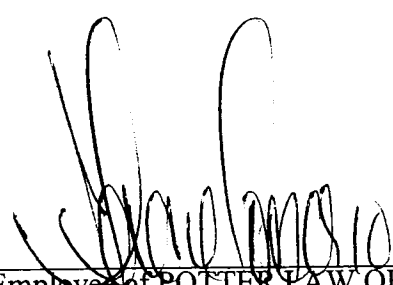
12 I HEREBY CERTIFY that pursuant to the Amended EDCR 7.26 and to NRCP5(b) on the  
13 \_\_\_\_ of July 2011, I did serve at Las Vegas, Nevada a true and correct copy of **MOTION TO**  
14 **DISMISS**, on all parties to this action by:

- 15  Facsimile  
16  U.S. Mail  
17  Hand Delivery

18 Addressed as follows:

19 Claudia Aguayo, Esq.  
Deputy City Attorney  
20 2225 Civic Center #228  
North Las Vegas, Nevada 89030  
Ph: (702) 649-8879  
21 Fax: (702) 633-1050  
*Attorney for Plaintiff*

22 William B. Terry, Esq.  
23 530 South Seventh Street  
Las Vegas, NV 89102  
24 Ph: (702) 385-0799  
25 Fax: (702) 385-9788  
*Attorney for Co-Defendant Tim Stebbins*



26  
27 An Employee of POTTER LAW OFFICES  
28

**RECEIPT OF COPY**

**RECEIPT OF COPY** of the following **MOTION TO DISMISS** regarding the case

*Frank adv. City of Henderson* is hereby acknowledged this 07 day of July, 2011.

By: AL An  
Employee of:

The Henderson City Attorney's Office  
240 Water Street  
Henderson, NV 89015

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A.



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

November 02, 2009

CC:ITA:B04  
GENIN-146085-09

UIL: 61.00-00; 118.00-00

Mr. Tim Stebbins  
2106 Alyssa Jade Drive  
Henderson, NV 89052

Dear Mr. Stebbins:

This letter responds to your request for information dated October 05, 2009. In particular, you ask for clarification of Rev. Rul. 70-604, 1970-2 C.B. 9, and whether a condominium management association must recognize income attributable to excess assessments collected during the taxable year if the assessments are accumulated in a working capital reserve.

Except as provided under section 528 of the Internal Revenue Code, a condominium management association that is classified as a corporation for federal income tax purposes has taxable income to the extent its income exceeds its expenses. Thus, income attributable to excess assessments is generally taxable.

Rev. Rul. 70-604 concerns the issue of whether a particular condominium management corporation is taxable on excess assessments that are applied against the following year's assessments. The revenue ruling states that the sole authorized activity of the condominium management corporation is the assessment of its stockholder-owners for the purposes of managing, operating, maintaining and replacing the common elements of the condominium property. The stockholder-owners of the corporation hold a meeting each year to decide whether to return any excess assessments to themselves or to have the excess applied against the following year's assessments. The ruling concludes that the corporation is not taxable on the excess assessments because the excess has been returned, in effect, to the stockholder-owners (whether in the form of cash or in the form of a credit against next year's assessment).

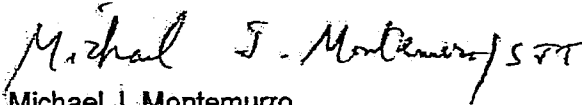
Rev. Rul. 70-604 does not provide that a condominium management corporation may avoid recognizing taxable income attributable to excess assessments by accumulating the excess amount in a working capital reserve.

There are two subsequent rulings that deal with special assessments. Rev. Rul. 75-370, 1975-2 C.B. 25, provides that special assessments for roof and elevator replacements collected by a condominium management corporation and held in a separate bank

account are not taxable to the corporation because it acts merely as an agent for the homeowners in receiving the special assessments (i.e., the corporation has a fiduciary obligation to expend the funds as specifically approved by the owner-stockholders). For another situation, Rev. Rul. 75-371, 1975-2 C.B. 52, provides that Section 118 excludes special assessments for replacing outdoor furniture from income.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2009-1, §2.04, 2009-1 I.R.B. 7 (Jan. 5, 2009). If you have any additional questions, please contact our office at (202) 622-4920.

Sincerely,



Michael J. Montemurro  
Branch Chief  
Office of Associate Chief Counsel  
(Income Tax & Accounting)

Statement made by IRS auditor Kathy Thomas...

During the course of the examination, a review of the board meeting agendas, minutes and resolutions was conducted. Also reviewed during the examination were the budgetary documents and tax planning documents that were used in the tax planning meeting. As noted in several board resolutions and on the 2007 income tax return, the board elected to roll over reserve funds in accordance with Revenue Ruling 70-604. An attachment to 2007 Form t 120 U.S. Corporation Income Tax Return also indicates "The Association elects to use the provisions of IRC Revenue Ruling 70-604 for the current tax year. The members of the Association specifically empower the signor of this return to make this election on their behalf. Thus, current excess membership income will be carried over to the following year's assessments." (See Exhibit B)

Schedule M-3 of the 2007 Form t 120 U.S. Corporation Income Tax Return Statement II shows \$3,179,168 reserve amounts were carried forward from 2006 and \$3,845,024 carried forward to 2008 (See Exhibit C)

Based upon conversation with Jack Troia, President of Sun City Anthem Community Association, on September 9, 2010, during the field audit, the 2007 reserve surplus was never refunded or applied to the subsequent year.

An adjustment which relates to a change in method of accounting is computed as though the taxpayer had used the new method of accounting in all prior years. Accounts must be adjusted as of the beginning of the year of change. The year of change is defined as the taxable year for which the taxable income of the taxpayer is computed under a method of accounting different from that used for the preceding taxable year. When there is a change in method of accounting for which an adjustment is required, income for the year of change and the following tax years must be determined under the new method of accounting as if the new method had always been used. When the Service imposes a method change (involuntary method change) as a result of an examination, in general the entire net positive or negative IRC section 481(a) adjustment is taken into account in the year of change. (See Rev. Proc.2002-18 for involuntary method change procedures.) The Taxpayer did not refund or credit the homeowners the surplus funds for tax years 2001-2007. Based upon the method of accounting for reserves and capital contributions, meaning improperly excluding those items as income, the taxpayer used an inappropriate accounting method. The taxpayer used a method to exclude member assessments that does not provide for a clear reflection of income. Since the two prior years are in the same tax bracket as the year of adjustment, there is no relief per IRC section 481(b). Therefore, the entire 200712.

Form 886A Department of the Treasury • Internal Revenue Service

## Explanation of Items

Year/Period Ended

2007-12

Schedule No. Or

Exhibit 2

Name of Taxpayer

Sun City Anthem Community Association, Inc.

Imposition of Substantial Understatement of Tax

Tax as Determined

Tax as Shown On Return

\$1,120,684

0

Understatement of Tax

§6662(d) Penalty Application Percentage

\$1,120,684

20%

Substantial Understatement Penalty Determined by E)

October 5, 2009

Michael Montemurro  
Branch 4  
ITA  
Department of the Treasury  
Internal Revenue Service  
1111 Constitution Avenue  
Washington, DC 20224

Dear Sir,

IRS personnel in Washington have informed us you are the person to whom this letter requesting guidance should be directed. The matter concerns the proper application of Revenue Ruling 70-604. We are seeking general guidance such as an Information Letter, or other manner deemed suitable by your office, covering our questions.

We are stockholder-owners in a homeowner association of senior citizens called Sun City Anthem in Henderson Nevada. There is a significant difference of opinion between our board of directors and us concerning two aspects of how excess assessments collected by our Association are to be treated under Revenue Ruling 70-604 in order to be non-taxable. Our questions are:

1. Just who is to decide the distribution method: return excess assessments to the stockholder-owners or have them applied against the following year's assessments?
2. Can the distribution of the excess assessments be withheld so as to build up a reserve of tax free "working capital"?

We are of the opinion the stockholder-owners are to vote at a meeting of stockholder-owners each year to decide on the distribution method for excess assessments collected. Also all of the excess assessments are to be distributed to the stockholder-owners in one form or the other in the year following the collection of the excess assessments.

Our board of directors seem of the opinion the stockholder-owners are not to be permitted to decide the distribution method, rather the board of directors unilaterally and exclusively will decide the distribution method at a board meeting of their choice. Also, rather than any form of total or partial distribution, excess assessments may be accumulated year after year to build a tax-free cash reserve they call "equity".

The principal parties involved are the undersigned stockholder-owners and:

Board of Directors  
Sun City Anthem Community Association, Inc.  
2450 Hampton Road  
Henderson, NV 89052

And very likely their professional advisors:

1. Association Auditor and tax preparer: Gary Lien, CPA  
Hilburn & Lien  
5520 South Fort Apache Road  
Las Vegas, NV

2. Association Attorney: John Leach  
Leach, Johnson, Song and Gruchow  
5495 South Rainbow Boulevard  
Las Vegas, NV

The Association Treasurer sent a letter to at least one stockholder-owner stating there is no IRS requirement for stockholder-owners to decide the distribution of excess assessments; insisting the board of directors alone is to make the decision. We do not wish to speculate beyond that as to what the actual position of the board of directors is or the basis for their position.

To assure all positions are reviewed we have requested that one or more of the Association directors join with us in making this request for guidance to your office on the matter and to make their position known in writing for inclusion with this letter.

The following page presents our view on the two questions. We have also included any communication received from any Association directors.

Please accept our thanks for your prompt attention to this matter and for your guidance on our two questions.

Person to whom the response should be directed ► Tim Stebbins  
2106 Alyssa Jade Drive  
Henderson, NV 89052  
(702) 492-1024  
[tstebbins1@cox.net](mailto:tstebbins1@cox.net)

Colonel Robert E. Frank, USAF (Ret.)  
2384 Sandstone Cliffs Drive  
Henderson, NV 89044

Norman McCullough  
2620 Peoria Avenue  
Henderson, NV 89052

Enclosures: Views on proper application of RR 70-604, Exhibit #1

Question 1: Just who is to decide the distribution method: return excess assessments to the stockholder-owners or have them applied against the following year's assessments?

**Our View: The decision is to be made by stockholder-owners.**

Revenue Ruling 70-604 seems clear on this point stating "A meeting is held each year by the stockholder owners of the corporation, at which they decide what is to be done with any excess assessments not actually used for the purposes described above, i.e., they decide either to return the excess to themselves or to have the excess applied to the following year's assessments". That position has also been stated in IRS Information Letter INFO 2001-0176 that states "The stockholder-owners hold a meeting each year to decide whether to return an excess assessments to themselves or to have the excess applied against the following year's assessments." and IRS Information Letter INFO 2004-0231 that states "Revenue Ruling 70-604 provides guidance regarding the application of excess assessments to future assessments. The Revenue Ruling provides that this treatment must be elected at a meeting of the shareholder-owners."

Our Association operates a fiscal year January 1 through December 31. The Association normally chooses the tax filing date extension and files a Form 1120 tax return on or before September 15 each year.

Our Association holds two (2) meetings of stockholder-owners each year; one in latter November, shortly before the close of our fiscal year on December 31 and another late April or early May for our annual election of directors. It is very easy for stockholder-owners to make the decision of how the excess assessments are to be distributed at either meeting. Our Association is very large with over 7,000 stockholder-owners and the practical way for stockholder-owners to vote the decision is by ballot.

**Current Status:** Stockholder-owners in our Association have never been allowed to decide the distribution method. The board of directors simply adopts a resolution; typically at a board meeting in latter August shortly before the tax form is filed, to hold the excess revenue from the previous year over to the current year. The Association Treasurer and the Tax Preparer, Mr. Gary Lien, then sign the Form 1120 attesting the excess assessments are not taxable because RR 70-604 has been adhered to.

-----  
Question 2: Can the distribution of the excess assessments be withheld so as to build up a reserve of tax free "working capital"?

**Our View: No, all of the excess assessments are to be distributed to the stockholder-owners in one form or the other in the following year. We are a community of senior citizens; many on fixed incomes and we want and deserve the return of our untaxed money.**

This position has been made clear in IRS Information Letter INFO 2001-0176; which states: "The revenue ruling (70-604) was not intended to permit a condominium management association to build a reserve."

**Current Status:** The board of directors has failed to distribute much if any of the excess assessments to the stockholder-owners in any manner over the last five years.

Our Association transitioned from developer control to stockholder-owner control as of June 1, 2005. Note Exhibit #1 from a recent board workshop that shows our stockholder-owner controlled board of directors had a total of \$2,348,000 in undistributed and untaxed surplus income at the end of 2005 – a combination of whatever funds the developer transferred to the Association at transition plus excess assessments collected that year. Then note how most or all of the undistributed and untaxed surplus income was retained by the board of directors every following year and now totals \$4,755,000 as of the end of our last fiscal year, December 31, 2008.

October 21, 2009 – Approximately 10:00 AM my time

Received a phone call from the IRS Chief Counsel Office in Washington, DC.

Mr. Frank Dunham, (202) 622-7522

It was in response to our letter of October 5, 2009.

Had a nice discussion. I think he was trying to determine if we are just a bunch of kooks or if we are sincere and know what we are talking about.

We covered the key issues of homeowner-stockholders making the decision of how excess assessments are to be returned to the homeowner-stockholders in order for the excess assessments to be exempted from income tax and the retention of the untaxed excess assessments year after year.

Mr. Dunham confirmed we are interpreting Revenue Ruling 70-604 correctly.

He also stated surplus assessments could not be accumulated tax free as “working capital”.

He said he would send an Information Letter. Likely brief and might cite some other Revenue Rulings pertinent to the matter.

He could not promise how soon the Information Letter would be sent but he hoped it would “sooner rather than later”.

He gave me his phone number as said I was free to phone him if the letter does not arrive in a few weeks.

Mr. Dunham suggested it would be wise for the board to be preemptive and proactive approach the IRS facing up to the unpaid taxes. Possibly some or all penalties and interest might be forgiven in that case. I told him that had been recommended to the board and they refused. He said they had their chance and could be in serious trouble.



Tim & Claudia Stebbins  
2116 Algeza Jade Drive  
Henderson, NV 89052  
(702) 452-1024

e-mail: [tstebbins1@cox.net](mailto:tstebbins1@cox.net), [cstebbins1@cox.net](mailto:cstebbins1@cox.net)

August 27, 2009

Board of Directors  
Sun City Anthem Community Association, Inc.  
2450 Hampton Road  
Henderson, NV 89052

Subject: Distribution of Surplus Funds

The purpose of this letter is to urge the matter of how surplus funds accumulated as of the end of our fiscal year 2008 should be distributed be presented in a good faith effort to the units' owners of SCA for a vote as to whether the surplus funds should be returned to the units' owners or carried forward as a reduction of assessments in 2009 as required by IRS Ruling 70-604. This might be done at a special Meeting of Units' Owners with a solicitation of proxies to strive for large participation by unit's owners, by a special ballot election or by "Some other Fashion" as allowed under TAM 9539001. After the vote of the units' owners is recorded it may be prudent for the board to take action to ratify the results at a properly noticed meeting.

I am concerned significant federal income taxes may result if the IRS rules are not followed explicitly. The requirement for a vote by units' owners, rather than the board, is well established. There seems no basis in IRS regulations, rulings, opinions or court rulings for the board to act solely and unilaterally to determine the distribution of surplus funds.

It seems most HOAs use the ballot process for this election by units' owners as part of their annual election of directors. This normally results in a significant number of units' owners' votes and exceeds quorum requirements. It would seem reasonable for SCA to do the same but I think the opportunity for that election method for 2008 surplus funds may have passed.

Based on the information provided at the tax workshop last week there seems to be history of abuse of IRS Ruling 70-604 by SCA directors over several years in an effort to avoid payment of taxes. (Italicized remarks from memorandums by Gary Porter of Porter & Company except as noted)

1. Carry over of surplus funds year after year. Money was neither returned to units' owners nor was it used to reduce the next year's assessments. Rather it was just accumulated and now totals over \$4.7 million. (*"The Internal Revenue Service has continually held that the carryover allowed by the revenue ruling was to be interpreted as a one-year carryover only. That is, you could not indefinitely carry over a series of excess income from year to year to year."*)
2. Units' owners have never been allowed, or even asked, to vote on distribution of surplus funds. (*"I recommend that the wording of Revenue Ruling 70-604 be*

*literally interpreted and that the election be in the form of a resolution adopted by the membership.”)*

3. The executive boards attempted to unilaterally pass a resolution each year to carry over the surplus funds to the next year and then falsely claim the units’ owners had expressed the “desire” to do so as support of the Association federal tax forms for each year. (Per Adams Kessler Law Firm – “The Ruling [70-604] requires the membership rather than the board vote on the issue.”)
4. Suggestion that certain surplus funds be transferred as an unscheduled deposit to the Association reserve fund. (“*The Ruling [70-604] allows two options, either refunding the excess member income to the members or rolling it forward to the subsequent tax year. However, many tax practitioners and associations have elected a third option, which is to transfer the excess to reserves. The third option is not valid.*”)
5. The resolution adopted by the executive board on August 28, 2008 concerning distribution of surplus funds accumulated as of the end of the 2007 fiscal year purports the desire of SCA Members for a carry over distribution. This is not true. It is a false statement. SCA members never indicated their desires to do so. (*if the election [by members] is not documented in writing, you have no evidence of having made the election.*)

The behaviors noted above would seem to make the Association vulnerable and present considerable exposure to major tax liability as well as possibly penalties for filing a fraudulent tax return by claiming or implying member election of distribution when there was none. In such an event a special assessment might be required to meet tax and penalty obligations. I do not think anyone would like that.

I suggest it is important any resolution passed by the executive board prior to a vote by SCA units’ owners concerning distribution of surplus income at the end of fiscal 2008 make no reference or indication that units’ owners or members have agreed to the distribution indicated in the resolution. That would be a false statement.

Thus I urge prompt good faith action to obtain a vote by units’ owners concerning the distribution of surplus funds accumulated at the end of fiscal 2008 in accordance with IRS Ruling 70-604. Under Nevada Law NRS116.011, NRS116.095 and NRS116.3101 units’ owners have the authority to decide fiscal matters of the Association.

Thank you,

(SIGNED)

Tim Stebbins