

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS, AND MOBILE HOMES,

Petitioner,

vs.

LEONARD W. TANNER, individually
and as PRESIDENT of ZEPHYR SPRINGS
VALLEY, INC.; ZEPHYR SPRINGS
MEMBERS' ASSOCIATION, INC.; and
SUN VALLEY BEACH, INC.,

Respondents.

LEONARD W. TANNER, individually)
and as PRESIDENT of ZEPHYR SPRINGS)
VALLEY, INC.; ZEPHYR SPRINGS)
MEMBERS' ASSOCIATION, INC.; and)
SUN VALLEY BEACH, INC.,)
Respondents.)

An administrative hearing was conducted in this proceeding on November 21, 1997, in Sanford, Florida, before Daniel Manry, Administrative Law Judge, Division of Administrative Hearings.

For Petitioner: Robin Suarez
Chief Assistant General Counsel
Department of Business and
Professional Regulation
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Tallahassee, Florida 32399-1007

For Respondents: Clayton D. Simmons, Esquire
Stenstrom, McIntosh, Colbert,
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200 West First Street
Sanford, Florida 32772-4848

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents violated Sections 498.023(1)(a), 498.023(2)(a), 498.035(1), and 498.049(5), Florida Statutes (1997), and Florida Administrative Code Rule 61B-9.003(1), by participating in the offer or disposition of subdivided lands that are neither exempt, registered, nor approved for the taking of reservation deposits, by failing to deliver a current public offering statement to each purchaser, and by disseminating advertising materials prior to filing for approval by Petitioner for the subdivided lands and what, if any, penalty should be imposed. (All references to chapters and sections are to Florida Statutes (1997) unless otherwise stated. Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect as of the date of this Recommended Order.)

PRELIMINARY STATEMENT

Petitioner filed a Notice To Show Cause against Respondents on September 5, 1996. The Notice To Show Cause contained 466 counts against Respondents. Petitioner filed a separate Notice To Show Cause against Mr. Bruce Hancock containing a similar number of counts against Mr. Hancock.

Respondents and Mr. Hancock requested an administrative hearing. The matters were referred to the Division of Administrative Hearings ("DOAH") to conduct a hearing. Petitioner named Respondent, Leonard Tanner ("Tanner"), and Mr. Hancock individually and as President of Zephyr Springs Member's

Association. The separate matters were consolidated on January 10, 1997.

At the hearing, Petitioner's motion to sever the case against Mr. Hancock was granted without objection. Mr. Hancock had previously filed for bankruptcy, and Petitioner did not wish to pursue the administrative proceeding during the pendency of the bankruptcy proceeding.

Neither Petitioner nor Mr. Hancock timely filed a status report ordered in the case against Mr. Hancock. The DOAH file was closed and referred to the referring agency for final disposition.

At the administrative hearing involving Tanner; Respondent, Zephyr Springs Valley, Inc. ("Zephyr Valley"); Respondent, Sun Valley Beach, Inc. ("Sun Valley"); and Respondent, Zephyr Springs Members' Association, Inc. ("Members"), Petitioner presented the testimony of seven witnesses and submitted 25 exhibits for admission in evidence. Tanner testified in his own behalf, called one witness, and submitted no exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the transcript of the hearing filed with the undersigned on January 15, 1998. Respondents' motion for extension of time was granted without opposition. The parties timely filed their proposed recommended orders ("PROs") on February 9, 1998.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the disposition of any interest in subdivided lands within the meaning of Sections 498.003 and 498.004. Tanner is a Florida resident and the sole shareholder of Zephyr Valley, Sun Valley, and Members.

2. Petitioner charges that between 1993 and 1995 Respondents violated Sections 498.023(1)(a) and (2)(a) and Section 498.049(5) by participating in an offer or disposition of any interest in subdivided lands located in the state without a valid order of registration for the subdivided lands and without delivering a public offering statement to the purchasers prior to the disposition of any interest in subdivided lands. Petitioner also charges that Respondents violated Section 498.035(1) in connection with the advertising used for the disposition of any interest in subdivided land.

3. Respondents assert that they did not participate directly or indirectly in any offer or disposition of any interest in subdivided lands located in the state. Respondents assert that their role in the land at issue is limited to that of a creditor of the subdivider.

4. If Respondents limited their role to that of a creditor of the subdivider, Respondents are exempt under Section 498.049(5) from joint and several liability with the subdividers unless Respondents assumed managerial or fiduciary responsibility

in a manner related to the basis for which the subdividers are liable. In relevant part, Section 498.049(5) provides:

Each person who materially participates in any offer or disposition of any interest in subdivided lands in violation of this chapter . . . and who directly or indirectly controls a subdivider or who is a general partner, officer, director, agent, or employee of a subdivider shall also be liable under this subsection jointly and severally with and to the same extent as the subdivider unless that person did not know, and in the exercise of reasonable care could not have known, of the existence of facts creating the alleged liability. . . except that a creditor of a subdivider shall not be jointly and severally liable unless the creditor has assumed managerial or fiduciary responsibility in a manner related to the basis for the liability of the subdivider. . . . (emphasis supplied)

5. Sometime in 1993, Tanner, Mr. Gary Tanner, and Mr. John Tanner, Tanner's two sons, undertook to acquire approximately 300 acres of land (the "land") in Pasco County, Florida ("Pasco County") and to develop the land into an adult mobile home park to be known as Zephyr Springs Mobile Home Park (the "mobile home park"). The three individuals formed a joint venture to develop the mobile home park.

6. Petitioner did not submit any evidence that the Tanners formed any business entity other than a joint venture to develop the mobile home park. For example, there is no evidence that the Tanners formed a corporation, limited liability company, or trust to develop the mobile home park.

7. Petitioner did not submit any documentary evidence of a written joint venture agreement or of the terms of the joint

venture agreement. Evidence of the joint venture agreement consists solely of the testimony of Tanner.

8. The joint venture agreement called for development of the mobile home park in six phases referred to as Phases I-VI. Proposed amenities included lighted streets and an 18-hole golf course in Phase I. Phases II-VI contemplated lighted streets, a club house, swimming pool, jacuzzi, four tennis courts, shuffleboard, horse shoes, bocci board and court, and a lake with a dock.

9. The joint venture agreement called for Tanner to function solely as a creditor for the development of the mobile home park. Tanner would finance the land acquisition and the improvements to the land in Phase I. Phases II-VI would be sold and developed by others.

10. John Tanner was to be responsible for horizontal improvements to Phase I, including site plan, site clearing, streets, gutters, curbs, sewer, water, electric, other utilities, and an 18-hole golf course. Gary Tanner was to sell and market the mobile home sites in Phase I to the public.

11. The joint venture agreement between the Tanners was a partnership (the "partnership"). Rather than paying each joint venturer a percentage of gross revenues, the agreement provided each partner with a percentage of the net profits derived from the development of the mobile home park (a "net profits interest").

12. The mobile home park consisted of 994 sites. The projected sale price for a site ranged from \$25,000 to \$40,000. Tanner projected gross revenues from the sale of all 994 sites to be approximately \$20-\$30 million. Expenses included approximately \$1.75 million in land acquisition costs, debt service on the purchase-money mortgage, \$90,000 in impact fees due on the land at the time of acquisition, back-taxes for three years, \$750,000 in horizontal improvements to Phase I, and possibly some or all of the development costs for Phases II-VI.

13. Petitioner failed to submit any testimony or documentary evidence that explained how the partnership structured the sale of Phases II-VI for development by others and retained an interest in either the gross income or net profits from the sale of the sites in those phases. Petitioner also failed to submit any evidence of the nature and scope of the partnership's continuing obligation, if any, for the development costs for Phases II-VI after those phases were sold. The testimony of Tanner and John Tanner also failed to address these issues.

14. Petitioner also failed to submit any evidence showing that Tanner was a general partner in the partnership or otherwise had any management control of the partnership. The testimony of Tanner and John Tanner was the sole evidence on this issue. It showed that Tanner had no management or operational control over the partnership. Tanner's partnership capacity was that of a limited partner, capital partner, financier, or creditor.

15. Prior to September 9, 1993, the land was owned by the Living Trust of Eva Stanley (the "Stanley Trust"). On September 9, 1993, Sun Valley contracted with Ms. Shirley A. Lanier for the purchase of the land.

16. Petitioner failed to submit evidence explaining the authority of Ms. Lanier to sell the land, including a copy of the contract for sale. Evidence of the contract for sale consists solely of the testimony of witnesses.

17. The contract for sale of the land called for Sun Valley to make a down payment of \$250,000, execute a purchase money mortgage of \$1.5 million dollars, pay impact fees of approximately \$90,000, and pay back-taxes for three years. The terms of the debt service on the purchase-money mortgage, including the term of the mortgage, the interest rate, and payment amount and intervals, are not evidenced in the record.

18. Sun Valley never took title to the land. In July 1994, Sun Valley assigned its interest in the contract for sale of the land to Zephyr Valley. Zephyr Valley closed on the land and took title to the land. Sun Valley financed the land acquisition by Zephyr Valley.

19. Tanner borrowed approximately \$1.4 million from Ms. Beverly Wibeck to finance the land acquisition and development of the mobile home park. He executed a promissory note for the loan and transferred the money to Sun Valley.

20. Sun Valley used over \$340,000 to finance the down payment, impact fees, and back taxes needed by Zephyr Valley to

acquire the land from the Stanley Trust. Sun Valley loaned the remainder of the money to corporations owned by Gary Tanner and Bruce Hancock to fund improvements to the land and to fund the sales and marketing of the park.

21. Sometime between July 1994 and the end of November 1994, Zephyr Valley entered into three conveyances of separate parcels of the land. First, Zephyr Valley sold the land for Phase I to Zephyr Springs Homeowners Association, Inc., a Florida Corporation wholly owned by Gary Tanner ("Homeowners").

22. Most of the terms of the sale to Homeowners are not evidenced in the record, including the purchase price and the terms of the note. From the testimony of Tanner, however, the evidence shows that Zephyr Valley placed a deed to the land for Phase I in escrow. Homeowners executed a promissory note for the purchase price.

23. The note from Homeowners was a demand note. It required payment in full when all of the sites were sold and no debt service in the interim. Although arguably a "sweetheart" loan for Homeowners, the loan was not without economic reality or a legitimate business purpose for a creditor who was a limited partner with a net-profits interest in the partnership. To the extent Zephyr Valley decreased interest charges and other costs of the loan to Homeowners, Tanner, as the individual creditor of the partnership, enjoyed the potential for an increase in the dollar value of his eventual distributive share of net profits from the partnership.

24. In November 1994, Zephyr Valley completed a second conveyance. It sold the land for phases II-VI to Five Star Development Trust ("Five Star").

25. Five Star is controlled and operated by Mr. Bruce Hancock ("Hancock"). Zephyr Valley and Five Star entered into an agreement for deed. Five Star was to pay \$2.5 million for the land for phases II-VI. Other terms of the agreement for deed are not evidenced in the record.

26. On November 30, 1994, Zephyr Valley completed the third conveyance. It sold 25 acres of the land for the golf club to Zephyr Springs Golf Club, L.P., a Delaware limited partnership ("Golf Club, L.P."), and International Golf Group, Inc. ("Golf Group, Inc."), a Delaware Corporation and the general partner in Golf Group, L.P.

27. The sale price for the golf club site was approximately \$675,000. Other terms of the sale are not in evidence.

28. None of the foregoing land transactions are the subject of Petitioner's administrative action against Respondents. The initial land acquisition from the Stanley Trust and the subsequent conveyances to Homeowners, Five Star, and Golf Group, L.P., and Golf Group, Inc., are each exempt from the provisions of Chapter 498. Each transaction is a single transaction for a purchase price of at least \$50,000, 20 acres, or both, within the meaning of Sections 498.025(1)(e) and (i).

29. The land at issue in this proceeding is the land encompassing the 994 mobile home sites in the mobile home park

(the "mobile home sites"). The mobile home sites comprise land that is situated in Pasco County and located "in this state" within the meaning of Section 498.023(1)(a).

30. The mobile home sites are subdivided land within the meaning of Section 498.005(21). In relevant part, Section 498.005(21) defines subdivided land to include:

- (a) . . . contiguous land which is divided
. . . for the purpose of disposition into 50
or more lots, parcels, units, or interests;
or
- (b) Any land, whether contiguous or not, which is
divided or proposed to be divided into 50 or
more lots, parcels, units, or interests which
are offered as a part of a common promotional
plan.

31. Petitioner failed to submit any evidence, including a plat map, other documentary evidence, or sworn testimony showing that 50 or more of the mobile home sites are contiguous. In the absence of such evidence, the mobile home sites fail to satisfy the definitional requirement for contiguity in Section 498.005(21)(a).

32. Irrespective of whether the mobile home sites are contiguous for purposes of Section 498.005(21)(a), they are subdivided land within the meaning of Section 498.005(21)(b). The mobile home sites were divided into 50 or more lots, parcels, units, or interests and offered as part of a common promotional plan within the meaning of Section 498.005(22).

33. The sale and marketing of the mobile home sites satisfy substantially all of the elements prescribed in Section

498.005(22) as relevant to the definition of a common promotional plan. Even if the mobile home sites were not contiguous, they were proximate to each other. They were located within the same 300-acre tract of land. In addition, the mobile home sites were known, designated, and advertised as a common unit or by the common name of Zephyr Springs Mobile Home Park.

34. At least some of the mobile home sites were recorded as a subdivision in the official records of Pasco County. Pasco County determined that those mobile home sites are subdivided land. The number of mobile home sites included in the recorded subdivision is not evidenced in the record.

35. Only 210 of the 994 mobile home sites planned for the mobile home park were acquired by the public. All 210 mobile home sites were acquired between December 12, 1993, and December 31, 1994. No mobile home sites were acquired after 1994.

36. On June 1, 1995, Petitioner obtained an injunction in circuit court that prohibited any further sales of mobile home sites. The court ordered that monthly payments on mobile home sites already sold must be paid into an escrow account.

37. Without the revenues from monthly payments on mobile home sites, Five Star was unable to service the debt to Zephyr Valley. In turn, Zephyr Valley, Tanner, and Sun Valley were unable to service the debt to the Stanley Trust or to finance any further improvements to the land. In addition, Tanner defaulted on his note to Ms. Wibeck.

38. The Stanley Trust sold its mortgage to Russo and Company ("Russo"). Russo foreclosed against Respondents, Five Star, and the individual owners of the mobile home sites.

39. Russo agreed not to disturb the individual owners of the mobile home sites. Petitioner agreed to pay the debt service on the mortgage purchased by Russo out of the escrow account required by the circuit court when the court enjoined any further sales of mobile home sites.

40. Ms. Wibeck has filed a civil action against Tanner to recover the \$1.4 million she loaned him to finance the mobile home park. That action was pending at the time of the hearing.

41. Of the 210 mobile home sites acquired by the public, Petitioner submitted evidence concerning the sales and marketing of only 48 mobile home sites. The sales and marketing of the other 162 mobile home sites is not evidenced in the record.

42. The 48 mobile home sites evidenced in this proceeding were acquired by the public pursuant to a common promotional plan carried out by Homeowners and Members. Between December 12, 1993, and October 4, 1994, the public acquired 30 mobile home sites from Homeowners. Between April 1 and December 31, 1994, the public acquired 18 mobile home sites from Members.

43. Homeowners and Members offered mobile home sites to the public as part of a common promotional plan. They utilized common sales personnel, common sales offices, and common sales promotional methods to market mobile home sites to the public.

44. Homeowners and Members employed common sales staff and

housed them in a common sales center located on the mobile home park. The sales center was known by the singular name of Zephyr Springs Mobile Home Park Sales Center.

45. Homeowners and Members offered mobile home sites in a similar plan of disposition. In relevant part, Section 498.005(4) defines a disposition to mean:

. . .any transaction involving any interest in subdivided lands entered into for profit, including any sale, resale, lease for more than 5 years, assignment, or award by lottery.

46. Homeowners and Members offered mobile home sites to the public in a similar plan of disposition. The written instrument of disposition was entitled a Membership Agreement. Each Membership Agreement purported to convey a membership in the homeowners' association and a license to use the premises described in each agreement.

47. It is uncontroverted that Homeowners and Members entered into each Membership Agreement for profit within the meaning of Section 498.005(4). However, the parties disagree over whether the execution of each Membership Agreement was a transaction that involved any interest in land.

48. Petitioner asserts that the execution of each Membership Agreement was a transaction "involving any interest in land" within the meaning of Section 498.005(4). Respondents claim that the execution of each Membership Agreement was a transaction that did not involve an interest in land. Respondents argue that each Membership Agreement involved only a

membership in the homeowners' association and a license to use the mobile home site.

49. The term "interest in land" is not defined in Chapter 498. The issue of whether a transaction involves any interest in land must be determined based on the facts and circumstances evidenced in each case.

50. The facts and circumstances evidenced in this case show that the execution of each Membership Agreement was a transaction "involving any interest in land" within the meaning of Section 498.005(4). On balance, the bundle of rights conveyed in each Membership Agreement conveys a lease rather than a license.

51. Each Membership Agreement conveys an exclusive possessory interest in a specific mobile home site described in the paragraph captioned "Premises." The premises described in each Membership Agreement is a specific mobile home site described by reference to lot and block number and more specifically by a legal description unique to each mobile home site. The fact that the premises described in each Membership Agreement also include a "non-inclusive right to use" common areas with others does not obviate the conveyance of an exclusive possessory interest in each mobile home site.

52. Each Membership Agreement conveys an exclusive possessory interest in a specific mobile home site for a term of 99 years for a "purchase price" that ranges from \$25,000 to \$40,000 depending on the specific mobile home site described as the premises. The purchase price is paid in the form of a

negotiable down payment plus \$75 a month until the balance of the purchase price is paid in full.

53. The balance of the purchase price is characterized in each Membership Agreement as an "annual membership fee" of \$900 payable in equal monthly installments of \$75. However, the "annual membership fee" terminates before the expiration of the 99-year term of the Membership Agreement.

54. The "annual membership fee" terminates on different dates in each Membership Agreement depending on the original purchase price, the original date of purchase, and the down payment. For example, the "annual membership fee" for a mobile home site purchased for \$40,000 on July 1, 1994, with a \$5,000 down payment terminates on May 1, 2033. In contrast, the "annual membership fee" for a mobile home site purchased for \$25,000 on June 17, 1994, with a \$4,000 down payment terminates on October 1, 2017.

55. The 99-year term in each Membership Agreement is not revocable at will. The agreement prescribes specific terms and procedures for revocation.

56. Each Membership Agreement provides that each member's interest in the premises is assignable without the prior consent of the homeowners' association. In each Membership Agreement, the homeowners' association covenants and warrants the member's quiet, exclusive, and peaceable enjoyment of the premises.

57. Each member is responsible for paying the real estate taxes for the specific mobile home site described in the

Membership Agreement. Each member is also responsible for any construction costs for improvements to the site.

58. The premises are subject to covenants, restrictions, and rules promulgated by the homeowners' association. Each Membership Agreement provides that these conditions run with the land.

59. Homeowners and Members "offered" mobile home sites to the public within the meaning of Section 498.005(13). Homeowners and Members induced, solicited, and attempted to encourage individuals to acquire an interest in subdivided lands.

60. Homeowners and Members "offered" mobile home sites to the public in violation of Section 498.023(1). It is uncontroverted that neither Homeowners nor Members obtained a valid order of registration for the subdivided lands and that neither the subdivided lands nor the transactions entered into by Homeowners and Members were exempt pursuant to Section 498.025.

61. Both Homeowners and Members were required to obtain a valid order of registration in order to sell interests in the mobile home sites. Homeowners derived its title in the mobile home sites from the deed placed in escrow when Zephyr Valley sold the land for Phase I to Homeowners. Members derived its authority to sell mobile home sites from its apparent agency for Five Star. Five Star derived its title in the mobile home sites from the agreement for deed between Five Star and Zephyr Valley for the land for Phases II-VI. Bruce Hancock managed and

controlled Five Star and Members as the sole officer and director for Members during the time Members sold memberships.

62. Homeowners and Members violated Section 498.023(2). Each time Homeowners and Members entered into a Membership Agreement with a member, they disposed of an interest in subdivided lands without delivering a public offering statement to the purchaser prior to the disposition. Neither Homeowners nor Members ever provided a public offering statement for the mobile home park to any member of the public.

63. Petitioner failed to submit evidence that Homeowners, Members, or Respondents violated Section 498.035. While Petitioner submitted evidence of the advertising used in the sale and marketing of the mobile home sites, Petitioner failed to show that either Homeowners or Respondents placed the advertisements.

64. Petitioner did not show that Tanner, Sun Valley, or Zephyr Valley violated Section 498.023(1)(a) by offering or disposing of any interest in the mobile home sites. Although Tanner was the sole shareholder of Members and Members offered and disposed of 18 mobile home sites, Tanner was not an officer or director of Members and did not exercise any management control over Members prior to February 5, 1995. Members offered and disposed of all 18 mobile home sites prior to February 5, 1995.

65. Members was incorporated by Bruce Hancock on April 1, 1994. Bruce Hancock was the sole director and officer until February 5, 1995, when Tanner became an officer and director.

Members did not offer or dispose of any of the 18 mobile home sites after February 5, 1995.

66. Neither Tanner, Sun Valley, nor Zephyr Valley owned any stock in Homeowners. On October 4, 1994, however, Tanner exercised management control over Homeowners pursuant to a letter agreement with Gary Tanner. Homeowners offered and disposed of all 30 mobile home sites in evidence in this proceeding prior to October 4, 1994.

67. The letter agreement did not alter the stock ownership of Homeowners or its officers or directors but operated as a management agreement between Tanner and Gary Tanner. The letter agreement required Tanner to pay Gary Tanner \$1,000 a month in consideration for Tanner's exclusive right to manage Homeowners. Tanner entered into the letter agreement because he believed Gary Tanner was stealing money from Homeowners.

68. Petitioner claims that Tanner, Sun Valley, or Zephyr Valley violated Section 498.023(1)(a) by participating, either directly or indirectly, in the offer and disposition of the 48 mobile home sites in evidence in this proceeding. There is no evidence that Sun Valley or Zephyr Valley ever participated in any way in the offer and disposition of mobile home sites.

69. A determination of whether Tanner participated in the offer and disposition of 48 mobile home sites is made more difficult by the absence of a statutory definition in Chapter 498 of the term "participate." The American Heritage Dictionary (Second College Edition 1982) at 905 states that the term

"participate" means, "To take part; join or share with others To share in; partake of."

70. Although the joint venture agreement between Tanner and his sons entitled Tanner to a share of the net profits of the venture, Tanner testified that he never in fact participated in the net profits. All of the gross revenues from the mobile home park were used for improvements to Phase I, debt service on the purchase money mortgage given by Zephyr Valley to the Stanley Trust, and the purchase money mortgage from Five Star that resulted from the agreement for deed for Phases II-VI. There was no debt service on the demand note given by Gary Tanner for the purchase of Phase I.

71. Petitioner submitted no evidence that gross revenues from the mobile home park were used for any purpose other than the purposes evidenced by Tanner's testimony. There are no bank records in evidence showing the use of gross revenues by Tanner, Sun Valley, Zephyr Valley, and Members, for purposes other than debt service and financing the costs of development, sales, and promotion. No representative of the Stanley Trust testified that the Trust did not receive loan payments from Sun Valley on behalf of Zephyr Valley or that Zephyr Valley was in default on the purchase-money mortgage before Petitioner obtained an injunction in 1995. No evidence enabled a comparison of gross revenues with the cash flow required to service the debt in exempt transactions involving the agreement for deed between Zephyr Valley and Five

Star and the purchase money mortgage from Zephyr Valley to the Stanley Trust.

72. Petitioner did not show that Tanner directly participated in the offer and disposition of the 48 mobile home sites at issue in this proceeding. Neither Homeowners nor Members offered or disposed of any of the 48 mobile home sites after Tanner exercised management control over either corporation.

73. Petitioner did not show that Tanner indirectly participated in the offer and disposition of the 48 mobile home sites at issue in this proceeding. Petitioner showed that Tanner had the authority to sign checks for Homeowners and Members and in fact signed several checks for both companies from February 25, 1994, through January 18, 1995. However, Petitioner failed to show that Tanner signed any checks for any purpose other than the repayment of loans.

74. With one de minimis exception, all of the checks signed by Tanner were payable to Sun Valley and deposited to Sun Valley's account. Sun Valley was the creditor of Zephyr Valley. Zephyr Valley was the creditor of Five Star and Members. Five Star and Members were managed and operated exclusively by Mr. Hancock. Assuming arguendo that there was an evidentiary basis for disregarding the corporate form of each separate entity and that all of the checks flowed through to Tanner, Petitioner failed to show that Tanner signed the checks in any capacity, or for any purpose, other than the collection of debt by a creditor.

75. Tanner signed two checks for Homeowners in the aggregate amount of \$360,000. He signed one check on February 25, 1994, for \$250,000 and the other check on March 24, 1994.

76. The second check stated that it was for the partial repayment of a loan. The first check stated no purpose, but Tanner testified that it was for the repayment of a loan. Petitioner submitted no evidence to the contrary.

77. Tanner signed 19 checks for Members in the aggregate amount of \$240,730. Tanner testified that he signed all of the checks from Members to repay loans, and Petitioner submitted no evidence to the contrary. Of the 19 checks signed by Tanner on the Members account, 18 were made payable to Sun Valley and deposited to the Sun Valley account. One check in the de minimis amount of \$230 was payable to Homeowners without explanation.

78. The cancelled checks and Tanner's testimony show that Tanner's participation was limited to the repayment of development and sales costs financed by Tanner, as a creditor, or the repayment of loans owed either to Zephyr Valley by Five Star or to Sun Valley by Zephyr Valley. Petitioner did not show that Tanner used any of the checks to participate in the offer and disposition of mobile home sites by Homeowners and Members.

79. Petitioner submitted no evidence that Tanner used funds evidenced by the cancelled checks for any purpose other than payments to Sun Valley as a creditor. No bank records of Sun Valley are in evidence showing that either Sun Valley or Tanner

failed to use the check proceeds to service the debt Zephyr Valley owed to the Stanley Trust, to finance development and sales costs, to repay previously financed development and sales costs, or all three; or that Tanner or Sun Valley diverted any portion of the \$600,500 for personal use, for operational or management purposes, or to fund a distributive share of any net-profits interest. There was no testimony from a representative of the Stanley Trust showing that debt service due on the purchase-money mortgage was not timely paid to the Trust on behalf of Zephyr Valley or that Zephyr Valley was in default before Petitioner obtained an injunction in 1995.

80. By signing checks from Homeowners and Members to Sun Valley, Tanner collected loan payments in a manner that is the functional equivalent of the method used by an institutional lender when it is authorized to collect payments electronically by automatic debit to the customer's account. Instead of writing three separate checks from Members to Five Star to Zephyr Valley to Sun Valley, Tanner wrote one check from Members to Sun Valley. Similarly, Tanner wrote one check from Homeowners to Sun Valley instead of preceding it with an additional check from Homeowners to Zephyr Valley.

81. The role of Tanner, Sun Valley, or Zephyr Valley was limited to that of a creditor within the meaning of Section 498.049(5). For reasons previously stated and not repeated here, Petitioner did not show that Respondents materially participated in any offer or disposition of any interest in the 48 mobile home

sites or assumed managerial or fiduciary responsibility in a manner related to the basis of the liability of Homeowners and Members for offering or disposing of an interest in the 48 mobile home sites. Therefore, Respondents are not jointly and severally liable with Homeowners and Members for violating Sections 498.023(1)(a) and (2)(a).

82. Petitioner asserts that Respondents should have known of the acts committed by Homeowners and Members in violation of Sections 498.023(1)(a) and (2)(a). However, Tanner required his two sons to obtain all necessary state approvals before he would finance any portion of the development. Tanner's two sons sought legal counsel to assist them in obtaining the required state approvals and relied on that legal advice. Petitioner did not call any members of the law firm named by Tanner to refute Tanner's testimony.

83. Gary and John Tanner obtained letters from the Division of Mobile Homes and the law firm. They represented to Tanner that those documents satisfied his requirement for state approvals, and Tanner relied on their representations. Petitioner did not submit any documentary evidence from the law firm to refute Tanner's testimony.

84. When Tanner learned of the problems confronting Homeowners and Members, Tanner engaged in reasonable efforts to intervene in the management and operation of Homeowners and Members. On October 4, 1994, Tanner executed a management agreement with Gary Tanner for operating control of Homeowners.

On February 5, 1995, Tanner took over management of Members as an officer and director. Neither Homeowners nor Members sold any of the 48 mobile home sites after Tanner assumed management control of the two companies.

CONCLUSIONS OF LAW

85. The Division of Administrative Hearings has jurisdiction over the subject matter and parties. The parties were duly noticed for the administrative hearing.

86. Respondents' motion to dismiss for lack of jurisdiction is denied. For reasons previously stated in the Findings of Fact and based on the authority cited in Petitioner's legal memorandum, the Membership Agreements offered and disposed of an interest in subdivided land for the purposes of Chapter 498.

87. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondents committed the acts alleged by Petitioner and the reasonableness of any proposed penalty. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

88. Respondents assert that the Petitioner must prove its case by a preponderance of evidence. Respondent's PRO at paragraph 13, page 4. Petitioner's PRO does not address the applicable standard of proof in this case.

89. The general rule regarding the applicable standard of proof is that an agency must prove its case by a preponderance of the evidence. Florida Department of Transportation vs. J.W.C.

Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981); Balino vs. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977). However, an agency such as Petitioner, which seeks to impose an administrative fine against an unregistered or unlicensed person, must prove its case by clear and convincing evidence. Osborne, 670 So. 2d at 934-935.

90. Petitioner seeks administrative fines against Respondents in the aggregate amount of \$715,000. In Osborne, the court explained that an administrative fine is penal because:

. . .an administrative fine deprives the person fined of substantial rights in property. Administrative fines . . . are generally punitive in nature. . . . Because . . .administrative fines . . . are penal in nature and implicate significant property rights, the extension of the clear and convincing standard to justify . . . such a fine is warranted. Accordingly, we agree with the district court that, because the Department's final order imposing a \$5,000 fine . . . does not indicate that it was based upon a clear and convincing evidence standard, the case must be remanded for the application of the proper burden of proof . . .While there is substantial evidence in the record to support the violations charged by the Department, the district court correctly noted that the existence of evidence in the record supporting the hearing officer's findings is irrelevant to whether the fact-finder held the Department to the correct standard of proof. . . .

Osborne, 670 So. 2d at 935.

91. Petitioner failed to satisfy its burden of proof. The charges against Respondents are penal in nature and must be proven by clear and convincing evidence. Osborne, 670 So. 2d at 935.

92. Each charge requires proof of essential elements required as part of the statutory definition of the violation. Petitioner must prove each element by clear and convincing evidence.

93. In order for evidence to be clear and convincing:

. . . evidence must be found to be credible, facts to which witnesses testify must be distinctly remembered, testimony must be precise and explicit, and witnesses must be lacking in confusion

The evidence must be of such weight that it produces in the mind of the trier of fact a firm . . . conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz vs. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983).

94. The evidence was clear and convincing regarding most of the essential elements in the charges against Respondents. For example, the land is located in the state and is subdivided land. Each membership agreement disposed of an interest in land.

95. Evidence was clear and convincing regarding the corporate entities, trusts, and individuals involved in developing the mobile park, the injury to the public caused by the financial defaults, the foreclosure by Russo, and the injunction obtained by Petitioner. Petitioner also showed by clear and convincing evidence that Homeowners and Members were involved in a common promotional plan in which they failed to provide a public offering statement in connection with the offer or disposition of an interest in land.

96. The evidence was not clear and convincing for other elements essential to the charges against Respondents. Petitioner failed to show, even by a preponderance of the evidence, that Respondents were "subdividers", or that Respondents "participated" in the offer or disposition of any interest in land. Similarly, Petitioner failed to show by a preponderance of the evidence that Respondents "materially participated" in any activity which precluded them from the statutory exemption for a "creditor."

97. The terms "participation," "material participation," and a "creditor" are not defined by statute. Any ambiguity in a statute that is penal in nature should be strictly construed in favor of Respondents. Lester vs. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st. DCA 1977).

98. Zephyr Valley participated in the disposition of interests in land that were expressly exempt from the provisions of Chapter 498. Sun Valley's role in the development of the mobile home park was limited to that of a creditor.

99. While it is clear that Homeowners and Members participated in the offer and disposition of interests in land, Petitioner failed to show, even by a preponderance of evidence, that Tanner expanded his role in the development of the mobile home park beyond that of a creditor prior to the time he assumed management control over Homeowners and Members on October 4, 1994, and February 5, 1995, respectively. From that point

forward, neither Homeowners nor Members offered or disposed of any interest in the 48 mobile home sites in evidence.

100. Petitioner presented the testimony of six interested witnesses other than Tanner. Four witnesses were individuals who purchased mobile home sites. Two were Petitioner's investigators.

101. The testimony of one interested witness does not begin to approach the level of competent and substantial evidence.

Robinson vs. Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So. 2d 930, 932 (Fla. 3d DCA 1984). In this proceeding, the testimony of six interested witnesses and Petitioner's exhibits do not provide a preponderance of evidence to prove the essential elements of "subdividers," "participation," "material participation," and the loss of the statutory exemption for a "creditor."

102. Petitioner did not submit the testimony of a representative of the Stanley Trust, or of Russo for that matter, to show that Sun Valley, on behalf of Zephyr Valley, did not make payments to the Trust as required by the purchase-money mortgage or that Zephyr Valley was in default before Petitioner obtained an injunction in 1995. Petitioner did not submit bank records showing the misuse of gross revenues by Sun Valley, Zephyr Valley, or Members. Petitioner did not submit copies of the purchase-money mortgage from Zephyr Valley to the Stanley Trust or the agreement for deed between Zephyr Valley and Five Star so that the checks signed by Tanner on the account of Homeowners and

Members could be compared, respectively, to either: the timing and amount of debt service required by the purchase-money mortgage and by the agreement for deed; or the financing of development and sales costs incurred by Homeowners and Members.

103. The lack of a preponderance of evidence regarding essential elements in the charges against Respondent is reflected in Petitioner's legal arguments during the hearing. Petitioner argued that the lines between the separate entities involved in the development of the mobile home park began "blurring," that the management agreement between Tanner and Gary Tanner effectuated a "de facto merger" of the corporations owned by the two, that one can "deduce . . . who the senior partner is," and that Tanner controlled the entire operation as the father and the man with the money. However, Petitioner failed to support such inferences with either a preponderance of evidence or with statutory or judicial precedent authorizing such inferences, even if such inferences were supported by the applicable standard of proof.

104. Petitioner submitted no evidence that Respondents engaged in any acts that would allow the corporate veil of each corporate entity to be pierced. Petitioner cited no authority for disregarding the corporate veil of each corporate entity or for attributing the stock of Homeowners to Tanner. Petitioner cited no authority for concluding that the management agreement operated as a "de facto" merger. See, e.g., Florida Real Estate Commission vs. Shealy, 647 So. 2d 151, 152 (Fla. 1st DCA 1994)

(holding that the corporate form cannot be disregarded even though the sole individual shareholder and corporation were found to be "one and the same entity").

105. Respondent, Tanner's, Motion To Tax Attorney's Fees and Costs, filed on February 2, 1998, is denied. As a threshold matter, Tanner's motion is not ripe for determination because Tanner is not the prevailing party in this proceeding until a decision is final. Even if Tanner is the prevailing party in Petitioner's Final Order, Petitioner did not participate in this proceeding for an improper purpose within the meaning of Section 120.595.

106. Tanner, as the moving party, failed to establish the evidentiary requirements for the rebuttable presumption authorized in Section 120.595. Tanner did not show that Petitioner participated in this proceeding to harass Respondents, to cause unnecessary delay, or for a frivolous purpose. For reasons previously discussed in paragraphs 94-104, there were justiciable issues of law and fact in this case.

107. The terms "not guilty" and "innocent" are not synonymous. The term "not guilty" means that Petitioner did not satisfy its burden of proof. The term "innocent" means there is sufficient evidence to show that Respondents did not commit the alleged violations. A finding of not guilty in this proceeding does not mean that Respondents are innocent, or that there were no justiciable issues of law or fact.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a Final Order finding Respondents not guilty of violating Sections 498.023(1)(a) and (2)(a), Section 498.035, and Section 498.049(5).

DONE AND ENTERED this 16th day of April, 1998, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.