Attachment I
Homeowners' Post-Hearing Closing Brief

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BEFORE THE COUNTY OF SANTA BARBARA

MOBILE HOME RENT CONTROL ORDINANCE

In re: NOMAD VILLAGE MOBILEHOME PARK,	**HOMEOWNERS' POST-HEARING CLOSING BRIEF** Hearing Dates: September 19-20, 2011 Hearing Officer: Stephen Biersmith, Esq.

Petitioners, NOMAD VILLAGE MOBILE HOMEOWNERS (hereinafter "Home owners"), hereby submit the following post-hearing closing brief and legal points and authorities in support of their Petition filed herein.

I.

INTRODUCTION

In its Opening Post-Hearing Brief, the Park Owner argues from a broad perspective that that Homeowners "never presented a single number for a rent increase that they contend would be factually and legally appropriate." But this is not Homeowners' burden. It is the Park Owner which bears the burden of proving it's rent increase. Homeowners may, during the course of a hearing, show how any or all of the components which comprise the rent increase are improper, which in turn would result in reductions from the requested rent increase amount. This the Homeowners have done, via the testimony of their expert, the entered Exhibits and legal

argument. Homeowners' expert, Dr. Kenneth Baar, is perhaps the most qualified expert in the State of California on mobilehome rent ordinances and the application and interpretation of MNOI and other fair return theories. The testimony of the Park Owner's own witness (Dr. St. John several times made reference to his knowledge of Dr. Baar's work over many years) made this very clear, as does Dr. Baar's substantial resume. Unlike Dr. St. John, Dr. Baar has published numerous articles, been quoted by appellate courts in connection with MNOI analysis, and has been hired by many local jurisdictions to draft ordinances and consult in connection therewith. Referring to him as "Dr. No" (presumably this is not intended to cast Dr. Baar as some sort of James Bond villain), and arguing that he has "virtually no understanding of the Santa Barbara County Ordinance being applied in this case" is ludicrous, given Dr. Baar's exhaustive Exhibit "1" qualifications. Homeowners are content to let their expert's resume speak for itself. Dr. Baar, as the most qualified expert in this proceeding, gave specific testimony in connection with several of the sought-after increase components which is part of the evidentiary record.

The Park Owner's creative attempt to base its rent increase upon any category which is either not supported by the Ordinance or impermissible according to the opinion of a qualified expert in the field, must be denied. The Park Owner argues that because the Homeowners did not present a mathematical calculation during the hearing, even as the numbers were being modified by the Park Owner's own expert as the hearing progressed, that this somehow constitutes "insufficient evidence". Homeowners would respond that performing math calculations does not constitute evidence. Any of us can do math. What is important is the **basis** for the various rent components which are sought. If any such component is improper or must be reduced, then the calculation is affected accordingly. Homeowners have provided specific

reduction amounts in their opening brief in connection with a few admitted mistakes in Exhibit "C", and shall provide further calculations herein. But Homeowners need not provide calculations in order to successfully show that certain expenses or theories cannot support a rent increase. Homeowners have previously calculated in their opening brief that the maximum "Permanent Increase" amount which should be allowed under a proper application of MNOI (i.e. 75% indexing using a 1994 base year) is $40.40, subject to further reduction if property tax or ground lease expenses are also removed from the MNOI calculation.

II

HOMEOWNERS HAVE ESTABLISHED THAT MOST PORTIONS OF THE REQUESTED RENT INCREASE ARE IMPROPER

A. Permanent Increases

1. Property Tax Increase Expense

There is no dispute that the Ordinance allows property tax increases as an expense to be considered in connection with a requested rent increase. But this assumes that (1) the increase is legitimate, and (2) that it is actually paid. The Park Owner says that it has paid this increase, yet states at page 6, lines 24-27 of its Opening Brief that it has "determined that there may in fact be a legitimate basis for challenging the property tax increase." If so, then why has no challenge to the improper assessment been timely filed to date? Does the park owner expect that until it gets around to financing the cost of an assessment appeal via a rent increase (i.e. via this proceeding) that it has no obligation to proceed in good faith to avoid an expense that it now wants the Homeowners to guarantee? If there is a legitimate ground to challenge, then the Park Owner should have pursued it, and should have noticed its rent increase many months before. Homeowners are placed in a position of having to pay a permanent rent increase amount

($25.59) for an amount that the Park Owner admittedly believes could have been avoided, while also funding the cost of the appeal ($50,000.00) which may in fact be time barred (see below). If the Park Owner is to recover for this amount, it must first show some good faith to avoid the expense.

Although the Park Owner argues that it has informed Homeowners that any reduction in taxes will result in a commensurate decrease in rents, it offers no way for such a representation to be enforced. This Hearing Officer will be forced to draft some sort of contingency award, else the present Homeowners or their successors in interest would have no possible way to enforce a refund. Of course, the Ordinance contemplates nothing like this, nor are Homeowners aware of any authority for a Notice of Rent Increase to be based upon future contingencies which could change the amounts. As a result, this expense item should be removed from the MNOI analysis, and the calculation reduced accordingly.

2. Ground Lease Expense

As an expert in the drafting and interpretation of local mobilehome rent ordinances, Dr. Baar opined that in his experience the only mobilehome rent ordinances which allow ground lease expenses are those where a specific provision exists that authorizes them. Sample Ordinance provisions were marked as Exhibit "3". The Park Owner's expert did not specifically disagree with this opinion. Nor is it disputed that the Ordinance in this case is silent on the subject. Dr. Baar offered detailed testimony as to why such expenses should be excluded, and the anomalies in a fair return analysis which would otherwise be present if they were included. The Park Owner's expert could cite no other proceeding where such an expense was included by him, or where he argued for its inclusion. His tacit admission is that this case, for him, is one of first impression. As such, Dr. Baar's testimony is more persuasive, and the fact that the

Ordinance disallows a comparable expense item which is subject to manipulation or circularity (i.e. debt service expense) shows a policy for not allowing expenses which are a part of the negotiated purchase price. Nor has the Park Owner offered any solution to the problem of what would happen if the ground lease payments decrease or go away all together in the event of an outright purchase of the park property. The ability of the Homeowners to enforce a rent decrease based upon any such occurrence remains a problem in connection with this category.

B. Temporary Increases

1. Regulatory Lag

Park Owner's brief offers no authority for inclusion of this 33-month period of expenses, which Dr. Baar testified to be excessive. As the Park Owner has the burden of proof on the issue, this item should be disallowed. The Park Owner failed to explain why it waited for 33 months to compile this amount, and then pass it through to the residents on 90 days notice. Nor does the Park Owner appear to believe that there is any time limit within which such expenses can be recovered. In Dr. Baar's experience, while the concept could be allowable under an Ordinance, there should be a limit. In this case, should the Hearing Officer decide to allow its inclusion, Homeowners request that recovery be limited to 12 months. And, again, no "lag" payments can be allowed for either category if the Hearing Officer rules that property tax or ground lease increases are not properly includable to begin with.

2. Cost of Professional Fees

(a) Property Tax Appeal Fees ($50,000.00)

Homeowners request that the Hearing Officer take judicial notice of the rules and procedures of the County of Santa Barbara's Assessment Appeals Board. The Park Owner admits that no Application for Changed Assessment has been filed, nor is any explanation offered as to how an

apparent failure to file within the prescribed deadlines can be avoided. As such, Homeowners cannot be required to fund an enterprise which may be doomed to a quick failure, since it would appear that the deadline for any filing has long passed.

(b) Professional Fees Associated with Capital Improvements ($50,000.00)

During the hearing, the Park Owner introduced a one-page summary of legal fees and costs Incurred by its counsel, attorney Ballantine, allegedly in connection with capital improvements. This appears at page 2 of Exhibit "K", and sets forth no real detail for the expenses. Along with its Opening Brief, the Park Owner produced a detailed "Statement of Account" which for the first time provides an itemization and description of the fees and costs totaling $50,973.00. Having now seen these for the first time, which are unsupported by any Declaration from Mr. Ballantine or testimony in the record, Homeowners object to their inclusion in total.

An examination of what is marked as new Exhibit "Q" shows that each item is excludable for multiple reasons:

-The entries dated from Oct. 13, 2008-Nov. 20, 2008 concern two specific mobilehome spaces within the park; i.e. spaces 11 and 23, and appear to relate to what the Oct. 17 entry refers to as "abuse of electrical infrastructure". There are references to contacts with the residents' counsel, along with 3/60 and 7-day notices of termination in the November 3 entry. These expenses clearly relate to disputes with tenants at specific spaces concerning sub-metered gas and electric. As such, the expenses were not incurred in connection with any capital item which benefits the collective homeowners. Frankly, we don't have any testimony as to what these entries involve, but on their face (which is the only possible way that these expenses can now be included in the evidentiary record), they are excludable.

-Entries after November 20, 2008 which refer to electrical engineering (i.e. John Maloney) relate to sub-metered energy topics, and are excludable based upon the legal authority cited in Homeowners' Opening Brief. This appears to include all entries from November 21, 2008-January 27, 2009. (Note that the Park Owner's Opening Brief sets forth no authority for excluding such expenses, and appears to not to contest to authority of the Exhibit "4" *Rainbow Disposal* case entered into the record.

-The entries which appear beginning on February 2, 2009 are particularly troubling. They refer to legal expenses incurred in connection with a failure to maintain lawsuit filed against the previous park operator by the park residents based upon numerous park conditions. Numerous references to the Homeowners' attorneys in that action; i.e. Linda Reich and Henry Heater of the San Diego firm of Endemann, Lincoln, Turek & Heater, appear in the billing summary. Again, such litigation bears no relationship to any capital improvement, and cannot be included. This appears to encompass entries between Feb. 2, 2009-April, 2009, including several depositions. Without evidence as to what this litigation was about or how it involved capital improvements of any kind, the legal fees cannot be allowed.

-The billing entries beginning in 2010 begin to refer to some sort of administrative action by the County of Santa Barbara, resulting in a Writ of Mandate lawsuit. There has been no testimony as to what such a suit was about, why it was filed, how it benefited the homeowner community or whether it also related to sub-metered energy. As such, all of these entries are excludable.

Had Homeowners had a chance to see this itemization during hearing, it would have prompted many questions which now can never be asked. Without sufficient cross-examination capability, and based upon their suspect nature as they appear on Exhibit "Q", this category cannot be allowed. Trying to legitimize them now, following the close of evidence, does not

pass muster. These Homeowners do not have a duty to reimburse, dollar-for-dollar, any and all attorney's fees which the Park Owner might choose to incur in connection with the operation of its park. The Ordinance does not authorize this expense item.

(c) Professional Fees Relating to Rent Increase Proceedings

During the hearing, the Park Owner was unable to quantify the actual costs or expenses incurred to date in connection with the requested $125,000.00 estimated in item 6 of Exhibit "C". It was agreed that the Park Owner would submit this detail in conjunction with its opening brief, and we now have for examination two new Exhibits relating to this item.

Exhibit "R" is a recently created invoice dated September 21, 2011 addressed to the Park Owner by its expert. Significantly, this was created after the conclusion of the hearing, and not before. It shows a total of $32,219.65 incurred over a roughly two-year period. During the hearing, Dr. St. John could not recall what he had billed or been paid. It is also significant that he was still owed a significant amount after the conclusion of the hearing, which invokes the issue of whether or not he is being paid based upon the quality of his testimony, rather than prior to it.

But the biggest problem with this newly created "invoice" is that it is vague, ambiguous and includes entries which precede the Notice of Rent Increase by some 15 months. Entries simply refer to "Email" without any further explanation. Entries noted for "DC" and "Emails" routinely exceed 3 hours, yet we have no way of knowing what those documents were or what the emails related to. And the cost itself is clearly excessive. When one subtracts the three days of hearing travel, prep and attendance from Sept. 18-20, 2011, we are left with $25,087.50 in charges. Divided by Dr. St. John's very reasonable $150.00 rate, this calculates to over 167

1 hours of expert time. Based upon the final work produced in this case, wherein Dr. St. John
2 admitted that he merely used the financials he was given without analyzing them in any depth,
3 there is no reasonable basis to support such a huge amount of hours. Homeowners request that
4 the Hearing Officer adjust this amount appropriately to a reasonable number.
5
6 Exhibit "S" is the newly produced itemization from the Park Owner's Counsel. It too is
7 excessive.
8 The entries contain several references to work performed in connection with a
9 "settlement" being consummated with County Counsel Jerry Czulugar. A settlement of what?
10 How does this relate in any way to the current rent proceedings? No explanation is given. In
11 addition, further billing references to conversations with or activities involving the park's
12 electrical engineer, John Maloney, are referenced, and would be excludable as involving sub-
13 metered energy issues, and unrelated to this proceeding. In essence, all entries which precede
14 January 27, 2011 should be excluded, except for the entries on Dec. 1, 2010, Dec. 5, Dec. 8 Dec.
15 10, Dec. 11, Jan. 18, 2011, and Jan. 20, which comprise a total of 10.8 hours. Billed at $350.00
16 per hour, this results in a deletion of $3,780.00.
17
18 The entry for March 1, 2011 should also be excluded; i.e. one hour of time to monitor a
19 County hearing regarding mobilehome regulations. This does not relate to the instant hearing,
20 and results in an additional $350.00 reduction.
21
22 Mr. Ballantine shows a total of $72,913.50 for his efforts to prepare for this 2-day
23 hearing. The Hearing Officer should decide whether this represents an unreasonable amount.
24 Assuming that the above reductions are taken, the total is $68,783.50. Even if this entire
25 amount, together with the total St. John claim is allowed, the revised total would be $101,003.15.
26 This is $24,000.00 less than the amount claimed for item 6 on Exhibit "C". Presumably Mr.
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Ballantine will not be expending $24,000.00 (i.e. 68 hours of time) to compose his closing briefs, and thus at minimum, some reduction is warranted.

(d) **Capital Improvement Items**

Homeowners' opening brief calculated that the maximum amount recoverable for already expended capital items would be $22,192.50, rather than the $90,000.00 requested. This is primarily based upon the fact that the excludable expenses relate to sub-metered gas or electric systems. The Park Owner did not address this issue at all in its opening brief. Presuming that the Park Owner shall not be conceding the issue, Homeowners offer this additional evidence in support of their position.

It is well settled that the discount received by the Park Owner in connection with its sub-metered utilities is sufficient to cover its entire system, including maintenance, replacement or upgrade. This fact is understood by all of the major serving utilities in California, as evidenced by their recent filings in a pending Rulemaking proceeding now being conducted by the Public Utilities Commission. Rulemaking proceeding 11-02-018 was initiated by park owners to create a more efficient system for allowing park owners to transfer their systems back to the serving utility, which would effectively exit the park owner from the utility business. In the process, the discount would go away. The problem which the PUC is now addressing is this: Where the park owner wishes to transfer the system in its present condition, but the utility requires that the system be upgraded or replaced first, due to its age or condition, who pays for this? The utilities take the position that the park owner is responsible according to the discount rules, pending another solution being agreed to by the parties or ordered by the Commission. San Diego Gasx & Electric, in a recent filed proposal, stated the issue this way, quoting PUC Decision D.04-11-033 at pp. 22: **"The net effect of the above sections [i.e. the transfer sections of Public**

Utilities Code 2791-2799] is that the costs incurred to make a MHP distribution system acceptable for transfer to the utility must not be borne by the utility or the MHP tenants, and the general body of ratepayers must be rendered indifferent. Therefore, the costs may only be charged to ratepayers if there is an offsetting benefit such that they are indifferent. Otherwise, the costs must be borne by the MHP owner."

The decisions of the PUC, including D.04-11-033, as well as the filings in Rulemaking proceeding 11-02-018, are available to view on line at the PUC website, and Homeowners request that the Hearing Officer take judicial notice of same. It is clear that the opinion of Dr. St. John that the discount does not cover the costs to replace or upgrade a sub-metered energy system are incorrect, and that the park owner is presently solely responsible for such costs. Thus, the doctrine of the *Rainbow Disposal* case remains good law, and the Park Owner is prohibited from recovering any expenses associated with sub-metered energy repair, maintenance or replacement.

Finally, the Park Owner has attempted to buttress its claim for capital improvement funds by attaching a brand new exhibit (Exhibit "P") never entered into evidence, and created after the close of the evidentiary portion of the hearing. As such, it is simply irrelevant and cannot be considered.

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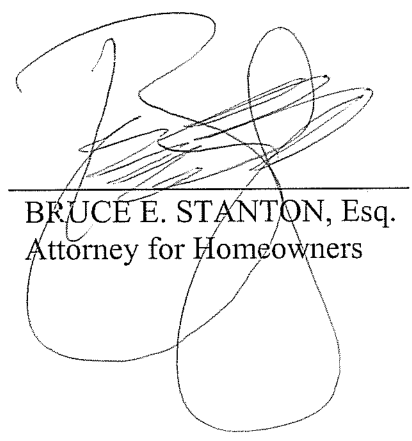
III

CONCLUSION

Based upon the foregoing reasons, Homeowners respectfully request that the Petition be granted and the $161.00 requested increase be denied, either in its entirety or based upon any or all of the component reductions set forth above.



Dated: November 8, 2011

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Attorney for Homeowners