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

Attorney for PARK MANAGEMENT OF NOMAD VILLAGE MOBILE HOME PARK

ARBITRATION PROCEEDINGS UNDER THE SANTA BARBARA COUNTY MOBILEHOME RENT CONTROL ORDINANCE

IN RE NOMAD VILLAGE MOBILE HOME PARK	POST REMAND ARBITRATION HEARING BRIEF BY PARK MANAGEMENT OF NOMAD VILLAGE MOBILE HOME PARK
	[STEPHEN BIERSMITH, Esq., Arbitrator]
	REMAND ARBITRATION HEARING DATE: August 10, 2016 TIME: 9:00 A.M. LOCATION: 267 Calle del Remedio Santa Barbara, CA

PARK MANAGEMENT OF NOMAD VILLAGE MOBILE HOME PARK ("Pa Management"), pursuant to the invitation of the Arbitrator, hereby submits its Post Remand Heari Brief for the Arbitration Hearing on the Remand ordered by the Santa Barbara County Board Supervisors ("Board") in response to the homeowners Remand Pre-Hearing Brief ("brief") filed by t homeowners of Nomad Village Mobile Home Park (collectively "homeowners"), submitted in tl matter in which they are appealing the March 5, 2016, Opinion and Award (Revised on Remar ("Remand Award") in the above-referenced Arbitration proceedings, as follows:

I

DISCUSSION OF AWARDS REMANDED TO ARBITRATOR

The following is organized by each of the separate awards set forth in the Remand Awa remanded to the Arbitrator for further findings.

Award No. 4. Amortization Rate

Award No. 4 is that "[a]ll granted temporary increases are to be amortized at 9% for seven (years."

The Court and the Board found that the Arbitrator's findings were sufficient to support t award. Accordingly, there are no grounds to change this award.

The homeowners in their brief acknowledge that the Court "affirmed this award...citi substantial evidence to support it." (HO Brief, p. 1, lines 8-9.) The homeowners go on to acknowled "the findings of the Court and the Board that 'the arbitrator did not abuse his discretion....'" (HO Bri p. 3, lines 7-8.)

Despite the fact that there is no dispute that Award No. 4 is supported by substantial eviden the homeowners, although they admit that the 7-year amortization period is appropriate, still attempt reargue the percentage amount. The homeowners' argument is misplaced, based upon incorrect fact and legal assumptions, as discussed below.

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i. The homeowners usury claim is misplaced

The homeowners' claims that the 9 % awarded by the Arbitration Award is "usurious" "unc "California "Article 15 [sic] of the Constitution titled [sic] Usury," (HO brief, p. 1, last 2 lines.) misplaced on a number of levels. Fundamentally, as noted, Award Number 4 has already been affirm by the Superior Court's Order and Decision. Moreover, the homeowners never raised this purport legal claim of usury at any point in any of the arbitration proceedings, in which they were represented San Jose attorney Bruce Stanton, a prominent mobilehome attorney experienced at representi homeowners in rent control matters, and Berkeley expert witness Kenneth Baar, also an attorn experienced at testifying for homeowners in mobilehome rent control proceedings. There was a go reason that Mr. Stanton and Mr. Baar did not raise any usury claim in the arbitration proceedings: such claim has no application or merit.

In the first place, California Constitution Article XV is wholly inapplicable. By its own terms only applies to: "loan or forbearance of any money, goods, or things in action, or on accounts af demand." A temporary rent increase of space rent for a mobilehome park space in a mobilehome pa to compensate park management for expenses incurred in the operation of the Park is none of the things. The homeowners point to no evidence in the record that establishes, as a factual matter, that t space rent at issue in this case factually would come within the purview of this provision. T Ordinance specifically provides that park management is entitled to recover the costs to pa management of financing costs of capital items. Section 11A-6 of the Ordinance provides that: "T cost of capital improvements/expenses incurred or proposed, including reasonable financing costs, m be passed on to homeowners."

Cases applying the usury provision make clear that usury only applies only to a **loan forbearance**, as noted by the California Supreme Court:

> The constitutional proscription against usury applies by its express terms only to a "... loan or forbearance of any money, goods or things in action." (Cal. Const., art. XV, § 1.) Without a loan or forbearance, usury cannot exist. (*Southwest Concrete Products v. Gosh Construction Corp., supra,* 51 Cal.3d 701, 705 (*Southwest Concrete*); see generally, 4 Miller & Starr, supra, § 10:3, p. 651; ["The first essential element of a usurious transaction is a loan or forbearance of money."]; Comment, A Comprehensive View of

> California Usury Law, supra, 6 Sw.U. L.Rev. 166, 175 ["It is imperative to remember that there must always be a lending or forbearance ... for the question of usury to arise."].)

(*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801-802.)

Moreover, the legal definition of the word "interest" as used in Article XV also makes clear that it has no applicability here: "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." (Civ. Code § 1915.) It is well established that a "loan or forbearance" is different from a finance charge imposed by a transferor of property who sells property and receives payment over time in return. A finance charge by a seller of property, real or personal, sold as a credit sale, is exempted from any usury laws under the long-established "time-price doctrine." (*Fox v. Federated Department Stores, Inc.* (1979) 94 Cal.App.3d 867, 876.) An arrangement involving the provision of materials and labor in the construction of specified improvements to real property has been held to result in a transfer of "property" within the meaning of this doctrine, and therefore is not subject to the usury provisions. (*Boerner v. Colwell Co.* (1978) 21 Cal.3d 37.)

Moreover, the homeowners ignore the fact that the interest on the temporary expenses is not interest per se, as much as it is to ensure that Park Management receives a fair rate of return on its investment in the Park, including the capital invested in the expenditures on which the temporary rent increase is based. The law is clear that Park Management is entitled to recover through a temporary rent increase not only its actual costs on which the temporary rent increase is based, such as a capital or increased operating expense, but also a fair rate of return on the capital invested by Park Management to pay that expense.

The California Supreme Court has held that a landlord, such as park management of a mobilehome park, is entitled to a fair return on capital that it invests in order to make capital improvements:

> A landlord is also entitled to a fair return on necessary capital improvements. (*Sierra Lake Reserve v. City of Rocklin* (9th Cir. 1991) 938 F.2d 951, 958, vacated in part (1993) 987 F.2d 662; see also *Guaranty Nat. Ins. Co. v. Gates* (9th Cir. 1990) 916 F.2d 508, 515.) For example, if a landlord retrofits an older building in order to comply with new building code requirements, the capital improvements may be the larger part of the

> building's value. In that case, if fair return did not take those capital improvements into consideration, it would be an empty promise. As the high court noted in *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 310 [109 S.Ct. 609, 617, 102 L.Ed.2d 646] (Duquesne), "fair rate of return" depends on "the amount of capital upon which the investors are entitled to earn that return." (See also *Hope Gas, supra*, 320 U.S. at p. 603 [64 S.Ct. at p. 288] ['return ... should be sufficient ... to attract capital"].) Thus, a rent control law that merely allows a landlord to recoup the bare cost of a necessary capital improvement runs the risk of being confiscatory and thereby violating the landlord's right to due process of law.

(*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773.)

In *Sierra Lake Reserve*, cited by the California Supreme Court in *Kavanau*, the Court held that a mobilehome park owner had a right to receive a "fair and reasonable" return on its investment in capital improvements:

> Under *Guaranty National* [*Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990)], every dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a 'fair and reasonable' return must be allowed. Breaking even is not enough; the law must provide for a profit on one's investment. . . . To the extent plaintiff alleges that the rent increases allowed on account of capital improvements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process under *Guaranty National*.

(*Sierra Lake Reserve v. City of Rocklin*, supra, 938 F.2d 951, 958 (internal citations omitted).

The homeowners in their brief try to argue that certain of Park Management's costs that were the subject of the rent increase were really operational costs and not capital costs. Again, the homeowners' claims are misplaced. Aside from being factually wrong, they are legally irrelevant; they are a distinction without a difference. The foregoing legal authorities, as well as rent control law in general, apply to all expenditures made by the park owner, regardless of whether they are deemed to be capital expenses or increased operating expenses. Rent control laws must be "reasonably calculated to ... provide landlords with a just and reasonable return on their property." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165.) The park owner has the constitutional right to receive a fair return on its property. (*Hillsboro Properties v. City of Rohnert Park* (2006) 138 Cal.App.4th 379, 391.) "Fair return is the constitutional measuring stick by which every rent control board decision is evaluated." (*Id.*; See also *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281.)

ii. The Homeowners do not dispute the 7-year Amortization Period

The homeowners do not challenge the 7-year amortization period for any temporary increases: they present no argument that the period is incorrect, and in fact they acknowledge that the arbitrator could in fact act within his discretion by awarding temporary increases over a 7 year period: "Amortizing extraordinary operating expenses over seven years at zero percent interest under § 11A-5 may be within the Arbitrator's discretion, which was not exercised." (HO brief, p. 3, lines 2-3.) The homeowners admit that the temporary rent increase can include extraordinary operating expenses, and that these expenses can be amortized over a 7-year period. (*Id.*)

The homeowners appear to argue that the capital expenses awarded by the Arbitrator (under Award No. 6) are not in fact for capital items; the homeowners are incorrect and that issue will be addressed in the discussion regarding Award No. 6, below. However, it should be noted that whether the expenses incurred by Park Management for the capital items under Award No. 6 are in fact characterized as capital items or as extraordinary operating expenses becomes a distinction without a difference. Either way, even under the homeowners' approach, Park Management is properly compensated for these expenses through a temporary rent increase amortized over a 7-year period.

In any event, as to Award No. 4, since the homeowners do not challenge the 7-year period and in fact acknowledge that the Arbitrator could award a temporary rent increase for a 7-year period, the sole issue now raised by the homeowners with respect to Award No. 4 is the percentage awarded. In fact, as found by the Court, substantial evidence in the record supports Award No. 4 as to both the amortization period and the percentage.

iii. Substantial Evidence Supports the Amortization Rate

As even the homeowners must admit, the Court found that Award No. 4 is supported by substantial evidence in the record.

The Court affirmed the Arbitration Award as to the amortization: "The record shows that there was substantial evidence to support the Arbitrator's decision of seven years and nine

percent. Park Management presented this amortization schedule [Exhibit C] and Dr. St. John testified that these numbers were the result of his professional judgment." (Decision, p. 30.)

As observed by the Court, Dr. St. John testified that, in his professional opinion, both numbers (the amortization period and the percentage rate) were appropriate under the Ordinance and under the facts (including the testamentary and documentary evidence).

Dr. St. John testified: "Nine percent seemed to me like a reasonable rate of interest in these contexts, and seven years seemed like a reasonably average time period." (Dr. St. John testimony, Sept. 19, 2011, RT1, p. 69, lines 12-15.) He went on to note: "9 percent and seven years seemed like an average kind of figure to use." *(Id.,* RT1, p. 70, lines 1-2.)

Dr. St. John made it clear at the outset of the above testimony that he was referring to the amortization methodology that he employed for **all** temporary increases. (*Id.,* p. 68, lines 23-25.)

Dr. St. John is a reasonable professional, and very candid and credible. He acknowledged that these numbers could be subject to debate (*Id.*, pages 68-70), however, as with many things in which an experienced professional must exercise professional judgment based upon all of the information, Dr. St. John, with a PhD in economics fro UC Berkeley in 1989 and over 20 years experience analyzing rent control economics *(Id.*, RT1, page 45; Exhibit E), did so in reaching the amortization figure:

> Q. Would it be accurate to say you used your professional judgment and experience in this area to come up with a number that you thought was appropriate?
> A. Yes.

(*Id.*, RT1, page 70, lines 10-13.)

The homeowners' brief also presents a quotation of testimony which it attributes to Dr. St. John, stating essentially that he has typically seen 7 percent more than 9 percent. (HO Brief, p. 1, lines 17-22.) However, the homeowners' brief falsely attributes the quote to Dr. St. John, when it should in fact be attributed to their own paid expert, Dr. Baar. The homeowners also ignore that Dr. Baar also admitted that the percentages made little difference: "**I'd also point out, whether 7 percent is used or whether 9 percent is used has very little difference on the outcome, very little.**" (Baar testimony, Sept. 19, 2011, RT1 181, 19-22.)

Notably, the homeowners have pointed to nothing in the record, from Dr. Baar or anyone else, that says that the 9 percent could not be awarded. He certainly never claimed that 9 percent was usurious. Moreover, since the homeowner's own expert testified that the percentage makes little difference, one wonders why the homeowners have forced the County, the Courts, the Arbitrator, and Park Management, to collectively expend a massive amount of time and expense on this non-issue.

iv. Proposed finding

All granted temporary increases are to be amortized at 9% for seven (7) years. The 7-year amortization period and 9% rate are supported by the testimony of economist Michael St. John as in his professional opinion being appropriate for all of the temporary rent increases.

Award # 5. Capital Items.

Award No. 5 is that the homeowners are to pay the $62,145.55 which were capital improvement expenses incurred prior to the commencement of arbitration.

The homeowners acknowledge that the testimony at the hearing support this award and the findings proposed by Park Management; the homeowners state: "Mr. Garcia said that all expenses in Exhibits J and K totaling $62,145.55 relate to Nomad Village capital items." (HO brief, page 3, lines 19-21.) The homeowners do not cite any evidence from the hearing, documentary or testimony or otherwise, that contradicts this evidence that they admit was presented at the hearing. Instead the homeowners vaguely argue, **without explanation and without any citation to the record**, that "no capital improvements were definite and certain as of the date of the hearing or completed within six months of approval of this award...." [sic] (HO brief, page 3, lines 23-24.) However, that assertion is preposterous. There is no dispute or contradiction in the evidence that all of the items listed in Exhibits J and K totaling $62,145.55 were in fact for capital items for the Park, or that the costs were actually incurred by Park Management, or that the items were completed by the time of the Arbitration Hearing. The homeowners also suggest, **again without explanation and without any citation to the record**,

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that these items were really for "operating expenses" (HO brief, page 3, lines 27-28.) The homeowners' claims are without any support in the record. Moreover, as explained in the section above, the claims are irrelevant, since the homeowners do not dispute that Park Management is entitled to recover through a temporary rent increase extraordinary operating expenses incurred by Park Management. Therefore, whether these $62,145.55 of expenses, which were indisputably incurred by Park Management, are deemed capital items as contended by Park Management and supported by the uncontradicted evidence, or deemed operating expenses as claimed by the homeowners, the temporary rent increase awarded through Award No. 5 is still supported either way.

Award # 6. Professional Fees.

Award No. 6 is that the homeowners are to pay $25,000 for professional fees associated with the capital improvements.

As with award No. 5, the homeowners do not dispute that Park Management actually incurred these expenses, they merely claim that they were not definite and certain and were for operating expenses. (HO brief, p. 4.) In fact, these expenses were definite and certain and are set forth in detail in Exhibit Q, and the areas of work are summarized in single page exhibit in Exhibit K. Mr. Waterhouse testified that the expenses were actually incurred and paid by Park Management in the course of business (RT2 145: 6-14), and Dr. St. John testified that legal fees of this type are properly the basis of a rent increase, and properly treated as a temporary rent increase by amortizing them (RT1 135:1-8. 95:3-15, 96:1-4). Regardless, as noted above, even if they are deemed as operating expenses, the homeowners have acknowledged that operating expenses may properly serve as the basis for a temporary rent increase.

Award # 7: Architecture and Engineering Fees

Award No. 7 is that the homeowners are to pay $40,000 for fees incurred by Park Management in purchasing plans and drawings and permits from the prior operator, in order to proceed with capital improvements of the Park.

As with Award No. 5 and 6, the homeowners do not dispute that Park Management actually incurred these expenses, they merely claim that they were not a definite and certain and were for operating expenses. (HO brief, p. 5.) In fact these expenses were definite and certain and are detailed in Exhibits J and L. Mr. Waterhouse testified without contradiction that the CAD drawings of the Park had significant ongoing value to Park Management as the current operator of the Park. (RT2 144:6-145:5.)

Award No. 8 Property Taxes

Award No. 8 is that the "Homeowners are to pay $130,531 for the supplemental tax increase payments already paid by the Park Owner."

This matter was not remanded by the Court, as the award of a rent increase based upon this supplement tax bill in the original Arbitration Award was already upheld by the Court. The Court found that the "increases in property taxes" were properly considered by the Arbitrator as a basis for a rent increase under the Ordinance, section 11A-5(f)(1), and that the Arbitrator properly weighed the evidence and followed Dr. St. John's opinion that the supplemental property taxes should properly be charged to the Homeowners in the form of a rent increase, and that substantial evidence supported the Arbitration Award. (Decision pp. 22-24.)

The homeowners appear to admit that the Arbitrator could "amortize extraordinary uncompensated operating expenses over seven years at zero percent interest." (HO brief, p. 7, lines 12-13.) However, as noted in the discussion regarding Award No. 4, above, Park Management is entitled to 9% on all temporary increases in order to obtain a constitutionally mandated fair rate of return. Zero percent interest on expenses incurred by Park Management long ago, would deprive Park Management of a fair rate of return.

Award # 11 Expert and Legal Fees Incurred In Rent Control Proceedings

Award No. 11 is that the "Homeowners are to pay $110,000 for legal fees associated with the challenge to the rent increase." The Arbitration Award states as follows: "After reviewing the itemizations submitted by the Park Owner for expert and legal services expended in this

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matter (Ex. R & S) and the Homeowners' response, a reasonable amount to be paid by the [latter] would be $110,000."

The Court found that these legal fees could properly be charged to the homeowners under the terms of the Ordinance, and that the Arbitration Award properly awarded these fees as part of the rent increase. The Court noted that the homeowners' expert conceded that these fees could properly be the basis for a rent increase. "This evidence constitutes substantial evidence to support the factual determination. Thus, the arbitrator did not abuse his discretion in making this award." (Decision, p. 29.) **The Court did <u>not</u> order the matter to be remanded for further consideration or further findings.**

The homeowners acknowledge that the Court ruled that Baar's testimony is substantial evidence that the legal fees are appropriately included as a basis for a rent increase. (HO Brief, p. 8, lines 3-4.) The rest of their argument is essentially that the Court, the Arbitrator, their own attorney and expert, and everyone else is wrong. (HO Brief, pages 8-9.)

The homeowners also claim that somehow California Code of Civil Procedure sections 1084.2 and 1021 limit fees to $7,500. (HO Brief, page 8.) Again, the cited sections have no such provisions, and, more significantly, have no applicability here. Section 1084.2 is part of a statutory scheme related to the conduct of arbitrations when there is a written arbitration agreement that does not specify the rules or procedures. In this case, there is no written arbitration agreement. This arbitration (and the rent limitation on which it is based) is imposed on Park Management by legal fiat, not any agreement by Park Management. Moreover, the Ordinance, Rules and case law regarding mobilehome rent control proceedings govern the conduct of this arbitration.

As a legal matter, Park Management is entitled to recover its legal and administrative costs incurred in having to go through administrative proceedings in order to obtain a rent increase, and may obtain them through a temporary rent increase. (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 102-1028, 1040; *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board* (1999) 70 Cal.App.4th 281, 294.)

II

THE ARBITRATOR SHOULD DETERMINE AND AWARD PROFESSIONAL FEES INCURRED THROUGH REMAND

Through their proceedings, the homeowners have caused Park Management to incur significant costs through these remand proceedings.

The Homeowners have expressly agreed that Park Management is entitled to recover its fees and expenses incurred in the writ proceedings and through remand, and that these fees and expenses should be determined by the Arbitrator upon remand.

The Homeowners' expert, Dr. Baar testified to this upon the homeowners' attorney's questioning:

> Q. ....My questions to you are, when an administrative hearing decision such as this is appealed to the courts, do the courts typically, if they find something wrong with that decision, remand it back to the administrative body for further or additional hearings?
>
> A. Yes, that's the standard procedure.
>
> Q. Do you have any knowledge as to whether or not, as part of that remand process, and **at that time of the remand, that the park owner would then be able to claim additional expenses as they're then being incurred?**
>
> A. You can say that would be an additional clarification to make. In these cases, park owner claims expenses as to they've incurred as legal expenses for the application, and then **if it goes to court and gets remanded back, then a second, additional claim is made at that time.**
>
> Q. **So on remand, the park owner is able to calculate the additional expenses that are now being incurred, because of the litigation, correct, the appeal?**
>
> A. **Right.**
>
> Q. And typically, the litigation in this case would be a writ of mandamus that would name the City [sic-County] as

a party defendant, correct?

A. Yes.

Q. Because the hearing officer is employed [sic-appointed] by the City [sic-County] and --

A. Right.

Q. -- the residents are real parties in interest?

A. Right. See, the park owner, their expense to date was $35,000. **If they end up going to court and prevailing in a writ of mandate action, they are not boxed in, they can come back again.**

(RT1 243:23-245:7, emphases added.)

Accordingly, Park Management respectfully submits that the Arbitrator should give Park Management an opportunity to submit an application for professional fees supported by a detailed summary of professional fees incurred to date, for determination of an appropriate award. This would be more efficient than Park Management obtaining such costs through a separate rent increase proceeding.

Dated: August 19, 2016

JAMES P. BALLANTINE
Attorney for Park Management
LAZY LANDING MHP, LLC;
WATERHOUSE MANAGEMENT CORP.

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 August 19, 2016, I served the foregoing document described as POST REMAND ARBITRATION HEARING BRIEF BY PARK MANAGEMENT OF NOMAD VILLAGE MOBILE HOME PARK on the interested parties in this action by e-mailing a true and correct copy thereof as follows:

Stephen Biersmith, Arbitrator
e-mail: sbiersmith@aol.com

Debra Hamrick
Homeowners Representative
e-mail: Ianmipres.gmail.com

Natalie Dimitrova
County of Santa Barbara
Real Property Division
e-mail: ndimitrova@countyofsb.org

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

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

Executed on August 19, 2016, at Santa Barbara, California.

Lisa M Paik