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ARBITRATION PROCEEDINGS UNDER THE SANTA BARBARA COUNTY

MOBILEHOME RENT CONTROL ORDINANCE

IN RE NOMAD VILLAGE MOBILE HOME PARK	CLOSING POST ARBITRATION HEARING BRIEF BY NOMAD VILLAGE MOBILE HOME PARK Before Stephen Biersmith, Esq. Arbitrator Date: September 19-20 2011 Time: 9:00 A.M. Location: Board of Supervisors Hearing Rm

TABLE OF CONTENTS

I. THE HOMEOWNERS HAVE FAILED TO ESTABLISH THAT THE PERMANENT RENT INCREASE IS NOT PROPER 2

A. THE HOMEOWNERS' OBJECTIONS BASED UPON THE UNDISPUTED PROPERTY TAX INCREASES ARE NOT WELL TAKEN 4

B. THE HOMEOWNERS' OBJECTIONS BASED UPON THE UNDISPUTED GROUND LEASE INCREASES ARE NOT WELL TAKEN 6

C. APPLICATION OF MNOI ANALYSIS 11

i. 1994 IS THE APPROPRIATE BASE YEAR 11

ii. Indexing 12

II. THE HOMEOWNERS HAVE FAILED TO ESTABLISH THAT THE TEMPORARY RENT INCREASE IS NOT PROPER 13

A. THE HOMEOWNERS OBJECTIONS TO THE CAPITAL IMPROVEMENTS ARE BASED UPON INAPPLICABLE LEGAL CLAIMS 13

B. THE HOMEOWNERS' OBJECTIONS TO REGULATORY LAG FOR INCREASED PROPERTY TAX AND GROUND LEASE COSTS ARE NOT BASED UPON ANY LEGAL OR FACTUAL PRINCIPLE 16

C. THE HOMEOWNERS' OBJECTIONS TO PROFESSIONAL FEES CONTRADICT THEIR OWN ADMISSIONS AT THE HEARING 21

D. THE HOMEOWNERS' CONSULTANT ACKNOWLEDGED THE VALIDITY OF AMORTIZING PROFESSIONAL FEES 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Rainbow Disposal Company, Inc. v. Escondido Mobilehome Rent Review Board (1994) 64 Cal.App.4th 1159 16

Nomad Village Mobile Home Park Management hereby submits its Closing Post Arbitration Hearing Brief submitted in these arbitration proceedings.

As Park management observed in its Opening Brief, the homeowners have simply adopted a "just say 'no'" approach to any rent increase whatsoever, despite the fact that the evidence and the law presented in these proceedings unequivocally demonstrates that the park management is entitled to a rent increase to compensate for expenses incurred in connection with the operation of the Park. The homeowners failed to present any evidence or analysis of any rent increase amount. In contrast, Park Management has prepared a detailed analysis outlining all of the elements of its rent increase, supported by a large volume of undisputed evidence. Accordingly, the only valid numbers in these proceedings are submitted by park management. In the face of utterly no valid competing number, the proposed rent increase as set forth herein should be accepted.

Park management further observes that the homeowners' Brief, for whatever reason fails to contain a single citation to the record, despite the fact that a complete transcript of proceedings has been prepared. As discussed herein, many of the homeowners' purported citations to the record are inaccurate, and at best, mischaracterize the record, and at worst, flatly misstate it. Also as discussed herein, the homeowners base their opposition on positions at odds with the express terms of the Ordinance, and reliance upon legal authorities that have been expressly superseded.

In their insistence upon saying "no" to any rent increase to compensate Park management for increased costs, the homeowners ignore the clear dictate of the governing legal proceedings in this case, the Santa Barbara County Rent Control Ordinance (referred to as "Ordinance" herein). In particular, the homeowners ignore the express purpose of the Ordinance is for: "recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs." (Ordinance, section 11A-1.) Instead, the homeowners treat the Ordinance as being nothing more than a permanent rent subsidy for themselves, regardless of the costs of operating the park for their benefit. Unfortunately, the homeowners' ongoing intransigence does nothing but inflate significantly the costs of these proceedings.

I

THE HOMEOWNERS HAVE FAILED TO ESTABLISH THAT THE PERMANENT RENT INCREASE IS NOT PROPER

The homeowners just say "no" to any permanent rent increase whatsoever, despite the fact that do not dispute that Park management has incurred significantly increased property tax and ground lease costs. The homeowners also object to what they characterize as a "dollar-for-dollar pass through" of the increased property taxes and ground lease costs incurred by the Park management. (H.O. Brief, pp. 5-7.) The homeowners blithely claim that these increased costs cannot be passed through. They

1 further claim that the increased costs may only be supported by
2 a "standard MNOI analysis" and cite general legal authority
3 regarding MNOI analysis, despite the fact that the Ordinance
4 sets forth specific provisions for calculating a rent increase.
5 The homeowners' misguided claims ignore the legal authority
6 applicable in this case, and confuse the basis for the costs and
7 the manner of calculation of the costs. The homeowners ignore
8 the fact that the Ordinance expressly requires the arbitrator to
9 consider "all relevant factors" specifically including increases
10 in management's operating expenses, including increases in
11 property taxes and other expenses in connection with operating
12 the park. Accordingly, the arbitration should consider the
13 amounts and the impacts of these specific increases in operating
14 expenses (Ordinance, section 11A-5(f).) The homeowners further
15 ignore the fact that the Ordinance is NOT a standard MNOI
16 analysis. The only rent-increase calculation of any type in
17 evidence in these proceedings was the one performed by Dr. St.
18 John. Dr. St. John made it clear that he made his calculations
19 in strict compliance with the terms of the Ordinance. (RT1 8:2-
20 19)
21 Dr. St. John performed rent increase calculations that show
22 the exact amount by which the increased property tax and ground
23 lease costs themselves support a rent increase, showing that
24 these increased costs support a permanent rent increase of
25 $58.16. He then compared this increase with an MNOI analysis
26 performed in strict compliance with the terms of the Ordinance,
27 and supported this figure with the analysis itself justifying a
28 permanent rent increase in the amount of $57.

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Notwithstanding the fact that the homeowners claim that the rent increase must be calculated pursuant to a generic MNOI analysis, they fail to submit any MNOI analysis themselves. Dr. St. John's analysis should be accepted.

A. THE HOMEOWNERS' OBJECTIONS BASED UPON THE UNDISPUTED PROPERTY TAX INCREASES ARE NOT WELL TAKEN

Unbelievably, notwithstanding the fact that the homeowners do not dispute that the property taxes for the property were tripled effective August 1, 2008, and notwithstanding that the Ordinance specifically provides that increased property taxes are a basis for a rent increase, the homeowners just say "no" to any rent increase based upon this tripling of the property taxes. The homeowners base this contention on their claim that the rent increase is "premature" (H.O. Brief, p. 8, line 5) because the Park (not the homeowners) have raised the point that the property tax increase may well be subject to challenge. Despite the fact that the property tax increase is clearly a cost increase for which the homeowners are responsible under the Ordinance, the Park has questioned the validity of the tax increase and indicated a willingness to pursue an appeal for the benefit of the homeowners. The homeowners cite no legal authority, and none exists, that they may prevent the park operator from a rent increase to recover these increased expenses (which expenses undisputably are the basis for a rent increase under the Ordinance), based upon speculation about future events.

Now, in order to attempt to escape any responsibility, the homeowners insist that "the legality issue should be sorted out first via an assessment appeal, and no amount should be allowed until any legal challenge is completed…" (H.O. Brief, 7:17-18.) Yet, a few pages later, the homeowners refuse to agree in any way to pay for an appeal that they insist be done for their benefit, and even suggest that the prospects of an appeal may not be good. (Id., 16:15 – 17:5.) In addition, the homeowners also object to any rent increase to compensate for the tripled property taxes already paid by park management prior to the rent increase (due to regulatory lag), on the grounds that the increase is too late. (Id., pp. 15-16.) So Park management should get nothing according to the homeowners, because it is both too early and too late.

Ironically, the homeowners claim that the "Park Owner cannot have it both ways." (H.O. Brief, 8:3.) In fact, it is the homeowners who are trying to have it any possible way that will allow them to avoid any rent increase, by objecting to the rent increase based upon the ongoing property tax increase as premature, objecting to the rent increase based upon the property taxes already paid as being too late, and objecting to any cost incurred in challenging the property tax as both too early and too late.

The fact of the matter is that the park operator is and has incurred a tripling of the property taxes, and unless and until this changes, it clearly is the basis for a rent increase. The amount that forms the basis for the rent increase is clearly identified and is undisputed. There is no good reason to go

through the time and expense of further rent control proceedings.

The homeowners make much of the fact that if the property taxes are ever refunded, then the rents would have to be refunded. That is certainly true, and the rent increase notice to the homeowners (Exhibit A) made this clear. But the homeowners confuse the prospect of a prospective challenge to the property taxes, which would operate for future years, with a retroactive claim for refund for taxes previously paid. While there likely is no claim for a refund, the taxes may still potentially be challenged on a going forward basis. Such a successful challenge could lead to a future rent reduction, also clearly stated in the rent increase notice (Exhibit A).

Any future property tax reduction, as well as any refund, may easily be dealt with in the arbitration award issued in this case. The award may simply order that any future permanent property tax reduction be credited as a permanent rent reduction in the amount of the reduction of the property tax, and that any refund of amounts previously paid, be refunded to the homeowners as a rent credit with the park operator giving written notice to the homeowners of the rent reduction and the amount and manner of calculation.

B. THE HOMEOWNERS' OBJECTIONS BASED UPON THE UNDISPUTED GROUND LEASE RENTINCREASES ARE NOT WELL TAKEN

Notwithstanding that the homeowners did not dispute that the rent for the park under the ground lease doubled commencing August 1, 2008, as a result of an arms-length transaction

between the land owner and the new operator, the homeowners just say "no" to any resulting rent increase as due to this increased operating cost.

The homeowners do not base their position upon the Ordinance or any law.

The homeowners base their resistance upon their claim at the arbitration hearing that rent control ordinances from certain other jurisdictions expressly provide that increased ground lease fees may be considered in granting rent increases. (H.O. Brief, page 8, lines 23-27.) This claim has no application to the Ordinance at issue here. Other ordinances are irrelevant, and the homeowners provide no authority that the Ordinance actually at issue here precludes consideration of increased ground lease rents as a basis for increasing space rents.

In fact, the homeowners' claim is contrary to the express terms of the Ordinance, and necessarily assumes that the Ordinance must explicitly specify each and every increased operating expense that may form the basis for a rent increase (and even when it does, such as property taxes, the homeowners still say "no"). The Ordinance states that "the arbitrator shall consider **all** relevant factors" in determining the amount of rent increase, and that: "Such relevant factors may include, **but are not limited to**, increases in management's ordinary and necessary maintenance and operating expenses, insurance and repairs; increases in property taxes and fees and expenses in connection with operating the park…." (Ordinance, Section 11A-11A-6(f)(1).) Therefore, the expenses set forth in the

Ordinance are by way of example rather than limitation, and in fact the arbitrator is to consider without limitation all increases in management's operating expenses incurred in operating the park. Accordingly, the homeowners' argument is contrary to the terms of the Ordinance.

Moreover, in their misplaced reliance upon other jurisdictions' rent control ordinances that consider increased ground lease expenses as a basis for rent increases, the homeowners contradict their other argument that as a matter of policy, ground leases expenses are not even appropriately considered under rent control ordinances. (H.O. Brief, page 8, lines 7-22.) If ground lease rents are as a matter of policy not properly considered as expenses justifying rent increases, then how could numerous ordinances specifically allow consideration of such expenses?

The homeowners also concoct, based upon sheer speculation, possible future changes to fundamental terms of the 34-year ground lease. (H.O. Brief, page 9, lines 2-17.) Such speculation cannot form a basis to deny a rent increase based upon an undisputed cost being incurred by Park management based upon what is undisputably an arms length transaction for a ground lease at an undisputedly market rent. To adopt such an approach as proffered by the homeowners would turn all rent control proceedings into exercises of sheer speculation. Illustrative of the disingenuous nature of their concoction is their speculation that if there are vacancies in the park then the ground rent will go down (Id.); but as the homeowners' own paid consultant acknowledged at the hearing, one of the

justifications for mobilehome rent control is the absence of vacancies in mobilehome parks. (RT1 207:1-8) Indeed, one of the express purposes for the Ordinance is to address the "low vacancy rates…in mobilehome parks in Santa Barbara County." (Ordinance, Section 11A-1.) If the homeowners' own consultant was available for cross examination on this point, he would no doubt agree that there typically are no vacancies in mobilehome parks in rent controlled jurisdictions. (RTI 207: 5-8.)

The homeowners again mischaracterize the record by purporting to quote Dr. St. John (again without any citation to the record) that ground lease expenses were "rare." (H.O. Brief, p. 8, line 28 to page 9, line 4.) The homeowners flatly misrepresent the testimony.

To the contrary, 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. What Dr. St. John actually stated was 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 those contexts, and it should be allowed in an MNOI context as well, and has been in my experience, many times.**
>
> When I say "many times," I don't say all the time only because most parks are owned by the operators. There

are some parks, like Nomad Village, where the operator does not own the park, it leases the park, so it's relatively rare that ground leases appear at all, **but when they exist, they do appear in the MNOI analysis.**"

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

The homeowners further severely mischaracterize the record by attempting to make an evidentiary argument that the appropriate ground lease rent in 2008 is in fact a higher number than the sole number actually in evidence at the hearing, and then purport to calculate a different rent increase number based upon what they claim should be a lower differential between the old rent amount and the new rent amount; i.e., the homeowners compare their revised rent number for 2008 with the rent number for 2009. (H.O. Brief, page 9, lines 18-23.) It is inappropriate for the homeowners to purport to introduce wholly new evidence during the briefing, and this escapade illustrates why. The homeowners mischaracterize the facts and attempt to mislead these proceedings. The homeowners blatantly ignore one of the fundamental facts of these proceedings—that the ground rent doubled effective August 1, 2008, (i.e. in the middle of 2008) therefore it would be patently inappropriate to consider all of the ground lease rents in 2008 for the purposes of determining the rent differential arising from the rent increase, but only the rents at the rate before the increase went into effect. Dr. St. John properly calculated the rent increase based upon this ground lease increase actually incurred as part of the permanent rent increase. (Exhibit D, Tables 3A & B.)

C. APPLICATION OF MNOI ANALYSIS

The homeowners also purport in their brief to determine their own MNOI numbers. (H.O. Brief, page 11.) The homeowners did not present any MNOI analysis at the hearing, let alone any analysis that complied with the Ordinance. The homeowners should not be able now in post-hearing briefing attempt to introduce new purported evidence or calculations. Accordingly, the homeowners' purported calculation of adjustments to the rent increase should be disregarded as being without evidentiary foundation. Similarly, the homeowners' arguments regarding the base year and the indexing should be disregarded.

The fact of the matter is, as the homeowners have to admit, the result of Dr. St. John's analysis performed according to the terms of the Ordinance supports in increase of $55 to $57 per space using either 1994 or 2007 as a base year; the only variation of this result is if 75%, as opposed to 100%, indexing is applied to the 1994 numbers. Under the Ordinance, 2007 is the appropriate base year to employ, as it is the last year under the prior operator and the year by which the costs can most accurately be compared with the new increased costs. If 1994 is used as a base year, then under the Ordinance 100% indexing is the most appropriate indexing to employ.

i. 1994 IS THE APPROPRIATE BASE YEAR

Curiously, in their pre-hearing brief, the homeowners criticized Dr. St. John's use of 1994 as the base year. After learning that using 1994 as a base year yields a more favorable result for them (if less than 100% indexing is employed), the

homeowners have now become huge fans of using 1994 as the base year. Their paid consultant has supported using 1994; however, his opinion supporting 1994 as the appropriate base year should be disregarded as it was based upon the false premise that 1994 was when the Ordinance was enacted. (RT1 194: 19-3.)

The homeowners ignore that ultimately their own consultant had to concede that he had no knowledge of any factors that would make 1994 a better base year than 2007 for an MNOI analysis. (RT1 201:4-8.)

With 2007 used as a base year, Dr. St. John's analysis supports a rent increase of $55.53 at 75% indexing and $57.04 at 100% indexing, strongly supporting the $58.16 noticed amount.

ii. INDEXING

The homeowners say that 75% indexing should be utilized, but provide no citations to the record, nor do they cite any legal authority. No wonder. In fact, their consultant admitted that the Ordinance did not require any such 75% indexing. (RT1 201: 9-16.) Dr. St. John testified at length as to the problems that arise when less than 100% indexing is employed over a long period of time. (RT1 107-109.)

Accordingly, to the degree that 1994 is employed as a base year, 100% indexing should be employed, which supports a permanent rent increase of over $57.

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II

THE HOMEOWNERS HAVE FAILED TO ESTABLISH THAT THE TEMPORARY RENT INCREASE IS NOT PROPER

A. THE HOMEOWNERS' OBJECTIONS TO THE CAPITAL IMPROVEMENTS ARE BASED UPON INAPPLICABLE LEGAL CLAIMS

The homeowners say "no" to any rent increase based upon any expenditures made for capital improvements for the Park. (H.O. Brief, pp. 13 – 16.)

The homeowners claim it is unclear how the $50,000 entry for professional fees is determined. (H.O. Brief, page 13, lines 16-21.) These are discussed in the professional fees section below.

The homeowners also complain about the $90,000 already paid by the Park operator for detailed plans for the park for capital improvements. (H.O. Brief, page 13, lines 22-26.) The homeowners do not dispute that these funds were actually paid for the benefit of the Park. Mr. Waterhouse testified that he made an agreement with the prior operator to pay their expenses for the plans in order to obtain the plans for capital improvements to the park, and confirmed that these plans were very valuable to the current operator. (RT2 144:1-142:5.) The homeowners cite nothing in the Ordinance, or any other legal authority, that precludes these expenses from serving as a basis for a rent increase. Each element of these $90,000 in costs is detailed in spreadsheet fashion in Exhibit J and invoices for these costs are submitted in Exhibit L. It appears that the homeowners mistakenly claim that Exhibit J only supports

$62,145.55 for this item and not $90,000. (H.O. Brief, page 13, lines 22.) The homeowners confuse the amounts paid to the prior operator, Nomad Village, Inc., for planning and engineering, which is separately itemized in the group on the lower half of Exhibit J and total nearly $90,000, with the group of expenses incurred by Waterhouse Management, Inc., for a variety of capital improvement items, which are itemized on the top half of Exhibit J and total $62,145.55, and, which are supported by the invoices set forth in Exhibit L.

The homeowners complain about the $320,000 in capital improvement funds, on the misguided grounds that the expenses have not been entirely spent and that they relate in part to electrical infrastructure improvements. The homeowners' claims run contrary to the law in both regards.

The homeowners misstate the record yet again when they claim (again without any citation whatsoever to the record) that the Park owners testified that "they were not yet sure what they were going to spend the capital improvement funds on." (H.O. Brief, page 14, lines 24-25.) To the contrary, Mr. Waterhouse testified that $320,000 had in fact been paid into an escrow fund, that all such funds are dedicated to be spent and will be spent on capital improvements to the Park, and that the funds expended will exceed that amount. (Exhibit K; RT2 145:15-147:1, 166:7-22, 179:1-13.)

The homeowners ignore the undisputed evidence that the Park operator has actually paid $320,000 into a reserve fund to be used for capital improvements to the Park. The Park has unequivocally demonstrated that it has already incurred

$62,145.55 in costs relating to the capital improvements of the Park. (Exhibits J & K; RT2 189:2-14.) Moreover, the Park has demonstrated that it has a number of projects planned, which are supported by a number of proposals. (Exhibits M, P.)

The homeowners further utterly ignore the clear provisions of the Ordinance that makes clear that the capital expenses that form the basis for a present rent increase may include those costs to be incurred in the future.

Section 11A-6(b)(1) 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.

Further, the Park then has a six-month window to **begin construction** with the money after the rent increase is approved, and that if they do not do so the homeowners have a clear remedy by way of a rent credit, which remedy the homeowners may enforce:

> (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.

The homeowners also make the erroneous claim that any costs whatsoever incurred by the park that relate to the electrical system cannot form the basis of a rent increase, objecting to any "any portion" of any expenses that "appear to bear some

relationship to electrical system." (H.O. Brief, page 13, line 26 to page 14, line 22.) The sole legal authority on which the homeowners base this claim is the 1998 case, *Rainbow Disposal Company, Inc. v. Escondido Mobilehome Rent Review Board* (1994) 64 Cal.App.4th 1159, which decision, as they observe, "was based upon the authority of a 1995 Public Utilities Commission Ruling." (Id., page 14, lines 1-5.) This sole legal authority relied upon by the homeowners is entirely ineffective. In fact, this 16-year-old authority, to whatever extent it may have applied, is out of date, and entirely superseded by subsequent rulings by the Public Utilities Commission ("PUC").

The homeowners fail to disclose what is widely known among mobilehome park management and homeowner advocates: In 2001 the PUC determined that the 1995 Ruling did not properly consider utility costs incurred by mobilehome parks that could be passed through as rent increases and stayed any further decisions based upon the 1995 ruling; In 2004, the PUC changed their rules expressly to allow park owners to increase rents to compensate for costs of improvements to mobilehomepark gas and electrical systems.

In 2001, the PUC issued its Order Instituting Rulemaking And Investigation, in which it acknowledged that P.U. Code section 739.5 only bars from further recovery those capital improvement costs that relate to the submetered system and that are costs factored into the master meter discount. The PUC determined that it would engage in a proceeding to identify all of those costs incurred by mobilehome parks in operating their

gas and electrical systems that park operators are entitled to pass through to their tenants in the form of rent increases:

"The first and central issue of this proceeding (Phase 1) is to identify, among all utility-related costs of operating an MHP, those costs, not already identified in prior Commission decisions that are avoided by a utility serving an MHP when the MHP submeters its tenants. **Costs identified and defined as not being incurred by the utility in MHPs that it meters directly, will emerge as costs that MHP operators will be legally entitled to pass through to their tenants**, subject to the oversight and discretion of local rent control boards, where applicable. Examples of cost categories that we will address include: meter reading and billing, capital improvement and associated maintenance, repair and replacement for common areas, lighting, appliance energy, pedestals, and service drops. In Phase 1 we will define cost components and categories as a matter of policy."

In 2004, the PUC issued its Order Instituting Rulemaking and Investigation in which it concluded that there were a variety of costs incurred by mobilehome parks costs related to electric or natural gas utility service that are either not incurred by the utility when it directly served MHP tenants, or are not reflected in utility rates for direct service, but are incurred by sub-metered MHP owners, and that these are costs may be separately charged to tenants by way of a rent increase.

Park management will submit a request for judicial notice of these PUC rulings, made necessary as a result of the homeowners' misstatement of the law.

These PUC rulings expressly supersede the 1995 authority relied upon by the homeowners. Notwithstanding the homeowners' zeal to just say "no" to everything, it is surprising that experienced representatives of the homeowners would attempt to have any ruling in this arbitration proceeding based upon outdated and inapplicable legal authority.

Accordingly, the homeowners are flatly wrong in their sweeping statement that no expense related to the electrical system can form the basis of a rent increase. In fact, the expenses to the electrical system involved in this action are those types of expenses that are not incurred by a utility in serving their customers, and include expenses related to the Park common area.

In sum, any objections by the homeowners to the rent increase to compensate for capital expenses are addressed by the Ordinance, in the event that all funds are not spent on capital improvements; moreover, Park management has no objection to the arbitrator retaining jurisdiction to enforce the terms of the arbitration award and review any and all future expenditures. Such an approach maximizes the efficiency of the rent control process.

B. THE HOMEOWNERS' OBJECTIONS TO REGULATORY LAG FOR INCREASED PROPERTY TAX AND GROUND LEASE COSTS ARE NOT BASED UPON ANY LEGAL OR FACTUAL PRINCIPLE

Incredibly, the homeowners also say "no" to any increase that allows the Park owner to recover for the increased expenses

that it undisputedly incurred prior to the effective date of the rent increase, as a result of the tripled property taxes and doubled ground lease rents. (H.O. Brief, pp. 15-16.) Dr. St. John explained that this period was commonly known as "regulatory lag." (RT1 75:14-22.) Notwithstanding that they do not dispute that Park management incurred these increased expenses, the homeowners object to any rent increase based upon them. When it suits the homeowners' attempts to escape any responsibility for any rent increase, they claim that an expense is either premature or too late. In the case of the regulatory lag category, the homeowners claim that the rent increase comes too late. In their Brief, the homeowners state that their own consultant testified that no more than 12 months of regulatory lag should be charged to homeowners (H.O. Brief, page 15, lines 18-19), although they, of course, do not cite the record. In fact, their consultant was not quite so definitive. He acknowledged that there were "no absolute lines" as to when a park operator had to notice a rent increase for expenses incurred in the past. (RT1 223:16.) He acknowledged that there was no legal authority setting forth any limitation period.

The homeowners cite no legal authority for their objection, they merely claim that "there is no precedent in the Ordinance" for this increase for regulatory lag. (H.O. Brief, p. 15, line 27.) The homeowners ignore that the Ordinance not only does not prohibit collection for regulatory lag, it necessarily allows such an increase. For example, Section 11A-8 of the Ordinance is labeled "collection and frequency of increases" and provides: "(a) Management may increase the maximum rent increase schedule

no more than once a year…" Accordingly, the Ordinance makes clear that a rent increase may not be issued more than one time a year, but the County expressly declined to put any other limit on the frequency of a rent increase or any time limit on regulatory lag. Instead it must be reasonable.

The homeowners' reasons for objecting are contrary to the actual facts in the record. The homeowners complain that they are "hit with a cumulative sum all at once, now including interest…." (H.O. Brief, page 15, lines 17-18.) In fact, the rent increase is amortized, so the residents pay a small monthly sum, $32.74 (Exhibit D – table 1), and they are not charged interest for any of the regulatory lag period. The homeowners claim that the regulatory lag expenses may be "difficult to track or prove" (H.O. Brief, page 16, line 6), but in fact the expenses are very clear and well documented, and, in fact, the factual basis for the rent increase (i.e. the existence and the amounts of the property tax and ground lease rent increases) are absolutely undisputed.

The homeowners' position is contradictory and impractical, and also, in the long run, self defeating. As may be seen by these proceedings, rent control litigation is time consuming and expensive. It is in all parties' interests (including the County's and the public's) that there be fewer rather than more proceedings.

Dr. St. John pointed out that it did not make good sense effectively to require the park operator to be subject to frequent fair return proceedings. (RT1 73:3-20.)

In sum, the homeowners newly concocted limitation period of one year for recovering expenses appears neither in the Ordinance or any other provision of law. The plain fact is that these categories are reimbursable, that they haven't been reimbursed, and that they will not ever be reimbursed if this item is disallowed. Treating these amounts as reimbursable as amortized makes good sense. It is simply a way of ensuring that residents pay for all cost increases that they should pay for under the cost-recapture system.

C. THE HOMEOWNERS' OBJECTIONS TO PROFESSIONAL FEES CONTRADICT THEIR OWN ADMISSIONS AT THE HEARING

The rent increase also includes a factor for extraordinary costs incurred by the Park operator for professional fees for: matters relating to regulatory and infrastructure improvement issues, a proposed potential property tax appeal, and rent control proceedings.

Not surprisingly, the homeowners say "no" to any rent increase of any type based upon any of these fees. (H.O. Brief, pp. 16-17.) The homeowners ignore the simple fact that these fees have actually been incurred by park management, that they relate to the operation of the park, but that Park management is not compensated for them absent a rent increase based upon them.

An element of the temporary rent increase is for $50,000 of extraordinary professional fees. Mr. Waterhouse confirmed that the $50,000 in professional fees were amounts actually paid. (RT2 145: 6-15.) As discussed herein, the homeowners'

representative agreed that the treatment of professional fees as a temporary expense is a legitimate approach and favorable for the homeowners, instead of making it the basis for a permanent rent increase. Pursuant to stipulation between counsel, the Park owner has submitted the detailed billing statement summary (with the content of attorney-client privileged communications redacted) to demonstrate the basis of these costs.

Another element of the temporary rent increase is for the retainer amount in the event that the park operator goes forward with a property tax appeal, for the benefit of the homeowners. Unbelievably, the homeowners still say "no" to this expense, despite the fact that their own consultant conceded that he did not disagree that a park operator was entitled to recover the costs of challenging a property tax increase through a rent increase. (RT1 225:16-226:1) and acknowledged that the cost "looks like it's reasonable". (RT1 227:2-22.) The fact of the matter is that if the park operator challenges the property tax increase, then it will necessarily incur costs in doing so. The park operator should properly recover these costs in the form of a rent increase, rather than being put in the position of having to incur expenses for the benefit of the homeowners, without any guarantee of recovering any of these expenses. Moreover, the Park operator should know whether or not he will be able to recover these fees via a rent increase, rather than be forced to incur these fees knowing that when he asks the homeowners for a rent increase to cover these costs, their response will undoubtedly be "NO."

The homeowners' concern that it is unknown to what extent all of the retainer fees will be consumed in the appeal is easily addressed. An arbitration award can include the order that fees begin being incurred within a particular time-frame and that any fees not consumed during the course of an appeal (or if the appeal is settled or abandoned or otherwise discontinued) be refunded to the homeowners and that the homeowners be provided with an accounting of all fees consumed within a reasonable period of time.

Counsel for park management already did some legal research regarding the matter following the arbitration hearing, to get a better handle on potential legal approaches to challenge the property tax increase.

Ensuring that their "just say no" approach to any rent increase whatsoever is complete, the homeowners continue to object to any rent increase based upon the costs that park management has been forced to incur through rent control proceedings. (H.O. Brief, p. 17) The homeowners' ongoing refusal is made in the face of the testimony by their own consultant who agreed that the Park operator was entitled to recover professional fees relating to the rent control proceedings, and that he agreed with the methodology employed here by making it the basis of a temporary rent increase amortized over a period of years. (RT1 235:19-236:8.) By stipulation between counsel, park management provided a summary statement of professional fees incurred through the opening brief in this matter, and will update the summary through the reply briefing. The detailed summaries support the rent

1 increase. Of course, the total amount incurred in connection
2 with the rent control proceedings will not be known until the
3 proceedings are final. For example, surely there will be
4 additional steps taken to review and comply with the terms of
5 the resulting arbitration award. It is not known what steps, if
6 any, the homeowners might take, such as appealing an award,
7 which would require further action on the part of the park
8 operator.

9 To the extent that the park operator does not incur the
10 amount of professional fees on which the rent increase is based,
11 then they are easily subject to being refunded to the homeowners
12 in the form of a rent credit, just as the Ordinance provides
13 with respect to future capital improvement expenses that do not
14 wind up being incurred.

15

16 D. THE HOMEOWNERS' HAVE ACKNOWLEDGED THAT THE ARBITRATOR HAS
17 THE FLEXIBILITY TO AMORTIZE PROFESSIONAL FEES

18

19 Again, in their zeal to "just say no," the homeowners are
20 attempting to have it both ways. In their Brief, they object to
21 the park operator's proposed treatment of the professional fees
22 by amortizing them in a manner analogous to a capital expense
23 item, yet their consultant acknowledged that this was a valid
24 approach; the homeowners further ignore that if the professional
25 fees are not amortized as a temporary rent increase, then they
26 necessarily would be included in the park's expenses for a
27 permanent rent increase. Moreover, the homeowners concede that
28

the arbitrator has flexibility in the treatment of amortized expenses.

The homeowners' consultant agreed that professional fees could properly be amortized as proposed by the park operator) and that this benefits the homeowners (conceding the applicability of the treatment of such fees as analogous to a capital expense item. (RT1 174:21-175:4.)

Accordingly, the homeowners opposition to this manner of treatment set forth in their brief is at odds with the evidence in these proceedings.

Moreover, the homeowners also want flexibility in the amortization period. The homeowners request that "the hearing officer should construct a parallel calculation which amortizes the amount [of all temporary rent increases] at both 7 and 15 years, so that each resident can choose the option" that each resident prefers. (H.O. Brief, page 13, lines 8-9.) Management agrees with the homeowners' proposal. It is a reasonable, and practical approach.

The homeowners cite nothing in the Ordinance that specifically authorizes this type of treatment of temporary rent increases. However, nothing in the Ordinance prohibits such an approach, and therefore as homeowners clearly recognize and concede, the Ordinance should be given a reasonable construction that accomplishes its stated purpose of protecting the homeowners from unreasonable rent increases wile at the same time ensuring that mobilehome park owners receive a fair return on their investment and rent increases sufficient to cover their increased costs. (Ordinance, Section 11A-1.)

Essentially, the homeowners concede that the arbitrator has the flexibility to issue an award that considers the practical realities of the problem at hand.

Based upon this concession, the homeowners cannot dispute that: i) the arbitrator has the flexibility to handle such matters regarding amortization in a practical manner, ii) if the Park's professional fees are not amortized, they have to be included in whole if they are in the comparison year, iii) amortization is the most accurate and fair way to handle them, iv) amortization favors the residents in most cases.

CONCLUSION

In requesting that the arbitrator give homeowners options as to the amortization period, the homeowners acknowledge that the Ordinance provides flexibility to accomplish its purposes.

The undisputed evidence in this case supports the following arbitration award:

1. A permanent rent increase of $57.00, based upon Dr. St. John's MNOI analyses.

2. A temporary rent increase of $102.00 (rounding down from the noticed increase of $102.84), based upon a 7-year amortization period.

3. The homeowners could properly be given an option for a 15-year amortization period, as proposed by the homeowners. The park management could be ordered to calculate this option.

4. Any decrease in the property taxes should lead to a dollar-for-dollar rent decrease to the homeowners, promptly upon the property tax reduction being finalized.

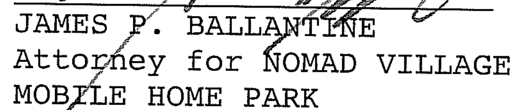
5. Any increased property taxes refunded to park management should be refunded to the homeowners in the form of a rent credit, promptly upon the refund being received by park management.

6. Any professional fees not incurred by park management in connection with the property tax issue should be promptly refunded to the homeowners upon termination of the proceedings, or upon park management's failure to file a formal appeal within 6 months of the arbitration decision being final.

7. Any funds awarded by the arbitrator for capital improvements and not expended on capital improvements should be refunded to the homeowners in the form of a rent credit.

8. The arbitrator could maintain jurisdiction to enforce the terms of the award.

Dated: November 8, 2011



JAMES P. BALLANTINE
Attorney for NOMAD VILLAGE
MOBILE HOME PARK

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 November 8, 2011, I served the foregoing document described as RESPONSE BY NOMAD VILLAGE MOBILE HOME PARK TO HOMEOWNERS' POST-HEARING BRIEF on the interested parties in this action by e-mailing a true and correct copy thereof as follows:

Bruce E. Stanton **E-mail: brucestantonlaw@yahoo.com**
Law Offices of Bruce E. Stanton
6940 Santa Teresa Blvd., Suite 3
San Jose, California 95119

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 November 8, 2011, at Santa Barbara, California.