SANTA BARBARA COUNTY
BOARD AGENDA LETTER

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
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Agenda Number:	
Prepared on:	10/21/04, revised 12/03/04
Department Name:	County Counsel
Department No.:	0710
Agenda Date:	11/2/04
Placement:	Departmental
Estimate Time:	1 hr
Continued Item:	NO
If Yes, date from:	

TO: Board of Supervisors

FROM: Stephen Shane Stark, County Counsel

STAFF CONTACTS: Jennifer Klein, Deputy County Counsel
Karen Freegard, acting "Clerk for Mobile Home Rent Control Ordinance"
x2950

SUBJECT: Petitions for Review of Mobile Home Rent Control Arbitrator Award - Nomad Village

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Recommendation(s): Consider the Petitions for Review filed by the Homeowners of Nomad Village Mobile Home Park and by Nomad Village Mobile Home Park, and act as follows:

ISSUE #3:

(A) Affirm the decision of the Arbitrator that Homeowners did not prove by a preponderance of the evidence that no Meet and Confer was held by Nomad Village Mobile Home Park.

ISSUE #8:

(A) Find that the Arbitrator abused his discretion when he erroneously interpreted and applied County's Mobile Home Rent Control Ordinance (§11A-5) contrary to its plain meaning and in a manner not permitted by law concerning the automatically allowable rent increase; and

(B) Reverse the Arbitrator's decision and hold that under Ordinance §11A-5, the Park may automatically increase homeowners' rents by 1.5 %, which represents 75% of the 2.0% increase in the Consumer Price Index over the 12 months immediately preceding January 2004, the month the Park noticed its rent increase.

ISSUE #9:

(A) Find that the Arbitrator abused his discretion when he failed to support his decision to allow the Park to pass through the cost of utility meter replacement to the residents of the park pursuant to Ordinance §11A-5 with the findings that (1) the Park's notice of rent increase complies with state law as a threshold matter, and (2) the replacement of the utility meters is a capital expense "required by a *change* in governmental law or regulation".

(B) Reverse the Arbitrator's decision to allow the Park to pass through the cost of utility meter replacement to park residents, based on the finding that the record before the Arbitrator does not contain substantial evidence to support required findings that (1) the Park's notice of rent increase to cover the cost of replacing utility meters complies with state law; and that (2) the cost of replacement of utility meters was required by change in governmental law or regulation.

ISSUE #6:

OPTION #1:

(A) Affirm the Arbitrator's decision and find that it is based on substantial evidence in the record that the Park sought to impose a fee outside of the rent, which was not permitted by the rental agreement drafted by the Park and executed by the parties.

OPTION #2:

(A) Find that the Arbitrator elevated form over substance by considering the noticed of the "mandatory fee" to not be a notice of "rent increase" and in so doing abused his discretion by not following the procedures for reviewing increases above the maximum rent schedule pursuant to County's Mobile Home Rent Control Ordinance §11A-5; and

(B) Remand the matter of the recycling fee to the Arbitrator with directions to follow the procedure in §11A-5 for evaluating proposed increases above the maximum rent schedule, and to determine whether the Park's recycling fee is justifiable pursuant to §11A-5, based on substantial evidence, if any, contained in the record of the hearings held on July 26 and July 30, 2004 before the Arbitrator.

Alignment with Board Strategic Plan:

The recommendation(s) are primarily aligned with Goal No. 5: A High Quality of Life for All Residents.

Executive Summary and Discussion:

County Code Chapter 11A codifies the County's Mobile Home Rent Control Ordinance. Under Chapter 11A, arbitration shall be used to fix maximum rent increase schedules for mobile home tenancies that fall within the protection of Chapter 11A. In the present case, the Homeowners of Nomad Village (Homeowners) petitioned for Arbitration contesting increases imposed by Nomad Village Mobile Home Park (Park). Specifically, the Homeowners contested (1) the amount of the "automatically allowable" annual rent increase noticed by the park, (2) a proposed "pass through" of the cost of upgrading the Park's utility systems as a capital expense beyond the allowable rent schedule, and (3) a proposed fee for recyclables collection service. The parties appeared before Arbitrator Paul Fritz, who issued an Arbitration Award on August 30, 2004. Both parties now appeal aspects of the Arbitration Award to your Board. Your Board's review shall ordinarily be made on the record alone; however, your Board may elect to hear oral argument from the parties, their representatives, and/or their attorneys.

Authority for Board Review

Rule 23 of the Mobile Home Rent Control Rules for Hearings requires that your Board review an arbitrator's decision upon submission of a proper petition alleging prejudicial abuse of discretion. A Petition for Review of portions of the Arbitrator's Decision was timely filed by the Homeowners of

Nomad Village on September 14, 2004. A Petition for Review of portions of the Arbitrator's Decision was timely filed by Nomad Village Mobile Home Park on September 21, 2004.

Rule 23 specifies that your Board's review of these matters may ordinarily be made by relying upon the written record alone; however your Board may elect to hear oral argument from the parties. If your Board finds that the Arbitrator has abused his discretion by failing to proceed in the manner required by law, by making findings not supported by substantial evidence or by making a decision not supported by the findings, your Board may:

1. Reverse the arbitrator's decision in whole or in part,
2. Make a new decision without remand, or
3. Remand the decision to the arbitrator for reconsideration in light of your Board's review.

If your Board does not find that the appealed decision constitutes an abuse of discretion, your Board must affirm the decision.

Rule 23 also specifies that your Board shall render its final decision within 30 judicial (i.e. working) days of your receipt of all pleadings, records, and transcripts.

Procedural Background

On March 4, 2004 the homeowners of Nomad Village, through Homeowners' Representative Tracy Quartararo, submitted a petition for a hearing (arbitration) under the County's Mobile Home Rent Control Ordinance and related Rules for Hearings. The petition was verified and the parties were notified of the verification on March 26, 2004.

Mr. Paul Fritz was selected from the list of newly appointed arbitrators by Tracy Quartararo, the Homeowners' Representative. James Ballantine, attorney for Nomad Village did not select an arbitrator from the list. Consequently, Paul Fritz was selected as the arbitrator for the Nomad Village Mobile Home Rent Control Arbitration. Paul Fritz has an extensive background in dispute resolution and is a CA licensed attorney. Mr. Fritz is familiar with the County's MHRC Ordinance and related Rules for Hearings.

The Arbitration was noticed for and held on July 26, 2004, in the Board of Supervisors Hearing Room. Prior to the Arbitration the parties submitted hearing briefs and various motions and objects, which were forwarded to the Arbitrator in advance of the hearing. In addition, the Arbitrator received correspondence leading up to the Arbitration compiled by the Clerk for the Ordinance.

At the July 26, 2004 hearing, both parties presented their positions. Approximately 10 homeowners were present in the audience. Norm Bremer, owner of Nomad Village, was also present. Both Nomad Village and the Homeowners' Representative submitted various pieces of evidence and information into the record. No witnesses were called.

The Arbitrator requested and received argument on (1) the appropriate CPI figure to apply to the rent increase, (2) whether the park could pass through the cost of garbage and recycling collection, and (3) whether the park could pass though the cost of upgrading utility service as a capital expense. The

Arbitrator also received testimony and argument concerning whether a meet and confer session had been held on February 25, 2004. Following each argument the Arbitrator recessed and ordered the parties to "meet & confer" on various issues during the recesses. The parties were unable to reach agreement on the issues following the meet & confer sessions. At the end of the hearing on the 26th the Arbitrator continued the hearing to July 30, 2004. The parties were unable to resolve any issues prior to the continued hearing.

The Arbitrator continued the hearing to July 30, 2004, at which time he received additional evidence and heard additional argument on the same three issues. No testimony from anyone other than Norm Bremer, James Ballantine, and Tracy Quartararo was taken. Similar to the first day of the arbitration, the arbitrator recessed multiple times to give the parties additional opportunities to reach mutual agreement on the issues. However, no mutual agreement was reached on any of the issues.

At the end of the hearing, the Arbitrator requested the parties submit (1) their opinion as to the applicability of certain sections of state law to the present hearing, and (2) additional information on the CPI that they wanted the Arbitrator to consider by August 9th at 5:00 P.M. The Arbitrator also gave the parties the opportunity to submit closing briefs by August 9th at 5:00 P.M, and gave the parties until August 12th at 5:00 P.M. to respond to the closing briefs and to present any and all other information and arguments the parties wanted the Arbitrator to consider.

The Homeowners' Representative submitted a closing brief and information concerning the applicability of the State Mobile Home Residency Law to the proceedings. Attorney for Nomad Village submitted a closing brief. Neither party submitted a response to the other's closing argument by July 30th.

The Arbitrator rendered his final decision on August 30, 2004. The decision was broken down into separate findings and decisions on nine different issues. Petitions for Review by the Board of Supervisors have been filed by both the Homeowners and Nomad Village pursuant to Rule 23 of the Mobile Home Rent Control Rules for Hearings. Each Party has filed a response to the Petition of the other party. These documents are attached to this staff report for your Board's review.

The **Homeowners' Petition for Review** seeks review and reversal or modification of the Arbitrator's decisions regarding the Issues #3, #8, and #9:

Issue #3: Whether a Meet & Confer was held? Arbitrator's Holding: Yes, a Meet and Confer was held. (Homeowners' position is that No Meet & Confer was held, and consequently that the Arbitrator shall deny an increase in the maximum rent schedule due to the Park's failure to provide a Meet and Confer.)

Issue #8: Based on the formula for automatic increase in rent found at County Code, Chapter 11A, §11A-5(a)(2); by what percentage may the annual rent be automatically increased in the present case? Arbitrator's Holding: 2.25% is the correct percentage increase. (Homeowners' position is that 1.5% is the correct percentage increase)

Issue #9: Whether the cost of replacing utility meters may be passed through to the Homeowners as a capital improvement? Arbitrator's Holding: Yes. (Homeowner's position is that the cost of replacing utility meters cannot be passed through.)

Nomad Village Mobile Home Park's Petition for Review seeks review and remand of the Arbitrator's decisions regarding Issue #6:

Issue#6: Whether the cost of collecting recyclables, pursuant to a county mandated recycling program, may be charged separately from the rent and passed through to the Homeowners? Arbitrator's Holding: No, the cost of collecting recyclables is a "service" contemplated by the rental agreement, the cost of which is covered by the rent and may not be separately passed through. (Nomad Village's position is that the cost of collecting recyclables may be passed through because the collection of recyclables is a new service that the County requires the Park to provide, and that is not covered by the existing rental agreement.)

No other issues have been appealed to the Board of Supervisors.

Analysis

Homeowner's Petition For Review of Arbitrator's Decision
(Appealing Issues #3, #8, and #9.)

ISSUE #3: Whether the Arbitrator committed prejudicial abuse of discretion when he found that a Meet & Confer session was held by the Park?

Homeowners allege prejudicial abuse of discretion on the part of the Arbitrator insofar as the Arbitrator rejected the Homeowner's demand that the Park's entire noticed rent increase be denied by the Arbitrator. The Homeowners' demand at the hearing before the Arbitrator was based on their argument that no meet and confer was held. Under Ordinance §11A-5 (e)(2) the Arbitrator is required by law to deny such increase if he finds that the Homeowner's have demonstrated by a preponderance of the evidence that no meet and confer session was held.

Homeowners argue that the Arbitrator disregarded the facts and evidence presented at the hearing concerning whether a meet and confer was held, and that he also disregarded the law concerning what constitutes a meet and confer session. By way of background, the Homeowners argued to the Arbitrator that the meeting that was held by Park and that was attended by homeowners was not actually a meet and confer because (1) the meeting did not meet the definition of a meet and confer and (2) the meeting was not noticed within the timeframe for noticing a meet and confer.

The Park argues that a Meet and Confer was held and that the Arbitrator's decision not to deny the Park's increase pursuant to 11A-5(e)(2) is supported by the findings, and that the findings are supported by substantial evidence.

Ordinance §11A-5(a)(3)(b) states that management shall set a Meet and Confer session where the noticed increase is in excess of the 75% of the CPI. The procedures for holding the Meet and Confer are set out in Rule 2 of the Rules for Hearings.

The Arbitrator decided not to deny the Park's notice increase pursuant to 11A-5(e)(2). This decision was based on the Arbitrator's findings that (1) a meet and confer was provided for by the Park, (2) a meet and confer was held on February 25, 2004, which was attended by approximately 25 homeowners, and (3) the face of the Homeowner's Petition indicates that a Meet and Confer was held on February 25, 2004. The Arbitrator also made the finding that the Meet and Confer session was not noticed within the time limit, but that this procedural defect was waived by the Homeowners' lack of timely objection to the timing of the notice and by their conduct in attending and participating in the February 25, 2004 meeting that was noticed as the required Meet and Confer session.

The Arbitrator's findings are based on the evidence contained in the record before the Arbitrator. The Arbitrator received into evidence, among other items, (1) the Homeowner's March 4, 2004 Petition, (2) the Park's January 15, 2004 Ninety-Day Notice of Rent Increase, which purported to conform with the allowed automatic rent increase of 75% of the CPI, and which enclosed separate notices summarizing amounts of CAP expenses, (3) the Park's January 20, 2004 Notice of Rent Increase (Capital Expense Pass-Through), and (4) January 20, 2004 "Notice of New Mandatory Recycling Fee". The Arbitrator also heard testimony by both sides concerning whether a meet and confer had been held, and whether the procedures guiding a meet and confer had been followed.

An examination of the documentary evidence in the record shows that the first rent increase notice by the Park was issued January 15, 2004, and allegedly only increased the rent by 75% of the CPI. The evidence also shows that on January 20, 2004, the park issued another rent increase notice to cover a capital expense pass-through. This notice allegedly increased the rent over the automatically allowable 75%, and contained a statement that read:

> "A Meet and Confer Session will be held at the Park recreation room on February 25, 2004 at 7:00 P.M. Should you have any questions concerning this increase prior to that time, please contact management or this office directly."

The evidence in the record also shows that on January 20, 2004, the Park issued a "Notice of New Mandatory Recycling Fee", which the Park alleged it was legally allowed to pass on to the homeowners. This notice contained a statement that read:

> "The Park will forward details and information about the operation of the program to you in the near future. Should you have any questions about this, you are welcome to raise them at the Meet and Confer scheduled for February 25 at 7:00 P.M. at the Park recreation room, or to call the Park office."

The record shows that the Petition filed by the Homeowner's challenging the rent increases states: "The required Meet and Confer session was held on <u>February 25, 2004</u>." The record also contains evidence and testimony that the notice of the meet and confer was not timely. The record contains evidence that homeowners did attend a meeting on February 25, 2004, that was noticed as a "Meet and Confer" by the Park.

All evidence was taken under submission, considered, and weighed by the Arbitrator.

<u>STAFF RECOMMENDATION - ISSUE #3:</u>

Recommend that the Board of Supervisors:

(A) Affirm the decision of the Arbitrator that Homeowners did not prove by a preponderance of the evidence that no Meet and Confer was held by Nomad Village

* * *

ISSUE #8: Whether the Arbitrator committed prejudicial abuse of discretion when he determined that the amount of the automatically allowable percent increase in the maximum rent schedule in the present case is 2.25%?

Homeowners allege prejudicial abuse of discretion on the part of the Arbitrator insofar as the Arbitrator's decision concerning Issue #8, "allowed Management to increase base rents by the amount of the <u>annual average</u> (which he erroneously identifies as the "annual increase") of the Consumer Price Index

(hereinafter CPI) for the year 2003." (p. 3 Homeowner's Petition for Review, September 14, 2004, emphasis in original.) Specifically, Homeowners argue that the Arbitrator incorrectly applied County's Ordinance and failed to use the correct percent change in the CPI over the 12 months preceding the month the Park noticed its rent increase, which was January 2004.

The Park argues that the Homeowners fail to establish any prejudicial abuse of discretion on the part of the Arbitrator and that the Arbitrator correctly applied the average annual percent change in the CPI for the year 2003 when he calculated the automatically allowable rent increase.

County Code §11A-5(a), provides the legal formula governing percent increases in the maximum rent schedule that may be noticed and imposed by the Park without triggering the Homeowner's right to petition to contest the noticed rent increase. In other works, this section provides the legal formula for what is generally known as the "automatic" allowable rent increase. Specifically, §11A-5(a) states:

> (a) Management's notice of an increase in the maximum rent schedule shall:
>
> (1) Comply with state law; and
>
> (2) Indicate whether or not the percentage of noticed increase in relation to the previous maximum rent schedule, less allowed costs for capital improvements and/or capital expenses, if any, is in excess of seventy-five percent of the percentage by which the most recently published edition of the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers, Los Angeles-Long Beach-Anaheim area, all items, Base Index 1967=100, shows that such index has increased during the immediately preceding twelve months for which said index has been published at the time notice of said increase was given or since the last rent increase (hereinafter called "in excess of seventy-five percent of CPI"); and
>
> (3) Where the noticed increase is in excess of seventy-five percent of CPI, management shall:
>
> (A) Itemize amounts for increased operating costs; any capital expenses incurred in the prior year to be undertaken for which reimbursement is sought, hereinafter "new" capital expenses; any capital expenses allowed in prior years but not fully reimbursed, hereinafter "old" capital expenses; any offset against new or old capital expenses; and capital improvements.
>
> (B) Set a meet and confer session. The procedure for meet and confer shall be set out in the rules for hearing.

A question of law was presented to the Arbitrator concerning the meaning and operation of the above quoted section. The Arbitrator in his Award made the following initial findings necessary to his application of section 11A-5 to the present case:

(1) The U.S. Department of Labor, Bureau of Labor Statistics has replace the "Los Angeles-Long Beach-Anaheim area" referenced in the ordinance with the "Los Angeles-Riverside-Orange County" area, and that the latter area is an acceptable substitute geographic area to use when calculating allowable rent increases under County's Ordinance;
(2) The "Base Index 1967=100" is the correct Base Index;
(3) The CPI for Urban Wage Earners and Clerical Workers, Los Angeles-Riverside-Orange County area, all items, Base Index 1967=100, is the correct CPI to apply to the present rent increase; and
(4) The Correct CPI data is reflected in Exhibit A to the Arbitration Award.

Exhibit A contains two charts. The first is an accurate and correct copy of the applicable CPI, charted for the years 1994 through 2004. In addition to showing the actual CPI for each month, the chart shows the *average* monthly CPI for each year under the column "Annual". The chart also shows the *average* for the

first half of each year under "HALF1", and shows the *average* for the second half of each year under "HALF2".

The second chart is entitled "12 Months Percent Change". The data in this chart shows the 12 months percent change in the actual CPI over the last 12 months as of any given month, and also provides *average* monthly "12 month percent change" for each year, and for the first and second halves of each year.

The Park's January 15, 2004 rent increase notice purported to increase rents based on the "*annual average"* of the applicable CPI for 2003. The Arbitrator similarly chose to apply ordinance section 11A-5, using the *annual average* of the applicable CPI for 2003. The annual average "12 months percent change" in CPI for 2003 was 3.0%. The Arbitrator then took 75% of 3.0% to arrive at allowable 2.25% automatically allowable rent increase.

The Homeowners essentially argue that the Arbitrator's reliance on the *average* 12 month percent change for 2003, instead of the actual percent change over the 12 months preceding the month that the Park noticed the proposed rent increase (January 2004), was an abuse of discretion. According to the Homeowners, had the Arbitrator correctly relied on the actual percentage change over the 12 months ending December 2003, which was 2.0%, he would have held that the Park could automatically increase the maximum rent schedule by 1.5% , which is 75% of 2.0%.

The key issue for the Board is whether the Arbitrator's interpretation and application of the ordinance was in the manner permitted by law. Specifically, the issue is whether the Arbitrator's decision to use of the *average* 12 month percent change (increase) for the year 2003 (i.e. 3.0% average change), instead the actual 12 month percent change (increase) preceding January 2004 (i.e. 2.0% actual change), was permitted by §11A-5.

Based on the plain language of the ordinance, the Ordinance cannot reasonably be interpreted to allow use of averaged percentages when calculating automatically allowable rent increases. Consequently, the Arbitrator did not proceed in a manner required by law when he used the 3.0% averaged "12 month percent change" instead of the actual percent increase over the 12 months preceding the month the rent increase was noticed, January 2004.

Section 11A-5(a) states in relevant part:

> "… seventy-five percent of the percentage by which the …[CPI]…, shows that such index has increased during the immediately preceding twelve months for which said index has been published at the time notice of said increase was given or since the last rent increase … "

The plain meanings of the above section must control. There is no indication in the above section that the term "percentage" means the *average* percent increase during the preceding 12 months. The plain language indicates that percentage means the percent the CPI has increased during the immediately preceding 12 months. Even though the Department of Labor, Bureau of Labor Statistics provides data on the average annual 12 month percent change , this is not the data that the County's Ordinance requires be used when calculating the automatically allowable rent increase.

STAFF RECOMMENDATION - ISSUE #8:

Recommend that the Board of Supervisors:

(A) Find that the Arbitrator abused his discretion when he erroneously interpreted and applied County's Mobile Home Rent Control Ordinance (§11A-5) contrary to its plain meaning and in a manner not permitted by law concerning the automatically allowable rent increase; and

(B) Reverse the Arbitrator's decision and hold that under Ordinance §11A-5, the Park may automatically increase homeowners' rents by 1.5 %, which represents 75% of the 2.0% increase in the Consumer Price Index over the 12 months immediately preceding January 2004, the month the Park noticed its rent increase.

* * *

ISSUE # 9: Whether the Arbitrator committed prejudicial abuse of discretion when he determined that the Park was entitled to automatically pass through to the Homeowners the cost of replacing electric, gas, and water meters?

Homeowners allege prejudicial abuse of discretion on the part of the Arbitrator, arguing that he erroneously applied the County's Mobile Home Rent Control Ordinance in a way that wrongly allowed the Park to automatically pass through the cost of replacing gas, electric, and water meters in the park. Specifically Homeowner's argue that there has been no change in law that would allow an automatic pass through of the cost of replacing gas, electric, and water utility meters pursuant to County's Ordinance. The Homeowners also allege the Arbitrator abused his discretion by ignoring applicable state law concerning the Park's recovery of the cost of maintaining, repairing, or replacing, utility meters.

The Park argues that there has been no abuse of discretion on the part of the Arbitrator because the utility meter replacement was mandated by a change in the law occurring after the Mobile Home Rent Control Ordinance was passed, and because even if the utility replacement is not mandated by a change in the law, the Arbitrator still has the discretion to allow passing the cost on to the homeowners. The Park also argues that state law concerning the Park's recovery of the cost of replacing the meters does not prevent the Park from recovering the replacement cost under County's ordinance.

Ordinance section 11A-2 (b) defines "Capital expense" as "a repair or replacement of existing facilities or improvements which has an expected life of more than one year."

Ordinance section 11A-6(b) states:

> (b) Capital Expenses.
>
> (1) The cost of capital expenses incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase.
>
> (2) Any notice of a rent increase which is in excess of seventy-five percent of CPI and includes costs for capital expenses shall contain a payment plan which shows the amount needed per month to amortize the cost of the capital item(s) over the useful life of the item(s). Payment plans for old capital expenses are not subject to modification by the arbitrator unless mutually agreed to by management and homeowners.
>
> (3) Notwithstanding any other provision to the contrary, the cost of capital improvements required by a change in governmental law or regulation may be automatically passed on to homeowners at the time of an annual increase. Any hearing on such costs shall be solely for the purpose of determining whether management's plan for compliance or for recoupment of costs is unreasonable, if so alleged by homeowners.
>
> (4) Management shall deduct increases allowed for capital expenses at the time which was specified by the arbitrator, or if no time was so specified, than at the time specified by the payment plan.
>
> (A) If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

(B) If the arbitrator finds that management failed to discontinue the increase, the arbitrator shall order management to credit such amount to each homeowner retroactive to the date the increase should have been deducted together with interest at the legal rate.

(5) If management fails to begin construction of a capital expense item within six months after approval of the cost of the capital expense, then management shall discontinue the increase for the capital expense and shall credit any amount collected to each homeowner. If management fails to automatically discontinue such increase, then such increase shall be considered an increase in the maximum rent schedule and shall be subject to all the provisions of this chapter, including, but not limited to, amount and frequency of increase.

[Sec. 11A-6 (b), Emphasis added.]

The Record demonstrates that the Park noticed its proposed rent increase for the cost of utility meter replacement as a capital expense on January 20, 2004. (p. 000034.) The Park lumped together the cost of replacing 50 electrical meters, 63 gas meters, and 61 water meters. (Id.) The total cost of replacement was noticed as $15,343.69. (Id.)

The Arbitrator's decision to allow the entire amount of the capital expense to be passed through to the homeowners was based on his interpretation and application of Ordinance §11A-6 to allow the Park to pass through the entire cost of the utility meter replacement, if found reasonable by the Arbitrator. (pp. 000465-466.)

His decision was also based on his findings that (1) the *Rainbow Disposal Company v. Escondido Mobile Home Rent Control Review Board* (1998) 64 Cal.App.4th 1159, is distinguishable from the present matter and is therefore not controlling; (2) the Public Utilities Commission Decision, D: 95-02-090, and the Southern California Edison Rate Schedule for DSM-2, do not control the present matter; and (3) that the utility meter replacement "plan presented by the Park Owner in the notice dated January 20, 2004, is … reasonable…". (pp. 000467.)

First, the Arbitrator did not make any finding that the cost of the Park's meter replacement project (capital expense) was "required by a change in governmental law or regulation," such that the cost may be passed on to the Homeowners at the time of the annual increase, pursuant to Ordinance section 11A-6(b)(3). Only a capital improvement or capital expense "*required by change in governmental law or regulation may be automatically passed on to the homeowners at the time of the annual increase.*" (Ord. Sections 11A-6(b)(3), emphasis added.) The Arbitrator only found that "the Park Owner is required by law to test and then replace faulty meters." (pp. 000468.) And that the "counter-balance" to the Ordinance' automatically allowable rent increase (75% of the change in the CPI) "is the ability of the Park Owner to pass on capital improvements that are required by law. Section 11A-6(a)(3)." (Id.) Thus, the Arbitrator's decision to allow the Park to automatically pass thorough the cost of the utility meter replacement pursuant to section 11A-5 is not supported by a finding that the capital expense is required by a change in governmental law or regulation such that it qualifies for an automatic pass through. The failure to make these findings renders the Arbitrator's decision unsupported by substantial evidence.

Second, much time was spent at the Arbitration hearing concerning the applicability of the *Rainbow* decision and a related decision of the California Public Utilities Commission, both of which interpreted section 739.5 of the California Public Utilities Code. The *Rainbow* decision in particular discussed the application of PUC §739.5 in the context of a local mobile home rent control scheme. The Homeowners essentially argue that PUC §739.5 as interpreted by the PUC and the Court of Appeals in *Rainbow*, prohibits a Park from charging the homeowners for utility related costs beyond the average rates set by the PUC. The Park argued that the PUC decision and *Rainbow* were distinguishable and inapplicable to the present case, and did not operate to prevent the Park from passing on the cost of the meters. The Arbitrator found that the factual setting in *Rainbow* distinguishable from the present situation, in that the

County of Santa Barbara's Mobile Home Rent Control Scheme does not involve a rent control *board* that exercises discretion over allowable rent increases. (pp. 000468.) Having distinguished the case, the Arbitrator did not apply it to the present matter. (Id.) The Arbitrator also found the decision of the PUC demonstrated that the PUC does not have "rent control" jurisdiction, and for that reason, the Arbitrator did not apply it to the present matter. (Id.)

The key legal question is whether California Public Utility Code §739.5 prohibits the Park from recovering the cost of the replacement of utility systems through rent increases authorized under the County's rent control scheme. This question is relevant because County's ordinance requires that the Park's notices of increase in the maximum rent schedule comply with state law. (§11A-5 (a)(1).)

In the *Rainbow* case, the City of Escondido's rent control board denied a Park's request for authorization to increase the rent to cover the cost of improving the park's gas and electrical systems. (*Rainbow Disposal Company v. Escondido Mobilehome Rent Control Review Board* (1998) 64 Cal.App.4th 1159, 1163.) The Court held this denial proper based on a California Public Utilities Commission decision that prohibited park owners from recovering the cost of maintaining and improving gas and electrical systems from submetered tenants through rent increases. (*Id.* at 1166-1168.) According to the Court, the PUC's decision applied equally to rent controlled parks and non-rent controlled parks. (*Id.* at 1167.) The Court held that PUC§739.5(a) precludes master-metered park owners from recovering the cost of repair and maintenance of gas and electrical systems through a rent increase, regardless of whether the rent increase was imposed by a park owner or authorized by a rent control board; and that there is nothing in PUC §939.5 that indicates it does not apply to rent controlled parks. (*Id.* at 1169.)

Based on the above analysis, the *Rainbow* decision indicates that CUP §739.5 applies to rent controlled parks, and that Park management must comply with that state law. The fact that the County of Santa Barbara may have a differently structured rent control scheme, does not change this analysis as suggested by the Arbitrator and the Park. Because the Arbitrator distinguished *Rainbow*, he made no finding that the Park's notice complied with CUP §739.5, as interpreted by the *Rainbow* decision.

Under the Santa Barbara County rent control ordinance, the Parks' notice of rent increase covering the capital expense pass through for the utility meter replacement project, must comply with state law. (Ord. §11A-5(a)(1).) Compliance with state law is a threshold requirement that must be satisfied before any matter concerning a rent increase or capital expense pass through may be considered under County's rent control ordinance by an Arbitrator. A review of the record before the Arbitrator demonstrates that there is insufficient evidence showing that the Park complied with state law governing and limiting the recovery of master-meter parks' recovery of costs related to the provision of utilities. In particular, there is no evidence indicating that the amount the park seeks to pass on to homeowners is at or below the cost recovery limits set by the PUC under state law.

STAFF RECOMMENDATION - ISSUE #9:

Recommend that the Board of Supervisors:

(A) Find that the Arbitrator abused his discretion when he failed to support his decision to allow the Park to pass through the cost of utility meter replacement to the residents of the park pursuant to Ord. §11A-5 with the findings that (1) the Park's notice of rent increase complies with state law as a threshold matter, and (2) the replacement of the utility meters is a capital expense "required by a *change* in governmental law or regulation".

(B) Reverse the Arbitrator's decision to allow the Park to pass through the cost of utility meter replacement to park residents, based on the finding that the record before the Arbitrator does not contain substantial evidence to support required findings that (1) the Park's notice of rent increase to cover the

cost of replacing utility meters complies with state law; and that (2) the cost of replacement of utility meters was required by change in governmental law or regulation.

* * *

Nomad Village Mobile Home Park's Petition For Review of Arbitrator's Decision
(Appealing Issue #6.)

ISSUE #6: Whether the Arbitrator committed prejudicial abuse of discretion when he determined that the Park could not charge a fee above the maximum rent schedule for pick-up of recyclables?

The Park alleges in its Petition for Review that the Arbitrator "mistakenly overlooked the legal provisions of both the Ordinance and the California Mobilehome Residency Law." (Nomad Village's Petition for Review, p. 3.) Specifically, the Park essentially argues that the Arbitrator did not proceed in the manner required by the Ordinance, and that the Arbitrator did not consider the operation of California Civil Code §798.31 and 798.32(a), which allow the Park to charge a fee for services actually rendered which are not listed in the rental agreement if the homeowner has been given at least 60 days notice before imposition of the charge. (Id. at p. 4.)

Homeowners argue that the Arbitrator did proceed in the manner required by law when he found that the Homeowners' rental agreement, and the Park's rules which the rental agreement incorporates by reference, require that the Park not charge a fee for collecting refuses, including recyclables, separately from rent. (Homeowners' Response to Park's Petition for Review, p. 1.)

The Arbitrator found that under the Park's rules, which are incorporated into the Homeowners' rental agreements which were made part of the Record, the Park is obligated to include charges for refuse and trash services in the monthly rent. (pp. 000464, 000169, and 000167) The Arbitrator also found "that the phrase 'refuse and trash service charges' is broad enough to include the recyclables referred to by the Park Owner." (Id.) Because the Arbitrator found that the collection of recyclables was included in "refuse" collection, which is a service listed in the rental agreement, the Arbitrator did not apply Civil Code § 798.32(a), which governs charges for fees for services that are not listed. Further, the Arbitrator found that the Park is responsible for the collection of refuse and trash, including recyclables, as part of the rent. Consequently, the Arbitrator found the Park could not charge a "fee" separately from rent to cover its expenses related to recyclable service. (Id.)

By essentially drawing a distinction between a "fee" charged for recycling services and a "rent increase" to cover recycling charges, the Arbitrator avoided applying Ordinance §11A-5, to determine whether a rent increase above the automatically allowable 75% of the CPI was justifiable. The Arbitrator (or the Board) have discretion to add an amount to cover increased operating costs above the automatically allowable rent increase that are found to be justified by the evidence in the record.

The record shows that on January 20, 2004, the Park issued a "Notice of New Mandatory Recycling Fee: $6.15 per space". (000033.) The Notice also indicated that the "Mandatory Recycling fee of $6.15 will appear on your monthly statement." (Id.) The Park did not, but could have noticed a "rent increase" instead of a "mandatory fee" to cover this amount, subject to the County's Mobile Home Rent Control Ordinance and subject to the right of Homeowners to contest the amount of the increase above the automatically allowable 75% of the CPI by petitioning for Arbitration.

STAFF RECOMMENDATION - ISSUE #6:

OPTION #1: Recommend that the Board of Supervisors:
(A) Affirm the Arbitrator's decision as it is based on substantial evidence in the record that the Park sought to impose a fee outside of the rent, which was not permitted by the rental agreement drafted by the Park and executed by the parties.

OPTION #2: Recommend that the Board of Supervisors:
(A) Find that the Arbitrator elevated form over substance by considering the noticed of the "mandatory fee" to not be a notice of "rent increase" and in so doing abused his discretion by not following the procedures for reviewing increases above the maximum rent schedule pursuant to Ordinance §11A-5;

(B) Remand the matter of the recycling fee to the Arbitrator with directions to follow the procedure in §11A-5 for evaluating proposed increases above the maximum rent schedule, and to determine whether the Park's recycling fee is justifiable pursuant to §11A-5, based on substantial evidence, if any, contained in the record of the hearings held on July 26 and July 30, 2004 before the Arbitrator.

* * *

Mandates and Service Levels: None

Fiscal and Facilities Impacts: No fiscal impact to County for Board's review of the Arbitrator's decision. However, if the Board chooses to remand any portion of the decision back to the Arbitrator, the following costs may be incurred for reconsideration and drafting of an amended decision: Arbitrator: $100/hr.

Special Instructions: Request the Clerk of the Board to return a copy of the Minute Order to County Counsel's Office, Attn: Karen Freegard, Clerk for the Mobile Home Rent Control Ordinance.

Concurrence: County Counsel

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Attachments:

1. **Arbitration Award, Petitions for Review, Responses by Parties**
2. **Legal Authorities**
3. **Record of Proceedings Before the Arbitrator (Transcript Not Requested by Either Party)**