

Attachment I
Homeowners' Post-Hearing Closing Brief

1 **BRUCE E.STANTON (SBN 104925)**
2 **LAW OFFICES OF BRUCE E. STANTON**
3 **6940 Santa Teresa Bld, Suite 3**
4 **San Jose, CA 95119**
5 **Telephone: (408) 224-4000**
6 **Facsimile: (408) 224-4022**

7 **Attorney for Petitioners, Mobile Homeowners**

8
9 **BEFORE THE COUNTY OF SANTA BARBARA**
10
11 **MOBILE HOME RENT CONTROL ORDINANCE**

12 In re:) **HOMEOWNERS' POST-HEARING**
13 NOMAD VILLAGE MOBILEHOME PARK,) **CLOSING BRIEF**
14)
15)
16) Hearing Dates: September 19-20, 2011
17)
18) Hearing Officer: Stephen Biersmith, Esq.

19
20
21
22
23
24
25
26
27
28
Petitioners, NOMAD VILLAGE MOBILE HOMEOWNERS (hereinafter "Homeowners"), 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

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

15
16
17
18 The Park Owner's creative attempt to base its rent increase upon any category which is
19 either not supported by the Ordinance or impermissible according to the opinion of a qualified
20 expert in the field, must be denied. The Park Owner argues that because the Homeowners did
21 not present a mathematical calculation during the hearing, even as the numbers were being
22 modified by the Park Owner's own expert as the hearing progressed, that this somehow
23 constitutes "insufficient evidence". Homeowners would respond that performing math
24 calculations does not constitute evidence. Any of us can do math. What is important is the basis
25 for the various rent components which are sought. If any such component is improper or must be
26 reduced, then the calculation is affected accordingly. Homeowners have provided specific
27
28

1 reduction amounts in their opening brief in connection with a few admitted mistakes in Exhibit
2 “C”, and shall provide further calculations herein. But Homeowners need not provide
3 calculations in order to successfully show that certain expenses or theories cannot support a rent
4 increase. Homeowners have previously calculated in their opening brief that the maximum
5 “Permanent Increase” amount which should be allowed under a proper application of MNOI (i.e.
6 75% indexing using a 1994 base year) is \$40.40, subject to further reduction if property tax or
7 ground lease expenses are also removed from the MNOI calculation.
8

9 II

10 HOMEOWNERS HAVE ESTABLISHED THAT MOST PORTIONS OF THE 11 REQUESTED RENT INCREASE ARE IMPROPER 12

13 A. Permanent Increases

14 1. Property Tax Increase Expense

15 There is no dispute that the Ordinance allows property tax increases as an expense to be
16 considered in connection with a requested rent increase. But this assumes that (1) the increase is
17 legitimate, and (2) that it is actually paid. The Park Owner says that it has paid this increase, yet
18 states at page 6, lines 24-27 of its Opening Brief that it has “determined that there may in fact be
19 a legitimate basis for challenging the property tax increase.” If so, then why has no challenge to
20 the improper assessment been timely filed to date? Does the park owner expect that until it gets
21 around to financing the cost of an assessment appeal via a rent increase (i.e. via this proceeding)
22 that it has no obligation to proceed in good faith to avoid an expense that it now wants the
23 Homeowners to guarantee? If there is a legitimate ground to challenge, then the Park Owner
24 should have pursued it, and should have noticed its rent increase many months before.
25 Homeowners are placed in a position of having to pay a permanent rent increase amount
26
27
28

1 (\$25.59) for an amount that the Park Owner admittedly believes could have been avoided, while
2 also funding the cost of the appeal (\$50,000.00) which may in fact be time barred (see below).
3 If the Park Owner is to recover for this amount, it must first show some good faith to avoid the
4 expense.

5
6 Although the Park Owner argues that it has informed Homeowners that any reduction in
7 taxes will result in a commensurate decrease in rents, it offers no way for such a representation to
8 be enforced. This Hearing Officer will be forced to draft some sort of contingency award, else
9 the present Homeowners or their successors in interest would have no possible way to enforce a
10 refund. Of course, the Ordinance contemplates nothing like this, nor are Homeowners aware of
11 any authority for a Notice of Rent Increase to be based upon future contingencies which could
12 change the amounts. As a result, this expense item should be removed from the MNOI analysis,
13 and the calculation reduced accordingly.

14 15 2. Ground Lease Expense

16
17 As an expert in the drafting and interpretation of local mobilehome rent ordinances, Dr.
18 Baar opined that in his experience the only mobilehome rent ordinances which allow ground
19 lease expenses are those where a specific provision exists that authorizes them. Sample
20 Ordinance provisions were marked as Exhibit "3". The Park Owner's expert did not specifically
21 disagree with this opinion. Nor is it disputed that the Ordinance in this case is silent on the
22 subject. Dr. Baar offered detailed testimony as to why such expenses should be excluded, and
23 the anomalies in a fair return analysis which would otherwise be present if they were included.
24 The Park Owner's expert could cite no other proceeding where such an expense was included by
25 him, or where he argued for its inclusion. His tacit admission is that this case, for him, is one of
26 first impression. As such, Dr. Baar's testimony is more persuasive, and the fact that the
27
28

1 Ordinance disallows a comparable expense item which is subject to manipulation or circularity
2 (i.e. debt service expense) shows a policy for not allowing expenses which are a part of the
3 negotiated purchase price. Nor has the Park Owner offered any solution to the problem of what
4 would happen if the ground lease payments decrease or go away all together in the event of an
5 outright purchase of the park property. The ability of the Homeowners to enforce a rent decrease
6 based upon any such occurrence remains a problem in connection with this category.
7

8 **B. Temporary Increases**

9 1. Regulatory Lag

10 Park Owner's brief offers no authority for inclusion of this 33-month period of expenses,
11 which Dr. Baar testified to be excessive. As the Park Owner has the burden of proof on the
12 issue, this item should be disallowed. The Park Owner failed to explain why it waited for 33
13 months to compile this amount, and then pass it through to the residents on 90 days notice. Nor
14 does the Park Owner appear to believe that there is any time limit within which such expenses
15 can be recovered. In Dr. Baar's experience, while the concept could be allowable under an
16 Ordinance, there should be a limit. In this case, should the Hearing Officer decide to allow its
17 inclusion, Homeowners request that recovery be limited to 12 months. And, again, no "lag"
18 payments can be allowed for either category if the Hearing Officer rules that property tax or
19 ground lease increases are not properly includable to begin with.
20
21

22 2. Cost of Professional Fees

23 **(a) Property Tax Appeal Fees (\$50,000.00)**

24 Homeowners request that the Hearing Officer take judicial notice of the rules and procedures
25 of the County of Santa Barbara's Assessment Appeals Board. The Park Owner admits that no
26 Application for Changed Assessment has been filed, nor is any explanation offered as to how an
27
28

1 apparent failure to file within the prescribed deadlines can be avoided. As such, Homeowners
2 cannot be required to fund an enterprise which may be doomed to a quick failure, since it would
3 appear that the deadline for any filing has long passed.
4

5
6 **(b) Professional Fees Associated with Capital Improvements (\$50,000.00)**

7 During the hearing, the Park Owner introduced a one-page summary of legal fees and costs
8 incurred by its counsel, attorney Ballantine, allegedly in connection with capital improvements.
9 This appears at page 2 of Exhibit "K", and sets forth no real detail for the expenses. Along with
10 its Opening Brief, the Park Owner produced a detailed "Statement of Account" which for the
11 first time provides an itemization and description of the fees and costs totaling \$50,973.00.
12 Having now seen these for the first time, which are unsupported by any Declaration from Mr.
13 Ballantine or testimony in the record, Homeowners object to their inclusion in total.
14

15 An examination of what is marked as new Exhibit "Q" shows that each item is
16 excludable for multiple reasons:
17

18 -The entries dated from Oct. 13, 2008-Nov. 20, 2008 concern two specific mobilehome spaces
19 within the park; i.e. spaces 11 and 23, and appear to relate to what the Oct. 17 entry refers to as
20 "abuse of electrical infrastructure". There are references to contacts with the residents' counsel,
21 along with 3/60 and 7-day notices of termination in the November 3 entry. These expenses
22 clearly relate to disputes with tenants at specific spaces concerning sub-metered gas and electric.
23 As such, the expenses were not incurred in connection with any capital item which benefits the
24 collective homeowners. Frankly, we don't have any testimony as to what these entries involve,
25 but on their face (which is the only possible way that these expenses can now be included in the
26 evidentiary record), they are excludable.
27
28

1 -Entries after November 20, 2008 which refer to electrical engineering (i.e. John Maloney) relate
2 to sub-metered energy topics, and are excludable based upon the legal authority cited in
3 Homeowners' Opening Brief. This appears to include all entries from November 21, 2008-
4 January 27, 2009. (Note that the Park Owner's Opening Brief sets forth no authority for
5 excluding such expenses, and appears to not to contest to authority of the Exhibit "4" *Rainbow*
6 *Disposal* case entered into the record.
7

8 -The entries which appear beginning on February 2, 2009 are particularly troubling. They refer
9 to legal expenses incurred in connection with a failure to maintain lawsuit filed against the
10 previous park operator by the park residents based upon numerous park conditions. Numerous
11 references to the Homeowners' attorneys in that action; i.e. Linda Reich and Henry Heater of the
12 San Diego firm of Endemann, Lincoln, Turek & Heater, appear in the billing summary. Again,
13 such litigation bears no relationship to any capital improvement, and cannot be included. This
14 appears to encompass entries between Feb. 2, 2009-April, 2009, including several depositions.
15 Without evidence as to what this litigation was about or how it involved capital improvements of
16 any kind, the legal fees cannot be allowed.
17

18
19 -The billing entries beginning in 2010 begin to refer to some sort of administrative action by the
20 County of Santa Barbara, resulting in a Writ of Mandate lawsuit. There has been no testimony
21 as to what such a suit was about, why it was filed, how it benefited the homeowner community
22 or whether it also related to sub-metered energy. As such, all of these entries are excludable.
23

24 Had Homeowners had a chance to see this itemization during hearing, it would have
25 prompted many questions which now can never be asked. Without sufficient cross-examination
26 capability, and based upon their suspect nature as they appear on Exhibit "Q", this category
27 cannot be allowed. Trying to legitimize them now, following the close of evidence, does not
28

1 pass muster. These Homeowners do not have a duty to reimburse, dollar-for-dollar, any and all
2 attorney's fees which the Park Owner might choose to incur in connection with the operation of
3 its park. The Ordinance does not authorize this expense item.
4

5
6 **(c) Professional Fees Relating to Rent Increase Proceedings**

7 During the hearing, the Park Owner was unable to quantify the actual costs or expenses
8 incurred to date in connection with the requested \$125,000.00 estimated in item 6 of Exhibit "C".
9 It was agreed that the Park Owner would submit this detail in conjunction with its opening brief,
10 and we now have for examination two new Exhibits relating to this item.
11

12 Exhibit "R" is a recently created invoice dated September 21, 2011 addressed to the Park
13 Owner by its expert. Significantly, this was created after the conclusion of the hearing, and not
14 before. It shows a total of \$32,219.65 incurred over a roughly two-year period. During the
15 hearing, Dr. St. John could not recall what he had billed or been paid. It is also significant that
16 he was still owed a significant amount after the conclusion of the hearing, which invokes the
17 issue of whether or not he is being paid based upon the quality of his testimony, rather than prior
18 to it.
19

20 But the biggest problem with this newly created "invoice" is that it is vague, ambiguous
21 and includes entries which precede the Notice of Rent Increase by some 15 months. Entries
22 simply refer to "Email" without any further explanation. Entries noted for "DC" and "Emails"
23 routinely exceed 3 hours, yet we have no way of knowing what those documents were or what
24 the emails related to. And the cost itself is clearly excessive. When one subtracts the three days
25 of hearing travel, prep and attendance from Sept. 18-20, 2011, we are left with \$25,087.50 in
26 charges. Divided by Dr. St. John's very reasonable \$150.00 rate, this calculates to over 167
27
28

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

19 The entry for March 1, 2011 should also be excluded; i.e. one hour of time to monitor a
20 County hearing regarding mobilehome regulations. This does not relate to the instant hearing,
21 and results in an additional \$350.00 reduction.
22

23 Mr. Ballantine shows a total of \$72,913.50 for his efforts to prepare for this 2-day
24 hearing. The Hearing Officer should decide whether this represents an unreasonable amount.
25 Assuming that the above reductions are taken, the total is \$68,783.50. Even if this entire
26 amount, together with the total St. John claim is allowed, the revised total would be \$101,003.15.
27 This is \$24,000.00 less than the amount claimed for item 6 on Exhibit "C". Presumably Mr.
28

1 Ballantine will not be expending \$24,000.00 (i.e. 68 hours of time) to compose his closing briefs,
2 and thus at minimum, some reduction is warranted.

3 **(d) Capital Improvement Items**

4 Homeowners' opening brief calculated that the maximum amount recoverable for already
5 expended capital items would be \$22,192.50, rather than the \$90,000.00 requested. This is
6 primarily based upon the fact that the excludable expenses relate to sub-metered gas or electric
7 systems. The Park Owner did not address this issue at all in its opening brief. Presuming that
8 the Park Owner shall not be conceding the issue, Homeowners offer this additional evidence in
9 support of their position.
10
11

12 It is well settled that the discount received by the Park Owner in connection with its sub-
13 metered utilities is sufficient to cover its entire system, including maintenance, replacement or
14 upgrade. This fact is understood by all of the major serving utilities in California, as evidenced
15 by their recent filings in a pending Rulemaking proceeding now being conducted by the Public
16 Utilities Commission. Rulemaking proceeding 11-02-018 was initiated by park owners to create
17 a more efficient system for allowing park owners to transfer their systems back to the serving
18 utility, which would effectively exit the park owner from the utility business. In the process, the
19 discount would go away. The problem which the PUC is now addressing is this: Where the park
20 owner wishes to transfer the system in its present condition, but the utility requires that the
21 system be upgraded or replaced first, due to its age or condition, who pays for this? The utilities
22 take the position that the park owner is responsible according to the discount rules, pending
23 another solution being agreed to by the parties or ordered by the Commission. San Diego Gas &
24 Electric, in a recent filed proposal, stated the issue this way, quoting PUC Decision D.04-11-
25 033 at pp. 22: **"The net effect of the above sections [i.e. the transfer sections of Public**
26
27
28

1 Utilities Code 2791-2799] is that the costs incurred to make a MHP distribution system
2 acceptable for transfer to the utility must not be borne by the utility or the MHP tenants,
3 and the general body of ratepayers must be rendered indifferent. Therefore, the costs may
4 only be charged to ratepayers if there is an offsetting benefit such that they are indifferent.
5 Otherwise, the costs must be borne by the MHP owner.”
6

7 The decisions of the PUC, including D.04-11-033, as well as the filings in Rulemaking
8 proceeding 11-02-018, are available to view on line at the PUC website, and Homeowners
9 request that the Hearing Officer take judicial notice of same. It is clear that the opinion of Dr. St.
10 John that the discount does not cover the costs to replace or upgrade a sub-metered energy
11 system are incorrect, and that the park owner is presently solely responsible for such costs.
12 Thus, the doctrine of the *Rainbow Disposal* case remains good law, and the Park Owner is
13 prohibited from recovering any expenses associated with sub-metered energy repair,
14 maintenance or replacement.
15

16 Finally, the Park Owner has attempted to buttress its claim for capital improvement funds
17 by attaching a brand new exhibit (Exhibit “P”) never entered into evidence, and created after the
18 close of the evidentiary portion of the hearing. As such, it is simply irrelevant and cannot be
19 considered.
20
21
22
23
24
25
26
27
28

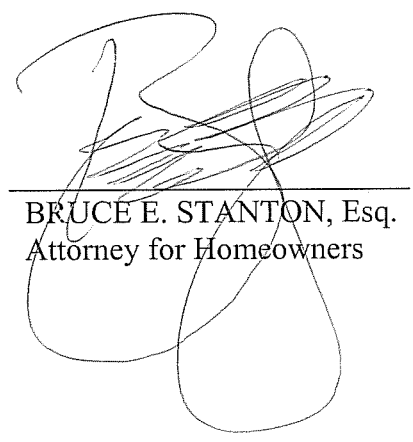
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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



BRUCE E. STANTON, Esq.
Attorney for Homeowners