

Lenzi, Chelsea

From: Tony Allen, CPA <tony.allen.cpa@cox.net>
Sent: Monday, January 18, 2016 9:01 PM
To: sbcob; SupervisorCarbajal; Wolf, Janet; Adam, Peter; Lavagnino, Steve; Farr, Doreen
Cc: Grady, Don
Subject: Alternative findings Agenda Item 16-00021
Attachments: Alternative Finding 5 Award number 8 and finding 6 Award number 11.pdf

Follow Up Flag: Follow up
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Please review the attached alternative findings for the 1.19.16 agenda item described above.

Regards,

Tony Allen

To: The Clerk of the Board
Re: Rent Increase Arbitration
Nomad Village Homeowners Alternative Finding #6
Nomad Village Mobile Home Park

Finding 6: Award number 11 (Legal Fees Associated with the Challenge to the Rent Increase)

The Board of Supervisors must:

Find that the Arbitrator abused his discretion by failing to proceed in the manner required by law, when he allowed of \$110,000 in ordinary expenses to be passed through via 11A6 (Attachment N, Page 19, Item 11).

Throughout the arbitration hearing, management and the Arbitrator made it clear they were treating these items under County Code § 11A-6 (See arbitration excerpts below).

It is clear that Judge Anderle was addressing legal fees as ordinary expenses when he began his discussion: "The Ordinance does not expressly include or exclude legal fees incurred in connection with rent increase notices and proceedings. The Ordinance provides: "[T]he arbitrator shall consider all relevant factors to the extent evidence thereof is introduced by either party or produced by either party on request of the arbitrator. [¶] (1) Such relevant factors may include, but are not limited to, increases in management's ordinary and necessary maintenance and operating expenses, insurance and repairs" (S.B. County Code, ch. 11A, § 11A-5(f)(1).)

It is also clear that the issue in regard to the Judge's ruling is whether or not legal fees need to be expressly listed in the ordinance to be considered ordinary expenses to be considered in the section 11A-5(f) calculation: "The above quotation of the comments of the Board for Award No. 6 was also directed to Award No. 11. **By this comment, the basis for the Board reversing Award No. 11 was the absence of an express inclusion of legal fees in the list of relevant factors. Legal fees may under appropriate circumstances be considered as operating expenses.**"

The Board's finding also discuss legal fees within the definition of operating expense and the inclusion in the section 11A-5(f) calculation: "(1) Such relevant factors may include, but are not limited to, .. increases in property taxes and fees and expenses in connection with operating the park ... " (County Code § 11A-5(f)(1).)".

The Board's finding also included that the Arbitrator found "After reviewing the itemizations submitted by the Park Owner for expert and legal services expended in this matter (Ex. R & S) and the Homeowners response, a reasonable amount to be paid by the later would be \$110,000."

The Board's finding does not resolve how the allowance of legal fees as ordinary expenses within the meaning of County Code § 11A-5(f)(1) leads to the Arbitrator granting a complete reimbursement of \$110,000 from the Homeowners to Management, "amount to be paid by the later would be \$110,000". (Attachment N, Page 14)

Ordinance §11A-5 has no provision for reimbursement, pass-through, temporary increase or any other direct charge to the Homeowners, by Management for ordinary expenses, above the maximum rent schedule.

The Judge's disposition states: "The court will grant the petition as to these Awards, and mandate that the Board vacate its reversal of these Awards, and, on reconsideration, exercise its discretion in the manner required by law". Finding that the Arbitrator abused his discretion in granting a pass-through of \$110,000 of ordinary expenses is within the Law. Finding that the Arbitrator may pass-through ordinary expenses is in error and undermines the whole intent of the rent control ordinance.

Hearing transcripts (Monday, September 19, 2011):

Ballantine opening:

P18-19: "The final area of the temporary increase is anticipated professional fees relating to the rent Increase....it makes more sense to treat it as a capital expense....."

Ballantine questioning St. John

P84: A...."and all of those amounts were taken out, summed, and treated by analogy to the way the capital improvements are treated.

P84: A... They're not capital improvements, that's true.

Stanton questioning St. John:

P234-235 Q. Are you aware of anything in the ordinance, other than the language that it has regarding the capital expense regarding essentially passing through essentially amortizing an expense and making it temporary? I guess my question is, isn't it the case that the capital expense provisions in the ordinance – those are the provisions that analytically apply to all of the types of expenses we're talking about here under the temporary increases because they're all amortized over a period of time?

A. Well, I think this is a good analytical argument for that, but you know. It's not what the ordinance says, but someone could, you know, decide or a decision could even say, taking into account relevant factors, look, if you don't incur this expense, you only incur part of it, you've got to give the other part back, you don't get the other part. So I wouldn't say it comes from the capital improvement increase.

P246: I'd like to, secondly, go back to this analogy argument that Dr. St. John is using to, in effect, treat items such as the professional fees as the equivalent of the capital improvements or

the capital items that the ordinance talks about, and you had some testimony that indicated, just now on cross-examination, that these are not capital items, all of those items down in items 4 - excuse me, 5 and 6 are not capital items, correct

A. Correct.

Q. -- the way the ordinance defines them?

A. Right.

Hearing transcripts (Tuesday, September 20, 2011)

Stanton to St. John:

P13: Q. Okay. I thought that's what I heard you say yesterday but I wanted to be sure by this line of questioning, that you're using the analogy to the capital improvement prospective allowance, if we can call it that, which I think appears in section 11 A-6 A, subsection 5?

A. Right.

Q. And subsections 1 and 4 before that?

A. That's right.

Q. The analogy that you're talking about is the basis not only for item 6, professional fees, but also for the item 5 professional fees....

P31:Q. Last question I want to ask in this area to make sure I confirm what I heard you say yesterday, Dr. St. John, I think you actually testified and I tried to use the exact words, that you weren't sure how to handle No. 5 and 6, correct?

A. Correct.

Q. And you admit these are not capital improvements or capital items, per se?

A. Per se, they are not.

P93: THE ARBITRATOR: I'll allow the question because he has, in another subject area, taken legal expenses in the capital area, which I thought was a little off-color, but I'll allow that as well.

To: The Clerk of the Board
Re: Rent Increase Arbitration
Nomad Village Homeowners Alternative Finding #5
Nomad Village Mobile Home Park

Finding 5: Award number 8 (Past Payments by Park Owners for Increased Real Property Taxes)

The Board of Supervisors must:

Find that the Arbitrator abused his discretion by failing to proceed in the manner required by law, when he granted Ordinance §11A-6 treatment of \$130,531 in ordinary expenses, via a pass-through above the permanent rent increase, contrary to Ordinance §11A-5.

Ordinance §11A-5 outlines the procedure for which the Arbitrator may increase rents above the allowable CPI increase. Section 11A-5(i), as outlined by the Judge's order and in the County's findings, provides a very specific formula for increases in the maximum rent schedule.

Ordinance §11A-5 has no provision for reimbursement, pass-through, temporary increase or any other direct charge to the Homeowners, by Management for ordinary expenses, above the maximum rent schedule.

The County's finding conflated the Judge's ruling that supplemental tax can be considered under §11A-5 with the arbitrator's granting a reimbursement of ordinary expenses (Attachment N, Page 19, Item 8). Judge Anderle wrote in some length in his decision about the how the Ordinance is applied to this ordinary expense and concluded:

“Thus, the supplemental assessment reflects an increase in property taxes within the meaning of section 11A-5(f)(1) of the Ordinance. To the extent that the Board's reversal of Award No. 8 was based a determination that the arbitrator abused his discretion by considering the supplemental property tax assessments because supplemental property tax assessments were not proper subjects of consideration under section 11A-5(f)(1), the Board's findings to that extent do not support its reversal of Award No. 8.”

Nowhere in his decision did the Judge discuss the propriety of the Arbitrator's extralegal granting of a charge to the homeowners of \$130,531 in ordinary expenses as capital expenses per section 11A-6. Management is now charging the Homeowners ordinary expenses in a manner that the ordinance reserves for capital items outlined in Section 11A-6(a)(1), “The cost of capital improvements incurred or proposed, including reasonable financing costs, may be passed on to homeowners at the time of an annual increase”. The Arbitrator's award clearly states his treatment of this ordinary expense as a capital item, “Supplemental Tax Increase: The \$130,531 spent by the Park Owners can be included in the temporary increase.” (Attachment N, Page 14)

Allowing Management to pass on ordinary expenses as capital expenses per 11A-6 is in error and will undermine the whole basis for having a rent control ordinance.

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