STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES,	)	
Petitioner,	)	
vs.	)	Case No. 01-2350
CHESTER YU, RONALD YU, and CAROL YU,	)	
Respondents.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Pierce, Florida, on August 17, 2001.

APPEARANCES

For Petitioner: Janis Sue Richardson
Department of Business and Professional Regulation,
Division of Florida Land Sales, Condominiums, and Mobile Homes
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Bernard A. Conko
Cohen, Norris, Scherer, Weinberger & Wolmer
712 U.S. Highway One
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North Palm Beach, Florida 33408

STATEMENT OF THE ISSUE

The issue is whether Respondents imposed upon mobile home owners an invalid "pass-through" charge to pay for the cost of work on the park's electrical distribution system, in violation of Section 723.031(5), Florida Statutes.

PRELIMINARY STATEMENT

By Amended Notice To Show Cause filed April 24, 2001, Petitioner gave notice to Respondents to show cause why Petitioner should not issue a cease and desist order to stop Respondents from imposing a monthly rent increase of $28.61 per lot, to require Respondents to refund all money already collected, and to require Respondents to take additional affirmative action.

The Amended Notice To Show Cause alleges that Respondents are the directors and trustees of Tanglewood Mobile Home Park, Inc., a dissolved corporation. The Amended Notice To Show Cause alleges that Respondents, in such capacities, own Tanglewood Mobile Home Park, which is located at 345 Weatherbee Road, Fort Pierce, Florida.

The Amended Notice To Show Cause alleges that, on February 12, 2000, a building inspector of St. Lucie County inspected the electrical distribution system at the mobile home park, cited Respondents for violations, and required them to replace a damaged meter bank and bring it up to the current

electrical code. The Amended Notice To Show Cause alleges that the building inspector required work to repair the system, but not expand it.

After performing the required work, Respondents issued a Notice of Pass-Through Charge, dated August 14, 2000, for $28.61 per month per lot for an "Electrical Distribution System Up-Grade," effective December 1, 2000. The notice states that the pass-through charge will end November 1, 2004.

The Amended Notice To Show Cause alleges that Section 723.003(10), Florida Statutes, provides that a "pass-through charge" is the "proportionate share of the necessary and actual direct costs and impact or hookup fees for a governmentally mandated capital improvement . . .." The Amended Notice To Show Cause alleges that a capital addition is a valuable addition to real property, rather than a repair, which restores a structure to its original condition. The Amended Notice To Show Cause alleges that the age of the electrical distribution system and lack of availability of parts precluded the restoration of the system to its original condition.

Respondents denied the material allegations and requested a formal hearing.

At the hearing, Petitioner called four witnesses and offered into evidence nine exhibits: Petitioner Exhibits 1, 5, 6, 9, 13, 14, 16, 119, and 121. Respondent called three

witnesses and offered into evidence six exhibits: Respondent Exhibits 1 and 4-8. All exhibits were admitted except Petitioner Exhibits 1 and 119, which were proffered. The Administrative Law Judge sealed Respondent Exhibit 6.

The parties did not order a transcript. They filed their proposed recommended orders on September 7, 2001.

FINDINGS OF FACT

1. Tanglewood Mobile Home Park, Inc., owns the Tanglewood Mobile Home Park located at 345 Weatherbee Road, Fort Pierce, St. Lucie County, Florida (Tanglewood). The Patricia Yu Irrevocable Trust owns Tanglewood Mobile Home Park, Inc. Respondents Chester Yu and Ronald Yu are the trustees of the trust; Respondent Carol Yu is not a trustee. References to "Respondents" shall include only Chester Yu and Ronald Yu.

2. Tanglewood was developed in 1969. The park was originally owned and operated for many years by Respondents' father.

3. An undated prospectus for Tanglewood Mobile Home Park (Prospectus) contains several provisions that have some bearing on this case. Prospectus Section VI.A.1 requires each mobile home owner to bear the expense of "electrical connections." Prospectus Section VI.A.2.a states that, "to the extent permitted by law, the mobile home owner may also be required to bear, in the form of increases in the lot rental, the costs

incurred by Owner in installing capital improvements or performing major repairs in the Park."

4. Prospectus Section VIII.3 states that the Owner may assess, on a pro rata basis, "pass-through charges" as rent increases. Prospectus Section VIII.3.a prohibits more than one increase in lot rental annually, except for "pass-through charges." Section VIII.1.c defines "pass-through charges" as "those amounts, other than special use fees, which are itemized and charged separately from the rent and which represent the mobile homeowner's share of costs charged to the Park Owner by any state or local government or utility company." Section VIII.3.b.4 states: "To the extent permitted by law, the mobile home owner may also be required to bear, in the form of increases in the lot rental, the costs incurred by Owner in installing capital improvements or performing major repairs in the Park."

5. The Prospectus states that Tanglewood has 158 lots. In reality, only 148 lots are improved and available for rent. One of these lots is the park office. At present, 139 lots are leased.

6. In October 1999, Hurricane Irene caused flooding in Tanglewood. After the flooding had receded, the power company restored power to the area, but a submerged transformer blew out and damaged part of the Tanglewood's electrical distribution

system, leaving 16 mobile homes without power. After repairing or replacing the transformer, the power company employee responsible for reconnecting Tanglewood's electrical distribution system reenergized eight mobile homes, but refused to reenergize the remaining eight due to the deteriorated condition of their meter bank.

7. Meter banks are located in groups at various points in the park. Power enters the park either above- or below-ground and is fed into individual meters for each mobile home. Each meter bank typically contains eight meters, and each meter typically has a junction box and a disconnect box.

8. The concern of the power company employee was that the mechanical force required to reconnect power to one meter bank could possibly be too great for the deteriorated supports to withstand.

9. As was typical of many meter banks at Tanglewood, the meter bank for these eight lots was poorly supported due to the deterioration of its support structure. Most supports at Tanglewood were made of wood, which required close monitoring and careful maintenance. Exposed to the elements, wood suffered considerable damage over time from wood rot. If the support failed, a meter bank would fall over to the ground, exposing live electrical lines in close proximity to the mobile homes and their occupants.

10. Many meter banks throughout Tanglewood also suffered from deteriorated supports. Many meter banks were deficient because of the use of plumbing-grade PVC pipes as conduit, which are of a decreased thickness, when compared to PVC pipes approved for outdoor electrical use and, when exposed to sunlight, tend to deteriorate faster than the type of PVC pipes approved for outdoor electrical use. The use of plumbing-grade PVC pipes may not have been legal at the time it was used.

11. Other meter banks also suffered from rusted and missing components, which might allow rainwater to enter the system and damage the parts. Some of the larger missing components left gaps large enough to allow a child's finger to penetrate and touch a live wire. Meter cans were damaged, masts (for above-ground supply lines) were inadequately supported, and drop wires (for above-ground supply lines) were too low.

12. Confronted with the problem of eight lots without electrical service, Respondents contacted a local electrical contractor, who replaced the meter bank and its supports, using new pressure-treated wood. He also increased the service for these eight meters from 100 amps to 150 amps. The power company promptly restored electrical service after these repairs were completed.

13. Respondents did not try to assess the mobile home owners a pass-through charge for this work. Instead, on

January 28, 2000, Respondents sent the mobile home owners a notice that their monthly rent would increase by $15 (net, $12, after relieving the tenants of the obligation to pay a $3 monthly administration fee for water and sewer). The notice states that the rent increase is effective May 1, 2000, which may reflect a common commencement date on all lot leases.

14. The letter notes that the park owner "has expended and will expend substantial sums for improvements and upgrades in the park," but warns that the park owner does not know if "any additional tax, utility or assessment prorations will be necessary." The rent increase covered, among other things, the cost of the work to restore electrical service to the eight lots whose meter bank required replacement.

15. On February 12, 2000, the St. Lucie County Building Inspector inspected the electrical distribution system at Tanglewood. He noted the conditions described above and issued numerous citations, which were submitted to the St. Lucie County Code Enforcement office.

16. In 1998, St. Lucie County adopted the National Fire Protection Association code, which is based on the 1996 National Electrical Code. The new code requirements prohibit a wood support system, require the placement of meters within 30 feet of the mobile home, and require underground wiring, but do not require service above 100 amps, which was the minimum level of

service at Tanglewood prior to any electrical work following Hurricane Irene.

17. On May 25, 2000, the County Code Enforcement Officer issued a notice of citations to Respondents for unsafe electrical equipment. The officer required the replacement of the remainder of the electrical distribution system. When work stopped at Tanglewood, the County Code Enforcement Officer issued other notices of citations in June 2000.

18. Respondents responded to these demands from the County by undertaking extensive work to Tanglewood's electrical distribution system. The result was a modern electrical distribution system--at a cost of $161,912, plus $28,977.76 in finance charges, for a total of $190,889.76.

19. By Notice of Pass-Through Charge dated August 14, 2000, Respondents advised the mobile home owners of a monthly pass-through charge of $28.61 per lot from December 1, 2000, through November 1, 2004. The notice discloses that the reason for the pass-through charges is the electrical distribution system upgrade that had recently been completed.

20. The evidence is clear that, except for the upgrade to 200-amp service, the electrical work done in this case was governmentally mandated. This finding is supported by the reluctance of Respondents to attend to the electrical system unless a mobile home was without electricity. Despite

Respondents' electrical invoices, their park-management policy obviously deferred maintenance, at least with respect to the electrical distribution system.

21. The closer question in this case is whether the work was a capital improvement or a repair. The addition of 50-100 amps of service was a capital improvement, but it was not mandated by the government. So the capital improvement versus repair question applies to the remainder of the work.

22. In their proposed recommended order, Respondents contend that the electrical distribution system was "completely functional" prior to the inspection and citations. This is true as to the function of conducting electricity; this is untrue as to the function of conducting electricity safely. Weakened and sometimes nonexistent supports, rusted holes, holes from missing components, and occasionally exposed wiring substantially undermined the safety of the electrical distribution system at Tanglewood.

23. Respondents argue that new code requirements forced them to relocate disconnects closer to the mobile homes, use four-wire (not three-wire) feeder line to all mobile homes, use electrical-grade conduit, and use metal supports for meter banks. However, these are subsidiary costs of repair, not capital improvements. As contrasted to the expansion of service, the remaining work does not enlarge the capacity of the

electrical distribution system. The remaining work repairs the system to make it safer, with some additional work required to meet current code requirements.

24. Respondents argue that the work increases the value of the land. The record does not support this assertion. Even if such evidence were present in this case, it would not be determinative. Although a capital improvement normally adds value, a residential safety hazard subtracts value, so its elimination would have the appearance of adding value.

25. Respondents argue that the work substantially extends the life of the electrical distribution system. This argument would be more appealing in the presence of an effective preventative maintenance program covering such basic needs as replacing wooden supports and metal covers when needed. However, the nature of the work, other than raising the service from 100 amps, is more retrospective than prospective; the work is really only catching up on preventative repairs and maintenance that was not done for years. Once Respondents allowed the system to fall into such a state of disrepair, the secondary costs of bringing the system up to code, such as adding four-wire feeds and relocating disconnects, do not change the nature of the expenditures; they are repair expenses, not capital improvements.

26. Respondents have proved that a portion of the work was clearly the responsibility of individual mobile home owners. For instance, about two-thirds of the mobile homes required $150-$200 of work to separate the grounded conductors from the grounding conductors. However, it is unclear that any of such work, for which individual mobile home owners were directly responsible, was performed on all lots. Even if this work were a capital expenditure, which it is not, it could not be passed "proportionately" among all of the mobile home owners, if only some of them required the work.

27. Respondent contends correctly that the pass-through charges are a minor violation, as defined in Section 723.006(9), Florida Statutes. Respondents fully disclosed the pass-through charges prior to assessing them. The pass-through charges did not endanger the health, safety, or welfare of the mobile home owners; to the contrary. The charges arose from a substantial expenditure by Respondents to enhance the health, safety, and welfare of the mobile home owners. The pass-through charges caused no economic harm to the mobile home owners because Respondents were authorized by the Prospectus to raise the rent by a sufficient amount to compensate for the entire cost of the work on the electrical distribution system. For these reasons, alone, neither a penalty nor a refund is appropriate; a cessation of the assessment of further pass-through charges and

the imposition of the maximum civil penalty for a minor violation are sufficient.

28. An order requiring a refund of any portion of the collected pass-through charges may have a disproportionately disturbing effect on Respondents and the mobile home owners. Respondents borrowed the full cost of the work on the electrical distribution system, and this note is payable in 48 equal monthly instalments ending on August 4, 2004. An order requiring a refund of any portion of the monies already collected may result in a significant disruption in the anticipated cash flow to Respondents, necessitating an even greater increase in rent to cover the loss of these funds. Mobile home owners who have left the park between the time of the electrical work and the time of the rent increase would unfairly be relieved of their proportionate share of the cost of this work, and mobile home owners coming to the park after this rent increase would unfairly be imposed with a disproportionately larger share of the cost of this work.

CONCLUSIONS OF LAW

29. 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.)

30. Section 723.006(5) authorizes Petitioner to take action against Respondents:

> Notwithstanding any remedies available to mobile home owners, mobile home park owners, and homeowners' associations, if the division has reasonable cause to believe that a violation of any provision of this chapter or any rule promulgated pursuant hereto has occurred, the division may institute enforcement proceedings in its own name against a developer, mobile home park owner, or homeowners' association, or its assignee or agent, as follows:
>
> (a) The division may permit a person whose conduct or actions may be under investigation to waive formal proceedings and enter into a consent proceeding whereby orders, rules, or letters of censure or warning, whether formal or informal, may be entered against the person.
>
> (b) The division may issue an order requiring the mobile home park owner, or its assignee or agent, to cease and desist from an unlawful practice and take such affirmative action as in the judgment of the division will carry out the purposes of this chapter. The affirmative action may include the following:
>
> 1. Refunds of rent increases, improper fees, charges and assessments, including pass-throughs and pass-ons collected in violation of the terms of this chapter.
>
> 2. Filing and utilization of documents which correct a statutory or rule violation.
>
> 3. Reasonable action necessary to correct a statutory or rule violation.
>
> (c) In determining the amount of civil penalty or affirmative action to be imposed under this section, if any, the division must consider the following factors:

1. The gravity of the violation.

2. Whether the person has substantially complied with the provisions of this chapter.

3. Any action taken by the person to correct or mitigate the violation of this chapter.

(d) The division may bring an action in circuit court on behalf of a class of mobile home owners, mobile home park owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution.

(e)1. The division may impose a civil penalty against a mobile home park owner or homeowners' association, or its assignee or agent, for any violation of this chapter, a properly promulgated park rule or regulation, or a rule or regulation promulgated pursuant hereto. A penalty may be imposed on the basis of each separate violation and, if the violation is a continuing one, for each day of continuing violation, but in no event may the penalty for each separate violation or for each day of continuing violation exceed $5,000. All amounts collected shall be deposited with the Treasurer to the credit of the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund.

2. If a violator fails to pay the civil penalty, the division shall thereupon issue an order directing that such violator cease and desist from further violation until such time as the civil penalty is paid or may pursue enforcement of the penalty in a court of competent jurisdiction. If a homeowners' association fails to pay the civil penalty, the division shall thereupon pursue enforcement in a court of competent jurisdiction, and the order imposing the civil penalty or the cease and desist order shall not become effective until 20 days after the date of such order. Any action commenced by the division shall be brought in the county in which the division has its executive offices or in which the violation occurred.

31. Section 723.006(11) adds:

> Upon adoption of rules establishing minor violations and a determination by the division that the violation is a minor violation, the division may levy a civil penalty of up to $250 but shall not require a refund of rent increases, fees, charges or assessments, including pass-through and pass-ons collected from mobile home owners. Until rules have been adopted as provided in this section, the enforcement procedures of the division in existence on the effective date of this act shall be in effect.

32. Rule 65B-35.002 defines "minor violations":

> (1) Pursuant to section 723.006, Florida Statutes, the following items are designated as minor violations of chapter 723, Florida Statutes:
>
> (a) Failure to provide a prospectus to a mobile home owner that incorporates the 1988 legislative amendments to the prospectus pursuant to section 723.011, Florida Statutes.
>
> (b) Failure to file copies of advertising required by section 723.016(1), Florida Statutes.
>
> (c) Failure to post park rules and regulations required by section 723.035(1), Florida Statutes.
>
> (d) Failure to file copies of lot rental increases with the agency required by by section 723.037(3), Florida Statues.
>
> (e) Failure to meet to discuss a notice of change as required by section 723.037(4), if there is mutual written agreement between the homeowners' committee and the park owner to meet at a time beyond the 30-day requirement, if a meeting is requested by either party.
>
> (f) Failure to file rule changes with the division no later than 10 days after the effective date of the changes as provided in the notice of rules change.

> (2) The listing of a violation as minor violation in this section does not preclude the division from finding that any other violation of chapter 723 or of the rules adopted thereunder is a minor violation as provided by 723.006. The listing of a violation as a minor violation in this section does not create any presumption that any other violation of chapter 723 or of the rules adopted thereunder, is or is not a minor violation.

33. Section 723.031(5)(b) restricts the ability of Respondents to collect additional money from the mobile home owners during the term of a one-year lease unless the additional money qualifies as a "pass-through charge":

> The rental agreement shall contain the lot rental amount and services included. An increase in lot rental amount upon expiration of the term of the lot rental agreement shall be in accordance with ss. 723.033 and 723.037 or s. 723.059(4), whichever is applicable, provided that, pursuant to s. 723.059(4), the amount of the lot rental increase is disclosed and agreed to by the purchaser, in writing. An increase in lot rental amount shall not be arbitrary or discriminatory between similarly situated tenants in the park. No lot rental amount may be increased during the term of the lot rental agreement, except:
>
> (b) For pass-through charges as defined in s. 723.003(10).

34. Section 723.003(10) defines a "pass-through charge" as:

> The term "pass-through charge" means the mobile home owner's proportionate share of the necessary and actual direct costs and

> impact or hookup fees for a governmentally mandated capital improvement, which may include the necessary and actual direct costs and impact or hookup fees incurred for capital improvements required for public or private regulated utilities.

35. As amended effective July 1, 2001, Section 723.003(11) defines a "proportionate share" as:

> The term "proportionate share" as used in subsection (10) means an amount calculated by dividing equally among the affected developed lots in the park the total costs for the necessary and actual direct costs and impact or hookup fees incurred for governmentally mandated capital improvements serving the recreational and common areas and all affected developed lots in the park.

36. The governmentally mandated work in this case is a repair, not a capital expenditure, for the reasons stated in the findings of fact. Cf. Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro Beach, 263 So. 2d 209, 213 (Fla. 1972) with Pinnacle Port Community Ass'n, Inc., v. Orenstein, 952 F.2d 375, 378 (11th Cir. 1992).

37. Because the work constitutes repairs, Respondents could not assess the mobile home owners their proportionate share of the costs during the lease term, as a pass-through charge, but could, under the Prospectus, add these costs to the rent. Respondents chose a rent increase as the vehicle to defray the costs of the electrical repairs to the first eight

lots. These costs were effectively passed through as of May 1, 2000.

38. Adding the considerably greater costs to the rent would mean two things. First, they would represent a permanent increase, rather than a pass-through charge that expires on a certain date. Second, they could not be added to the rent until the next anniversary of the leases, which may not have been until May 1, 2001. However, under the provisions of the Prospectus, Respondents could have increased the rent to recover these considerable repair costs.

39. Instead, effective December 1, 2000, Respondents passed through the costs to the mobile home owners over a period roughly commensurate with the term of the note that Respondents executed to pay for this work.

40. Although Respondents have violated Section 723.031(5) by attempting to pass through noncapital expenditures, the violation is a minor one in every respect. The expenditures enhanced the safety of the mobile home owners. Respondents clearly disclosed the nature of the pass-through. Respondents could have raised the rent to cover the expenditures. A refund order may have a disruptive effect on the financial health of Tanglewood and its residents. The circumstances dictate issuing a cease and desist order, prohibiting the collection of the

pass-through charge at anytime following the effective date of the final order, and imposing a $250 civil penalty.

RECOMMENDATION

It is

RECOMMENDED that the Division of Florida Land Sales, Condominiums, and Mobile Homes enter a final order dismissing the Amended Notice To Show Cause against Respondent Carol Yu.

It is further

RECOMMENDED that the Division of Florida Land Sales, Condominiums, and Mobile Homes enter a final order finding that Chester Yu and Ronald Yu have assessed a pass-through charge in violation of Section 723.031(5), Florida Statutes; that Chester Yu and Ronald Yu shall cease and desist from assessing this pass-through charge upon the effective date of the final order; that the violation is a minor violation and no refund is appropriate under the circumstances; and that Chester Yu and Ronald Yu shall pay a single civil penalty of $250, for which they are jointly and severally liable.

DONE AND ENTERED this 19th day of September, 2001, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2001.

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.