

Attachment P
Nomad Village Mobile Home Park's Petition

1 JAMES P. BALLANTINE
2 Attorney at Law
3 329 East Anapamu Street
4 Santa Barbara, California 93101
5 (805) 962-2201
6 State Bar No. 152015

01-17-12P06:00 RCVD

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9 Attorney for NOMAD VILLAGE MOBILE HOME PARK

10 ARBITRATION PROCEEDINGS UNDER THE SANTA BARBARA COUNTY
11 MOBILEHOME RENT CONTROL ORDINANCE
12

13)
14)
15 IN RE NOMAD VILLAGE MOBILE HOME PARK) PETITION TO SANTA
16) BARBARA COUNTY BOARD
17) OF SUPERVISORS FOR
18) REVIEW OF PORTIONS OF
19) ARBITRATOR'S DECISION
20) BY NOMAD VILLAGE MOBILE
21) HOME PARK MANAGEMENT
22)
23) Stephen Biersmith, Esq.
24) Arbitrator
25)
26) Date: September 19-20 2011
27) Time: 9:00 A.M.
28) Location: Board of
Supervisors Hearing Rm

1 TO THE HONORABLE MEMBERS OF THE SANTA BARBARA COUNTY BOARD OF
2 SUPERVISORS:

3
4 LAZY LANDING, LLC, as management of NOMAD VILLAGE MOBILE
5 HOME PARK, hereby petition for review of portions of the
6 Arbitrator's Opinion and Award (Revised) ("Decision") in the
7 matter of the Arbitration between Nomad Village Mobile
8 Homeowners, Petitioner, and Nomad Village Mobile Home Park,
9 Respondent by Arbitrator Stephen Biersmith, Esq., issued on
10 December 20, 2011, pursuant to Rule 23 of the Mobile Home Rent
11 Control Rules for Hearing ("Rules) adopted pursuant to the Santa
12 Barbara County Mobilehome Rent Control Ordinance ("Ordinance").

13 NOMAD VILLAGE MOBILE HOME PARK Management hereby petitions
14 for review of the following portions of the Decision solely on
15 the following limited grounds:

16 Opinion and Finding A.2 "Lease Payment Increase", and B.
17 "Uncompensated Increases Increased Land Lease", denying NOMAD
18 VILLAGE MOBILE HOME PARK management a rent increase based upon
19 increased operating costs attributable to an increased ground
20 lease fees, on the grounds of prejudicial abuse of discretion
21 because it is not in accordance with the manner required by law,
22 is not supported by the findings, and not supported by
23 substantial evidence in the record.

24 Dated: January 17, 2012


25
26 
27 JAMES P. BALLANTINE
28 Attorney for Petitioners
LAZY LANDING, LLC, and
WATERHOUSE MANAGEMENT, INC.

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1 POINTS AND AUTHORITIES IN SUPPORT OF PETITION

2
3 I

4 THE EVIDENCE IS UNDISPUTED THAT THE GROUND LEASE FEES FOR NOMAD
5 VILLAGE WERE DOUBLED AND WERE THE MARKET PRICE BASED ON ARMS
6 LENGTH NEGOTIATION

7
8 Park management solely appeals the denial of a rent
9 increase based upon increased ground lease fees as being
10 contrary to the express provisions in the Ordinance that the
11 Park management is entitled to a rent increase based upon
12 increased operation costs.

13 The record in the arbitration proceedings was clear that
14 the Management of Nomad Village Mobile Home Park incurred
15 increased operating expenses in the form of increased ground
16 lease fees, and that these fees were a market amount. There is
17 no factual dispute that the ground lease fees for operating
18 Nomad Village Mobilehome Park doubled in 2008, from 10% to 20%
19 of gross rents (Exhibit H; RT1 67:10-21). Further, there is no
20 factual dispute that the typical market rents for mobilehome
21 parks operating under ground leases operating on long-term
22 ground leases is 10-20% (RT2 136:1-6), nor is there any factual
23 dispute that the Ground Lease was the product of arms length
24 negotiations by Mr. Waterhouse and the property owner (RT2
25 134:10-135:16). The homeowners do not dispute that the increased
26 ground lease fee is a market price that was the product of an
27 arms length negotiation. (RT1 216:25-217:8.) In sum, there is
28 no dispute that the ground lease fees were necessarily incurred

1 by park management as an increased operating expense of the
2 park.

3 There was no evidence presented at the arbitration hearing
4 that the ground lease fees were in fact any kind of fee for the
5 acquisition of any property interest in the park, or anything
6 other than an operating expense of the Park.

7 There is no dispute that the increased ground lease fees
8 have in fact been paid by park management. The payment of the
9 increased ground lease fees was testified to by Mr. Waterhouse.
10 (RT2 136:17-19.) Dr. St. John confirmed from the books of
11 account that in fact this rent increase had occurred, and that
12 the increased rent payments had been made by the current
13 operator. (RT1 67:10-21, 121:20-122:1.)

14
15 II

16 THE EVIDENCE IS UNDISPUTED THAT PARK MANAGEMENT IS ENTITLED
17 UNDER THE ORDINANCE TO A RENT INCREASE BASED UPON INCREASED
18 OPERATING EXPENSES

19
20 Section 11A-5 of the Ordinance, deals with Increases in the
21 Maximum Rent Schedule, and section 11-A(f) provides in pertinent
22 part, with emphases added, as follows:

23 (f) [T]he arbitrator shall consider all relevant
24 factors to the extent evidence thereof is introduced
by either party or produced by either party on request
of the arbitrator.

25 (1) Such relevant factors may include, but are not
26 limited to, **increases in management's ordinary and**
necessary maintenance and operating expenses,
27 **insurance and repairs; increases in property taxes and**
fees and expenses in connection with operating the
28 **park; capital improvements; capital expenses;**

1 increases in services, furnishings, living space,
2 equipment or other amenities; and expenses incidental
3 to the purchase of the park except that evidence as to
4 the amounts of principal and interest on loans and
5 depreciation shall not be considered.

6 Accordingly, the rent increase, based upon increased
7 operating costs due to the ground lease fee increases, are
8 properly the bases for the rent increase. Any finding that such
9 increased operating costs are not the basis for a rent increase
10 is contrary to the express terms of the Ordinance, and
11 necessarily assumes that the Ordinance must explicitly specify
12 each and every increased operating expense that may form the
13 basis for a rent increase. The Ordinance states that "the
14 arbitrator shall consider **all** relevant factors" in determining
15 the amount of rent increase, and that: "Such relevant factors
16 may include, **but are not limited to**, increases in management's
17 ordinary and necessary maintenance and operating expenses,
18 insurance and repairs; increases in property taxes and fees and
19 expenses in connection with operating the park..." (Ordinance,
20 Section 11A-11A-6(f)(1).) Therefore, the expenses set forth in
21 the Ordinance are by way of example rather than limitation, and
22 in fact the arbitrator is to consider without limitation all
23 increases in management's operating expenses incurred in
24 operating the park. Accordingly, disallowing the rent increase
25 to cover such increased operating costs is contrary to the terms
26 of the Ordinance.

26 ///

27 ///

28 ///

III

THE EVIDENCE IS UNDISPUTED THAT INCREASED GROUND LEASE EXPENSES
ARE PROPERLY INCLUDED IN AN MNOI ANALYSIS

Any finding disallowing the rent increase to compensate Park management for increased ground lease fees is also contrary to the record and not supported by substantial evidence in the record. Based upon his thorough review of the Ordinance, the Park's consulting economist, Dr. Michael St. John, noted that a ground lease expense is an expense properly considered by the arbitrator in determining an appropriate rent increase amount. (RT1 55:7-11.)

In this case in particular, Dr. St. John testified that he performed an analysis and determined that the ground lease fees had in fact doubled, that the fees had in fact been paid as listed in this analysis, and determined that this increase in ground lease fees was an appropriate expense to pass through to the homeowners through a rent increase, under the terms of the Santa Barbara County Ordinance. (RT1 66:10-67:8.)

Moreover, Dr. St. John in fact testified unequivocally that ground lease rents were properly included in an MNOI analysis and typically and properly considered for the purpose of a rent increase. Dr. St. John stated as follows:

"Yeah, it's an expense. Ground expense would certainly be an expense from a bookkeeping point of view, it's a cash expenditure, it would be an expense from an auditing point of view, a tax return would certainly include it, and **it would be allowed in all**

1 those contexts, and it should be allowed in an MNOI
2 context as well, and has been in my experience, many
3 times.

4 When I say "many times," I don't say all the time only
5 because most parks are owned by the operators. There
6 are some parks, like Nomad Village, where the operator
7 does not own the park, it leases the park, so it's
8 relatively rare that ground leases appear at all, but
9 when they exist, they do appear in the MNOI analysis."

10 (RTI 51:18 - 52:7, emphases added.)

11 The performance of an MNOI analysis, and the proper
12 inclusion of ground lease fees in the analysis is significant;
13 the Ordinance in this case specifically prescribes a particular
14 MNOI analysis be performed.

15 As Dr. St. John, the Park's consulting economist,
16 explained, the Maintenance of Net Operating Income (MNOI)
17 analysis is a system employed under some rent control schemes to
18 determine whether increased operating expenses support a rent
19 increase. (RT1 49-51.) The MNOI analysis focuses solely on
20 income and expenses, and compares a base year to a subject year
21 in which the increased expenses have been incurred. (RT1 50:6-
22 13.) Dr. St. John testified in some detail that the Santa
23 Barbara County Ordinance specifies an analytical approach to a
24 permanent rent increase that was not a classic MNOI analysis but
25 was a variation on it. (RT1 52-54.)

26 Dr. St. John presented the MNOI analysis that he prepared
27 analyzing the income and expenses, showing that a rent increase
28 was justified resulting from the increased ground lease and

1 property tax expenses incurred by Park management. (Exhibit D,
2 Tables 3-A and 3-B.)

3 Dr. St. John testified that he prepared his analysis as
4 what he called a Santa Barbara type of MNOI analysis in
5 conformity with the requirements of the Ordinance. (RT1 88.)
6 Dr. St. John testified that in preparing his analysis, (Exhibit
7 D, Tables 3-A and 3-B, particularly p. 4 of each table) he
8 followed the Ordinance "precisely." (RT1 102:13-24.) The
9 homeowners never presented any other MNOI analysis and did not
10 dispute that the MNOI analysis prepared by Dr. St. John
11 (Exhibits D, Tables 3A & B) were prepared in accordance with the
12 requirements of the Ordinance. (RT1 241:20-242:25.)

13
14 IV

15 CONSIDERATION OF THE LANGUAGE OF OTHER ORDINANCES IS LEGAL ERROR

16
17 The homeowners caused legal error by injecting into the
18 arbitration proceedings references to rent control ordinances
19 from other jurisdictions, on which the Arbitrator based his
20 decision. Although conceding the fact that the Park operator
21 had been subject to a doubling of the ground lease rent, the
22 homeowners nevertheless challenged the Park's right to recover
23 these increased costs. The homeowners did not base their
24 opposition on the Santa Barbara County Ordinance. Instead, the
25 homeowners proffered an exhibit lacking foundation that referred
26 to certain mobilehome rent control ordinances from other
27 municipalities that by their terms expressly allowed increased
28 ground lease costs as a cost on which a rent increase may

1 properly be based. (Exhibit 3) Such alleged ordinances from
2 other jurisdictions are irrelevant here, other than they
3 demonstrate that there is no general rule that would preclude
4 increased ground lease costs from being considered as a basis
5 for a rent increase is not prohibited by the governing
6 ordinance.

7 The homeowners' consultant had to concede that there is no
8 rule that says that under no circumstances is a park operator
9 allowed to recover increased costs of a ground lease. (RT1
10 208:12-17.) He conceded that under the Santa Barbara County
11 Ordinance, since it provides that the relevant factors on which
12 the arbitrator may grant a rent increase can include but are not
13 limited to the specifically enumerated operating cost increases,
14 that the arbitrator could consider the increase ground lease
15 cost as a basis for a rent increase under the Ordinance. (RT1
16 213:6-23.)

17 Indeed, the Ordinance here very clearly provides guidance
18 that all legitimate operating expenses should be considered by
19 the arbitrator in determining the proper amount of a rent
20 increase. Section 11A-5(f) of the Ordinance provides: [T]he
21 arbitrator **shall consider** all relevant factors to the extent
22 evidence thereof is introduced by either party or produced by
23 either party on request of the arbitrator. (1) Such relevant
24 factors may include, but are not limited to, **increases in**
25 **management's ordinary and necessary maintenance and operating**
26 **expenses...."**

27 Clearly, the Arbitrator was mandated to consider the
28 increased ground lease costs in this case, which the undisputed

1 evidence demonstrated have been reasonably and actually incurred
2 in a market amount as a product of arms length negotiations.

3
4 V

5 EQUATING A GROUND LEASE INTEREST TO AN OWNERSHIP INTEREST IS
6 LEGAL ERROR

7 The Arbitrator's conclusion that a ground lease fee is in
8 the nature of an expense for acquisition of the property is
9 legal error and not supported by substantial evidence.
10 California law is clear, as explained by the California Supreme
11 Court, that a lease is not equivalent to a purchase of property:

12 "An estate in fee simple is a freehold estate. (Civ.
13 Code, §§ 762, 765.) A freehold estate is
14 distinguished from other forms of estates in that it
15 is of indeterminate duration [citations] and carries
16 with it title to land [citation]. But an estate for
17 years-in this case, a nonperiodic tenancy under a
18 lease-is not a freehold estate. (Civ. Code, § 765.)
19 Indeed, under California law an estate for years is
20 not real property at all but rather a chattel real-a
21 form of personalty-even though the substance of the
22 estate, being land, is real property. (Id., §§ 761,
23 765; *Dabney v. Edwards* (1935) 5 Cal.2d 1, 11 [53 P.2d
24 962, 103 A.L.R. 822]; see also *Weaver v. Superior
25 Court* (1949) 93 Cal.App.2d 729, 734 [209 P.2d 830]
26 ["The sale of a lease for a term of years is not the
27 sale of real [1 Cal.4th 163] property."]; *Parker v.
28 Superior Court* (1970) 9 Cal.App.3d 397, 400 [88
Cal.Rptr. 352, 67 A.L.R.3d 743] [although a leasehold
is not real property, it is nevertheless an estate in
land].)

24 Notwithstanding the fact that a lease is a present
25 possessory interest in land, there is no question that
26 as a nonfreehold estate it is a different species of
27 interest from a freehold estate in fee simple. Any
28 other conclusion would be contrary to centuries of
English and American common law and its codification,
as modified, in our Civil Code. A leasehold is not an
ownership interest, unlike the possession of land in

1 fee simple even when encumbered by a mortgage, for in
2 the latter situation the mortgagor acquires equity
3 over time through periodic payments. It is for that
4 reason that common parlance refers to the "owner" of a
5 freehold estate, encumbered or unencumbered, but to
6 the "holder" of a lease; the freeholder is seised of
7 land, whereas the leaseholder is not.

8 (*Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1
9 Cal.4th 155, 162-163; see also *Auerbach v. Assessment Appeals*
10 *Bd. No. 1 For The County Of Los Angeles (Northern Trust Bank of*
11 *California)* (2006) 39 Cal.4th 153, 162-163.)

12 "The owner of the legal title to property is presumed to be
13 the owner of the full beneficial title. This presumption may be
14 rebutted only by clear and convincing proof." (Evid. Code, §
15 662; *Pacific Southwest Realty Co., supra.*)

16 Park management in this case does not own the land on which
17 the park is located; it merely has a ground lease for the land.
18 Equating park management to an owner is legally and factually
19 incorrect in this case. The Park management has no equity in
20 the land, and is not building any equity in the land. The
21 Supreme Court in the *Pacific Southwest Realty* case addresses
22 this concept, noting that loan payments on land allow the
23 borrower to build equity in the real property over time, whereas
24 lease payments build up no equity in the real property.

25 Mr. Waterhouse confirmed this situation here, pointing out
26 that the operator was not building equity in the property, but
27 in fact it was a "diminishing asset," pointing out: "It's a
28 land lease; at the end of 34 years we have nothing." (RT2
137:2-8.)

///

CONCLUSION

The denial of the rent increase to compensate Park management for increased ground lease fees should be reversed, and the Park operators awarded a rent increase in the amounts of rent of \$32.57 and \$18.74 per month.

Dated: January 17, 2012



JAMES P. BALLANTINE
Attorney for Petitioners
LAZY LANDING, LLC, and
WATERHOUSE MANAGEMENT, INC.

DECLARATION OF SERVICE BY PERSONAL DELIVERY

[CCP §§ 1011, 2015.5]

State of California)
)
County of Santa Barbara)

I, LISA M. PAIK, declare:

I am a resident of the State of California and am employed in the County of Santa Barbara. I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the within action. My business address is 329 East Anapamu Street, Santa Barbara, CA 93101.

On January 17, 2012, I served: PETITION TO SANTA BARBARA COUNTY BOARD OF SUPERVISORS FOR REVIEW OF PORTIONS OF ARBITRATOR'S DECISION BY NOMAD VILLAGE MOBILE HOME PARK MANAGEMENT on the interested parties in this action by causing to be delivered a true and correct copy thereof addressed as follows:

Clerk of the Board
County of Santa Barbara
105 East Anapamu Street, Fourth Floor
Santa Barbara, California 93101

Margo Wagner
Sharon Friedrichsen
Community Services Department
County of Santa Barbara
105 East Anapamu Street, Suite 105
Santa Barbara, California 93101

I caused to be delivered said document to the addressee as set forth herein.

 X (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

 (Federal) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 17, 2012, at Santa Barbara, California.



DECLARATION OF SERVICE BY E- MAIL

I, LISA M. PAIK, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the within action. My business address is 329 East Anapamu Street, Santa Barbara, California 93101, and I am a resident of Santa Barbara County, California.

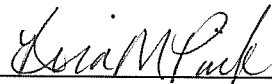
On January 17, 2012, I served the foregoing document described as PETITION TO SANTA BARBARA COUNTY BOARD OF SUPERVISORS FOR REVIEW OF PORTIONS OF ARBITRATOR'S DECISION BY NOMAD VILLAGE MOBILE HOME PARK MANAGEMENT on the interested parties in this action by e-mailing a true and correct copy thereof as follows:

Margo Wagner **E-mail: mwagner@co.santa-barbara.ca.us**
Sharon Friedrichsen **E-mail: sfried@co.santa-barbara.ca.us**
Community Services Department
County of Santa Barbara
105 East Anapamu Street
Santa Barbara, California 93101

I caused such document to be e-mailed to the addressee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2012, at Santa Barbara, California.



DECLARATION OF SERVICE BY U.S. MAIL

I, LISA M. PAIK, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the within action. My business address is 329 East Anapamu Street, Santa Barbara, California 93101, and I am a resident of Santa Barbara County, California.

On January 17, 2012, I served the foregoing document described as PETITION TO SANTA BARBARA COUNTY BOARD OF SUPERVISORS FOR REVIEW OF PORTIONS OF ARBITRATOR'S DECISION BY NOMAD VILLAGE MOBILE HOME PARK MANAGEMENT on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Debra K. Hamrick
Nomad Village Homeowners
4326 Calle Real, #33
Santa Barbara, CA 93111

I caused such document to be mailed in a sealed envelope, by first-class mail, postage fully prepaid. I am readily familiar with the firm's business practices with respect to the collection and the processing of correspondence, pleadings, and other notices for mailing with the United States Postal Service. In accordance with that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Santa Barbara, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2012, at Santa Barbara, California.

