

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 98-2923
)
BENTLEY FARMS, INC., d/b/a)
FIRST STREET APARTMENTS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Naples, Florida, on October 6, 1998.

APPEARANCES

For Petitioner: Daniel R. Biggins
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: D. Nathan Hoskins
Peck & Peck
First Union Building, Suite 103
5801 Pelican Bay Boulevard
Naples, Florida 34108

STATEMENT OF THE ISSUE

The issue is whether Respondent has violated various provisions governing public lodging establishments and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated March 10, 1998, Petitioner alleged that Respondent violated various provisions governing its public lodging establishment known as First Street Apartments at 220 South First Street in Immokalee. The Administrative Complaint alleged that the violations existed as of July 30 and August 19, 1997.

The Administrative Complaint alleges fifteen violations, including seven designated as "critical" (marked with an asterisk): 1)* apartments 30, 32, 40, and 79 lacked smoke detectors, in violation of National Fire Protection Association Life Safety Code 101, 19-3.4.4.1 and Section 633.025(11), Florida Statutes; 2)* apartment 31 had a broken smoke detector, in violation of Rule 61C-1.004(5), Florida Administrative Code; 3)* apartments 25, 29, 31, 33, 40, 42, 44, 47, and 78 had doors with hasps on them, in violation of Rule 61C-1.004(10), Florida Administrative Code; 4)* apartment 31 had a broken electrical socket hanging from the wall with a hot plate plugged into it and had exposed wiring not in conduit running within eight feet of the floor to the hot water heater, in violation of Rule 61C-1.004(11), Florida Administrative Code; 5)* residents in apartments 31, 32, and 33 were using extension cords improperly, in violation of Rule 61C-1.004(11), Florida Administrative Code;

6) the alley between the north building and fenced area lacked public lighting, in violation of Section 509.221(3), Florida Statutes; 7)* apartments lacked heat, in violation of Rule 61C-1.004(12), Florida Administrative Code; 8) the fencing behind the vertical balcony rail was missing on the west side and loose elsewhere on the second level, in violation of National Fire Protection Association Life Safety Code 101, 5-2.2.4.6(c); 9) apartments 30 and 32 had broken windows, torn screens, and a broken faucet in the kitchen sink repaired with duct tape; apartments 30 and 31 had leaky ceilings with structural damage and falling plaster; walls were pulling away from the ceiling; the south building had exposed interior beams; exterior areas had structural damage with worn concrete revealing the metal foundation; the exterior wall of the southeast end of the building had a 15-foot crack; and the concrete pillar supporting the second-floor landing on the northeast side of the building was worn and cracked, in violation of Rule 61C-1.004(6), Florida Administrative Code; 10) apartment 32 had a rotten shower wall and leaky toilet, apartment 31 had an inoperative shower, and apartments 31 and 32 had water leaking under the sinks, in violation of Rule 61C-1.004(2)(a), Florida Administrative Code; 11) apartment 31 had roaches, the dumpster had flies, and rotten food littered the east side of the building, in violation of Section 509.221(7), Florida Statutes; 12) an old car seat and buckets were under an exterior stairwell, in violation of Rule

61C-3.001(7), Florida Administrative Code; 13) a dumpster was not on an approved pad, in violation of Section 5-501.12 (amended at hearing from an incorrect reference to Section 5-501.11), 1995 Food Code, as adopted by the Food and Drug Administration, Public Health Service, United States Department of Health and Human Services; 14) a dumpster lid was left open, in violation of Section 5-501.114(B) (amended at hearing from an incorrect reference to Section 5-501.113(B)), 1995 Food Code, as adopted by the Food and Drug Administration, Public Health Service, United States Department of Health and Human Services; and 15)* a sewage line outside apartment 23 was open and covered with an old cabinet door, and a sewage cap outside apartment 23 was missing, in violation of Section 5-402.14, 1995 Food Code, as adopted by the Food and Drug Administration, Public Health Service, United States Department of Health and Human Services.

Respondent demanded a formal hearing. At the hearing, Respondent admitted the alleged violation of Rule 61C-1.004(12), Florida Administrative Code, for failing to provide heat, and Section 5-501.12, Food Code, for failing to provide a suitable pad for the second dumpster.

At the hearing, Petitioner called three witnesses and offered into evidence 15 exhibits. Respondent called two witnesses and offered into evidence no exhibits. All exhibits were admitted.

The parties did not order a transcript.

FINDINGS OF FACT

1. Respondent operates a public lodging establishment known as First Street Apartments at 220 South First Street in Immokalee. The license to operate this establishment, which is number 21-00721-H, expired December 1, 1997. However, Petitioner has allowed Respondent to continue to operate under this license until the resolution of pending proceedings against the license.

2. First Street Apartments comprise 84 residential units in buildings not greater than three stories. At the time of the inspection, about 60 units were occupied. The buildings were constructed in 1963, and Respondent acquired the property in 1984.

3. The controlling owner of Respondent was formerly a professional football player, and he formed Respondent to acquire First Street Apartments while still playing football. He has since retired, and he assumed direct responsibility for managing the property in 1994. First Street Apartments generate a net cash flow of \$25,000 to \$35,000 annually.

4. Respondent has no formal policy setting the frequency of inspections of apartment units. However, the weekend prior to the hearing, Respondent's owner and his family moved into one of the apartments.

5. Petitioner's inspector conducted inspections of First Street Apartments on July 30 and August 19, 1997. The July inspection resulted in the issuance of a warning for 38

violations. The inspector allowed Respondent 30 days to correct these violations.

6. The findings below describe the conditions at First Street Apartments on August 19, when Petitioner's inspector and a local fire inspector returned to the site for the reinspection.

7. As to the first alleged violation, apartments 30, 32, 40, and 79 lacked smoke detectors. As to the second alleged violation, apartment 31 had a smoke detector, but it was inoperative.

8. As to the third alleged violation, an undetermined number of apartments had hasps affixed to the outside doors, so as to permit them to be latched. Most if not all of these hasps were affixed to the screen door. Most but not all of these hasps were unlocked.

9. There is no evidence that any hasps were locked with occupants inside. The evidence suggests that tenants used the hasps to secure the contents of their premises while they were gone. However, the evidence does not establish that all of these hasps were attached to the doors and doorframe so securely as to present more than a momentary impediment to someone from the inside or outside trying to force the hasp open without unlocking it. The doorframes appear to have secured so many hasps that the wood is pitted and incapable of securing the hasp against much force. The clear appearance of numerous screwholes in the doors and doorframes supports Respondent's contention that its

representatives have frequently removed the hasps, only to find them reattached a short time later.

10. As to the fourth alleged violation, one of the apartments had uninsulated wiring, unprotected by conduit, running from the ceiling to a water heater. This uninsulated wiring ran within eight feet of the floor. The proximity of this exposed wiring to the water in the water heater rendered this violation especially hazardous. However, Petitioner failed to prove its allegation of a broken electrical socket with a hot plate plugged into it.

11. As to the fifth alleged violation, occupants of apartments 31, 32, and 33 used extension cords for other than intermittent purposes, such as cleaning, maintenance, or other temporary activities. These more ongoing, permanent uses included cooking and playing radios and televisions.

12. As to the sixth alleged violation, there was no public lighting in the alley between the north building and a fenced area to the next property. However, Respondent or Lee County has since added more exterior lighting, and the record does not permit a finding as to the effect of the former condition.

13. As to the seventh alleged violation, Respondent conceded that Respondent did not provide heat at the time of the inspections.

14. As to the eighth alleged violation, the original design of the guardrail along the balcony contains openings greater than

four inches. To remedy this hazardous situation, Respondent or a prior owner placed chain-link fence behind the guardrail, so as to reduce the openings to the size of the openings in the chain-link fence.

15. The chain-link fence may have been missing on the west side of the building, but this fact does not emerge clearly from the record. There is some evidence that the chain-link fence elsewhere had loosened from the guardrail, but the evidence fails to establish the extent to which any separation had occurred and the extent to which such separation presented a hazard to persons falling between the openings in the guardrails and then between the guardrails and the chain-link fence. Respondent has since repaired the guardrails, in any event.

16. As to the ninth alleged violation, apartments 30 and 32 had broken windows, torn screens, and a broken faucet in the kitchen sink repaired with duct tape; apartments 30 and 31 had leaky ceilings with structural damage and falling plaster; walls were pulling away from the ceiling; the south building had exposed interior beams; exterior areas had structural damage with worn concrete revealing the metal foundation; the exterior wall of the southeast end of the building had a 15-foot crack; and the concrete pillar supporting the second-floor landing on the northeast side of the building was worn and cracked.

17. As to the tenth alleged violation, apartment 32 had a rotten shower wall and leaky toilet, and apartment 31 had an inoperative shower.

18. As to the eleventh alleged violation, there were roaches and flies around the premises, but there is no evidence of "noxious small animals or parasitic insects, such as lice, fleas, worms, rats, or mice." As the administrative law judge advised at the hearing, he took official notice of this dictionary definition of "vermin" taken from a Funk and Wagnall's Dictionary present in the courthouse at which the hearing took place.

19. As to the twelfth alleged violation, there was a car seat under a stairwell and about a dozen five-gallon plastic pails. However, the tenants stored these items, on a temporary basis, for their work. They remove car seats to increase the passenger-carrying capacity of their motor vehicles, and they use the pails while picking fruits and vegetables.

20. As to the thirteenth alleged violation, there was no concrete pad under one of the two dumpsters.

21. As to the fourteenth alleged violation, a dumpster lid remained open for the entire 1.5-hour inspection.

22. As to the fifteenth alleged violation, a broken sewer line had leaked a pool of gray water, and a sewer cap was missing from the sewer line as it left a residential unit.

23. In sum, Petitioner proved the following violations, with critical violations marked with an asterisk: 1*, 2*, 4* (unprotected wiring, but no broken socket), 5*, 7*, 9, 10 (except for water leaking from under the sinks) 13, 14, and 15*.

24. By Ordinance No. 92-72, the Collier County Commission adopted National Fire Protection Association Life Safety Code 101, Life Safety Code, effective October 21, 1992.

25. NFPA 5-2.2.4.6(c) provides: "Open guards shall have intermediate rails or an ornamental pattern such that a sphere 4 in. (10.1 cm) in diameter cannot pass through any opening."

26. NFPA 19-3.4.4.1 provides:

Approved single station or multiple station smoke detectors continuously powered from the building electrical system shall be installed in accordance with 7-6.2.9 in every living unit within the apartment building regardless of the number of stories or number of apartments. When activated, the detector shall initiate an alarm that is audible in the sleeping rooms of that unit. This individual unit detector shall be in addition to any sprinkler system or other detection system that may be installed in the building.

27. Section 5-402.14, 1995 Food Code, as adopted by the Food and Drug Administration, Public Health Service, United States Department of Health and Human Services (Food Code), provides: "Sewage shall be conveyed to the point of disposal through an approved sanitary sewage system or other system, including use of sewage transport vehicles, waste retention tanks, pumps, pipes, hoses, and connections that are constructed, maintained, and operated according to law."

28. Section 5-501.11, Food Code, provides: "If located within the food establishment, a storage area for refuse, recyclables, and returnables shall meet the requirements specified under Parts 6-1 and 6-2."

29. Section 5-501.12, Food Code, provides: "An outdoor storage surface for refuse, recyclables, and returnables shall be constructed of nonabsorbent material such as concrete or asphalt and shall be smooth, durable and sloped to drain."

30. Section 5-501.113(B), Food Code, provides: "Cardboard or other packaging material that does not contain food residues and that is awaiting regularly scheduled delivery to a recycling or disposal site may be stored outside without being in a covered receptacle if it is stored so that it does not create a rodent harborage problem."

31. Section 5-501.114(B), Food Code, provides: "Equipment and receptacles for refuse, recyclables, and returnables shall be kept covered . . . [w]ith tight-fitting lids or doors if kept outside the food establishment."

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes, except for references to Sections of the Food Code. All references to Rules are to the Florida Administrative Code.)

33. Section 509.211(2) provides that Petitioner "may impose administrative sanctions for violations of these rules [adopted under Chapter 633, Florida Statutes] pursuant to Section 509.261."

34. Section 509.261(1) authorizes Petitioner to impose a fine of \$1000 per offense, require additional education, or suspend or revoke a license of any operator of a public lodging establishment for a violation of any provision of Chapter 509 or Petitioner's rules. Section 509-261(2) provides that the Petitioner "may" treat as a separate offense each day that a "critical" violation continues uncorrected.

35. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Criss v. Turlington, 610 So. 2d 292 (Fla. 1987).

36. Rule 61C-1.004 provides that all public lodging and public food service establishments must meet the following requirements:

The following general requirements and standards shall be met by all public lodging and public food service establishments:

(1) Water, plumbing and waste -- Except as specifically provided in these rules, standards for water, plumbing and waste shall be governed by chapter 5, Food Code, herein adopted by reference. For the purposes of this section, the term 'food establishment' as referenced in the Food code shall apply to all public lodging and public food establishments as defined in Chapter 509, Florida Statutes.

* * *

(2)(a) Each public lodging and food service establishment shall be provided with adequate and conveniently located bathroom facilities for its employees and guests in accordance with provisions of these rules and the plumbing authority having jurisdiction. Public access to toilet facilities shall be permitted through food preparation, storage, or warewashing areas. Bathroom fixtures shall be of readily cleanable sanitary design. Bathroom facilities shall be kept clean, in good repair and free from objectionable odors. Bathrooms shall provide at least 20 foot candles of light. The walls, ceilings and floors of all bathrooms shall be kept in good condition.

* * *

(5) All fire safety, protection and prevention equipment must be installed, approved, maintained and used in accordance with Chapter 509, FS, and the National Fire Protection Association Life Safety Code Chapter 101, as adopted by the Division of State Fire Marshal in Chapter 4A-3, FAC.

* * *

(6) All building structural components, attachments and fixtures shall be kept in good repair, clean and free of obstructions.

* * *

(10) Means of access must permit unobstructed travel at all times and be maintained free of obstructions and fire hazards. Halls, entrances and stairways shall be clean, ventilated and well-lighted day and night. Hall and stair runners shall be kept in good condition. Handrails shall be installed on all stairways and guard rails around all porches and steps. Adequate means of exit shall be provided pursuant to NFPA 101. Exits shall be clearly marked with approved illuminated exit signs.

(11) Electrical wiring -- To prevent fire or injury, defective electrical wiring shall be replaced and wiring shall be kept in good repair. No extension cords shall be used except during cleaning, maintenance and other temporary activities. Only a wall switch or approved pull cord shall be permitted in bathrooms. In accordance with the provisions of NFPA 70, the National Electrical Code, as adopted by the Division of State Fire Marshal in Chapter 4A-3, FAC, Uniform Fire Safety Rules and Standards, sufficient electrical outlets shall be provided.

(12) Heating and ventilation -- The heating and ventilation system shall be kept in good repair or be installed to maintain a minimum of 68 degrees Fahrenheit throughout the building. The insurance inspector's boiler report is required annually for power boilers and high pressure/high temperature boilers and biannually for low pressure steam or vapor heating boilers and shall be posted in the boiler room. The provisions of this section do not apply to the common areas of resort condominiums.

37. Rule 61C-3.001(7) provides, for all public lodging establishments, that

yards, alleys, driveways, sidewalks, and other exterior portions of the licensed premises shall be kept clean, free of debris, free of objectionable odors, and properly drained, maintained and mowed. All unused and discarded equipment and materials shall be removed from the premises, except when placed in a designated storage area.

38. Section 509.221 provides in material part:

(3) Each establishment licensed under this chapter shall be properly lighted, heated, cooled, and ventilated and shall be operated with strict regard to the health, comfort, and safety of the guests. Such proper lighting shall be construed to apply to both daylight and artificial illumination.

* * *

(7) The operator of any establishment licensed under this chapter shall take effective measures to protect the establishment against the entrance and the breeding on the premises of all vermin. Any room in such establishment infested with such vermin shall be fumigated, disinfected, renovated, or other corrective action taken until the vermin are exterminated.

39. Section 633.025 provides:

(1) Each municipality, county, and special district with firesafety responsibilities shall adopt minimum firesafety standards which shall operate in conjunction with the state minimum building code adopted by such local jurisdiction as required by s. 553.73.

. . .

(2) Pursuant to subsection (1), each municipality, county, and special district with firesafety responsibilities shall adopt and enforce the codes specified in paragraph (a), paragraph (b), paragraph (c), or paragraph (d) as the minimum firesafety code:

(a) The Standard Fire Prevention Code, 1985 edition or subsequent edition, as adopted by the Southern Building Code Congress International.

(b) The EPCOT Fire Prevention Code.

(c) The National Fire Protection Association (NFPA) Pamphlet 1, 1985 edition or subsequent edition.

(d) The South Florida Fire Prevention Code, subject to the provisions of subsection (4).

(3) In addition, each municipality, county, and special district with firesafety responsibilities shall adopt National Fire Protection Association (NFPA) 101, Life Safety Code, 1985 edition or subsequent

edition, as part of the minimum firesafety code.

* * *

(7) The new building or structure provisions enumerated within the firesafety code adopted pursuant to this section shall apply only to buildings or structures for which the building permit is issued on or after January 1, 1988. Subject to the provisions of subsection (8), the existing building or structure provisions enumerated within the firesafety code adopted pursuant to this section shall apply to buildings or structures for which the building permit was issued or the building or structure was constructed prior to January 1, 1988.

(8) With regard to existing buildings, the Legislature recognizes that it is not always practical to apply any or all of the provisions of the minimum firesafety code and that physical limitations may require disproportionate effort or expense with little increase in lifesafety. Prior to applying the minimum firesafety code to an existing building, the local fire official shall determine that a threat to lifesafety or property exists. If a threat to lifesafety or property exists, the fire official shall apply the applicable firesafety code for existing buildings to the extent practical to assure a reasonable degree of lifesafety and safety of property or the fire official shall fashion a reasonable alternative which affords an equivalent degree of lifesafety and safety of property. The decision of the local fire official may be appealed to the local administrative board described in s. 553.73.

(9) Nothing herein shall preclude a municipality, county, or special district from requiring a structure to be maintained in accordance with the applicable firesafety code.

(10) With respect to standards established by the National Fire Protection Association

(NFPA) 101, Life Safety Code, 1985 edition, s. 19-3.4.2.1, those standards shall not apply to structures having direct access to the outside from each living unit and having three stories or less.

(11) With respect to standards established by the National Fire Protection Association (NFPA) 101, Life Safety Code, 1985 edition, s. 19-3.4.4.1, battery operated smoke detectors shall be considered as an approved detection device for buildings having direct access to the outside from each living unit and having three stories or less.

(12) Heating and ventilation -- The heating and ventilation system shall be kept in good repair or be installed to maintain a minimum of 68 degrees Fahrenheit throughout the building. The insurance inspector's boiler report is required annually for power boilers and high pressure/high temperature boilers and biannually for low pressure steam or vapor heating boilers and shall be posted in the boiler room. The provisions of this section do not apply to the common areas of resort condominiums.

40. As noted in the findings of fact, Petitioner failed to prove the following alleged violations: 3, 4 (broken socket only), 6, 8, 10 (water leaking under sinks only), 11, and 12.

41. As to alleged violations 1 and 2, the First Street Apartments were constructed in 1963. Thus, Section 633.025(8) provides that the NFPA shall not apply until "the local fire official" determines that a "a threat to lifesafety or property exists." There is no evidence of such a determination.

42. However, Collier County adopted the NFPA by ordinance. Section 633.025(9) provides that nothing in Section 633.025 shall preclude a county from requiring the maintenance of a structure

in accordance with the applicable fire safety code. It appears the determination required by Section 633.025(8) thus applies to situations in which, under Section 633.025, the NFPA is applied to a county by operation of state law without adoption by the county.

43. Thus, Petitioner has proved two violations of NFPA 19-3.4.1, as adopted by Collier County in Ordinance No. 92-72. These are "critical" violations.

44. As to violation 4, Petitioner proved only that the wiring to the hot water heater was uninsulated and within eight feet of the ground. Petitioner proved that this violated Rule 61C-1.004(11). This is a "critical" violation.

45. As to violation 5, Petitioner proved that the use of extension cords violated Rule 61C-1.004(11). This is a "critical" violation.

46. As to violation 7, Petitioner proved that the absence of heat violated Rule 61C-1.004(12). This is a "critical" violation.

47. As to violation 9, Petitioner proved that the various items in disrepair violated Rule 61C-1.004(6).

48. As to violation 10, Petitioner proved all of the alleged items, except for the water leaking under the sinks, and these items violated Rule 61C-1.004(2)(a).

49. As to violation 13, Petitioner proved that the absence of a pad under the dumpster violated Section 5-501.12, Food Code.

50. As to violation 14, Petitioner proved that the open lid on the dumpster violated Section 5-501.114, Food Code.

51. As to violation 15, Petitioner proved that the broken sewer line and uncapped sewer line violated Section 5-5.402.14, Food Code. This is a "critical" violation.

52. Petitioner should fine Respondent \$1000 for violation 15, \$500 for violation 4, \$250 each for violations 1 and 2, \$250 for violation 5, \$100 for violation 7 (although a "critical" violation, the absence of heat in the summer is not hazardous to the occupants' health), and \$100 for each of the four non-"critical" violations, for a total of \$2750. The fine is set with consideration of the need not to deprive Respondent of the money necessary to maintain the property and in recognition of the commitment of Respondent's controlling owner, in moving his family to the property, to improve the maintenance level of the property. Petitioner should also require Respondent's controlling owner to attend take additional education in an amount set by Petitioner in the final order.

RECOMMENDATION

It is

RECOMMENDED that the Division of Hotels and Restaurants enter a final order imposing an administrative fine against Respondent in the amount of \$2750 and requiring Respondent's controlling owner to undergo additional education.

DONE AND ENTERED this 8th day of December, 1998, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of December, 1998.

COPIES FURNISHED:

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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 must be filed with the agency that will issue the Final Order in this case.