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. 02-2273
EDMUND C. VALENTINE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 4, 2002, and October 9, 2002, in Vero Beach, Indian River County, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph S. Garwood, Esquire
Department of Business and
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For Respondent: Bradley W. Rossway, Esquire
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STATEMENT OF THE ISSUE

At issue is whether the Respondent, Edmund C. Valentine (Respondent or Valentine), as owner of Palm Paradise Park (Palm Paradise or the mobile home park or park) assessed an improper pass-through charge to the mobile home owners in Palm Paradise in violation of Section 723.003(10), Section 723.031(5)(b), and Section 723.037(1), Florida Statutes, as set forth in a Notice to Show Cause issued by the Petitioner, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Petitioner or Department) on May 1, 2002, and if so, what remedy should be imposed.

PRELIMINARY STATEMENT

By Notice to Show Cause dated May 1, 2002, Petitioner alleged that the Respondent assessed an improper pass-through charge to the mobile home owners in Palm Paradise in the amount of $524.44 each, in violation of Sections 723.003(10), 723.31(5)(b), and 723.037(1), Florida Statutes. (Hereafter, all statutory references are to the laws of Florida in effect at the times of the facts to which they relate.)

The Department seeks a final order requiring Valentine to refund the pass-through charges to each mobile home unit owner, and imposing a civil penalty in the amount of $5,000.

Valentine timely requested a formal hearing pursuant to Chapter 120. Thereafter, Valentine filed a Motion for a More

Definite Statement, or in the Alternative, Motion to Dismiss for Failure to State a Cause of Action, contending that the Notice to Show Cause was insufficient to apprise him of the nature of the charges against him, in violation of his due process rights. By Order Denying Motion for More Definite Statement or to Dismiss and Motion to Continue, dated July 10, 2002, the motions were denied without prejudice.

The formal hearing was held over two days, September 4, 2002, and October 9, 2002, at the Indian River County Courthouse in Vero Beach, Florida. At the hearing, the Department presented the testimony of Evelyn Clark, Dan Dietz, Roland DeBlois, and eight Palm Paradise residents. The Department's Composite Exhibits 1-3 were received into evidence. The Respondent noted his limited objection to the introduction of the Department's Investigative Report, Composite Exhibit 3, acknowledging that the report was admissible for the limited purpose of supplementing, explaining, or buttressing admissible evidence. Section 120.58(1)(a).

The Department also moved to offer into evidence the deposition transcripts of two additional Palm Paradise residents, Hugh Helton (Helton) and Joseph Beno (Beno). The Respondent objected to the introduction of Helton's deposition transcript on the ground that Helton was present at the trial and therefore not unavailable to testify as necessary for the

offering of deposition testimony in lieu of live testimony under Rule 1.330(a)(3), Florida Rules of Civil Procedure. The Respondent also objected to the introduction of both Helton and Beno's deposition transcripts as evidence on the grounds that the Department failed to provide reasonable notice of the depositions in less than 24 hours; that the evidence to be presented was redundant; and that the Department had available various residents of Palm Paradise, who were either under subpoena or voluntarily present at the hearing, yet were not called to testify. Respondent's objection was overruled and the deposition transcripts were received into evidence.

The Respondent presented the testimony of the Respondent, Edmund C. Valentine, Warren W. Dill, and Randall L. Mosby. Exhibits 1-15 were offered by the Respondent as evidence in this case. A dispute as to the admissibility of the exhibits arose when Petitioner objected to Respondent's exhibits, alleging that the Respondent failed to provide copies in accordance with the Order of Pre-Hearing Instructions dated June 21, 2002. The Respondent disputed that contention and contended that he had offered opposing counsel the opportunity to view the exhibits upon counsel's arrival in Vero Beach and that when counsel did not reply to the offer but rather mailed copies of the Department's Exhibits, the Respondent immediately sent copies of his exhibits via facsimile to the counsel. To mitigate any

possible prejudice occasioned by reason of the mutual failure of counsel to achieve compliance with the Order of Pre-hearing Instructions, Petitioner's counsel was afforded the opportunity to review the exhibits, conduct discovery, if necessary, and to offer any substantive objections or ask any questions of the Respondent’s witnesses on the second day of trial, one month away. Because at that time, counsel made no objections to the Respondent’s exhibits nor did counsel recall any of the Petitioner’s witnesses for additional questions regarding the exhibits, the Petitioner was deemed to have waived any objections and the Respondent’s Exhibits 1-15 were therefore admitted into evidence.

FINDINGS OF FACT

1. The Department is the state agency responsible for regulating the landlord tenant relationship of mobile home parks pursuant to Chapter 723, also known as the Florida Mobile Home Act, and the administrative rules promulgated thereunder.

2. Palm Paradise is, at all times pertinent to this proceeding, subject to regulation by Petitioner pursuant to Chapter 723.

3. At all times material to this case, Valentine is the owner and operator of Palm Paradise.

4. Palm Paradise is located in Indian River County, Florida, and several agencies of that local government have

regulatory jurisdiction over the mobile home park. The Code Enforcement Board of Indian River County has jurisdiction to enforce regulations and compliance with standards for construction. The Indian River County Fire Rescue has the authority to approve or disapprove the final configurations for emergency vehicle access points. The Indian River County Utilities Department has the authority and responsibility to install water treatment systems throughout the county. Over the relevant time frame, each has exercised regulatory authority over the mobile home park in such a manner as to have necessitated the improvements at issue in this case.

5. Valentine purchased Palm Paradise in 1980. At that time, there were five entrances to the park, two primary entrances along U.S. Highway 1, and three back entrances along Old Dixie Highway. The back entrance on the southwest portion of the park along Old Dixie Highway, which was then and remains now a major thoroughfare, consisted of a narrow path with a deteriorating asphalt surface covering the foundation of the road. This entrance, which connected to the south road and allowed direct access to U.S. 1, was, for the most part, chained off and not assessable to vehicular traffic. From time to time the chains were removed, resulting in complaints from park residents who were victimized by criminals unable to resist the easy access and escape route afforded by U.S. 1.

6. In 1981, a representative from the Indian River County Sheriff's Department conducted a safety seminar for park residents. Although he did not have the authority to compel this outcome, the representative, Deputy McPherson, recommended that the park permanently close the southwest entrance to deter crime by making access slightly more difficult. Valentine complied in good faith with the recommendation and thereafter attempted to keep the southwest entrance closed permanently. Residents were generally supportive of the closing because it did in fact have a deterrent effect on crime.

7. As time went by and Indian River County grew, the park was subjected to more detailed regulation about which Valentine and unit owners had no discretion. For example, in late 1986, Indian River County mandated that the Park tie into the County's waste water system within five years.

8. In furtherance of this improvement, in late 1989 to early 1990, the Indian River County Utilities Department, a branch of the county government, installed sewer lines along Old Dixie Highway. During the installation process, the County Utilities Department ripped through and destroyed the foundation and surface of the park's existing northwest entrance, center entrance, and the closed southwest entrance along Old Dixie Highway. After the sewer lines were laid, the County replaced the foundation to the existing northwest entrance; however, the

County did not replace the foundation or surface of the center entrance or the closed southwest entrance. The center and the southwest entrances were left as chunks of crumpled-up asphalt and dirt covering up the county's sewer lines. The County Utilities Department then placed a cemented check valve and a wooden plank, to mark the presence of the check valve, in the middle of the closed southwest entrance. Palm Paradise was tied into the waste water system in 1992 as mandated by Indian River County.

9. While laying the pipe to prepare for the hook-up to the county's sewer system, Valentine installed a culvert pipe in the area of the former southwest entrance to help relieve the flooding problems which had been exacerbated by all of the above-noted construction. All of the work associated with the sewer lines was accomplished with the oversight and approval of the County Utilities Department.

10. For a time, Palm Paradise was at peace. Then, on February 5, 2001, the Code Enforcement Board of Indian River County issued a Notice to Appear directed to Valentine for an alleged obstruction in the county's right-of-way.

11. A hearing was held on February 26, 2001, and the Board entered an order requiring Valentine to open the southwest entrance.

12. At that time, Palm Paradise, viewed by planning professionals in light of 21st century knowledge, was a potential threat to the safety of its elderly population in that there was insufficient access for modern emergency vehicles. Thus, appropriate Indian River County officials with authority to do so further mandated that the entrance be constructed so as to allow emergency fire and rescue vehicles access to the Palm Paradise from the southwest.

13. This decision came after public hearings which were well-attended by residents of the mobile home park, all of whom understood that it was Valentine's intent to pass-through the costs of any capital improvements which he may be required to make to the extent permitted by law. The county was empowered to impose civil fines of $100.00 per day if Valentine failed to timely comply with county requirements regarding the property.

14. Valentine hired the services of attorney Warren W. Dill and engineer Randall L. Mosby, first to oppose the county’s demands and later to negotiate a less obtrusive and costly alternative to the extremely large “mall type entrance,” as the parties referred to it, originally proposed by the county. The so-called mall type entrance, it was feared, would encourage a large volume of traffic through the mobile home park for both emergency and non-emergency purposes.

15. Valentine, in furtherance of his own interests which coincided in this case with those of the residents, instructed these professionals to oppose the opening of the southwest entrance. Partly the residents remained concerned about security, but they were also aroused by the prospect of having to pay the cost of any improvements which might be mandated by county officials.

16. Ultimately, it became clear that the county would insist upon significant capital improvements to the southwest entrance.

17. In particular, Valentine was required to comply with the county's minimum standards to accommodate the turning radiuses of modern emergency vehicles, in this case 35° for a typical 30 foot fire truck and 45° for the 46 foot ladder truck.

18. Litigation ensued between Valentine and the county over the scale of the required southwest entrance. The parties subsequently reached a compromise resulting in the entrance which gives rise to this case.

19. The new southwest entrance was reasonable under the circumstances. It was constructed to give the appearance of a closed road while being accessible by emergency vehicles only. The entrance first required the laying of a foundation, being that the original limited foundation was destroyed by the county during its sewer installation project and not replaced. The new

larger and improved foundation consisted of coquina rock that was packed down to form a foundation that would withstand the extreme weight of emergency vehicles. The foundation was then sprayed with hydroseed to provide a grass surface for the protection of the foundation from erosion. The grass surface replaced the concrete surface, which was initially required by the County. Flexible delineators were installed across the length of the entrance and cemented in place. The flexible delineators can be driven over by emergency vehicles without any damage to the entrance.

20. There was evidence that some emergency vehicle drivers refuse to drive over the flexible delineators because they fear damage to their vehicles. The evidence established that this fear is unreasonable and Valentine is not responsible for the acts or omissions of county employees.

21. The new southwest entrance is a substantial improvement from the entrance at any time during Palm Paradise's existence. Its usage has been adapted for a completely new purpose, as mandated by county officials acting in accordance with modern safety standards.

22. Palm Paradise and its residents enjoy tangible benefits daily from the newly constructed entrance; this is the very essence of a capital improvement. Under the facts and circumstances of this case, the emergency vehicle entrance is a

capital improvement, which was governmentally mandated, within the meaning of “pass-through charge” as defined in Section 723.003(10).

23. In this case, the Park’s prospectus provided full disclosure to the mobile home residents of their potential obligation to pay for the costs of major repairs and capital improvements in the Park. While the prospectus states that the Owner, in this case Valentine, reserves the right not to pass through to the mobile home owner a lawful pass-through charge, it does not prohibit him from doing so. In any event, the Department has not alleged any procedural defect in the pass through assessment at issue in this case, and the evidence affirmatively establishes that all procedural requirements were in fact fulfilled.

24. The Department presented testimony from several residents who stated that they lived on fixed incomes and regarded the pass-through charge as a financial hardship. Of course, it is never appropriate to charge people monies they cannot lawfully be required to pay, and no evidence is necessary to establish this proposition. The testimony of the resident witnesses was improvidently admitted and may not properly be considered in that it directs itself only to the passions and sympathies of the tribunal, and not to any legal issue over which an administrative law judge has authority.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1).

26. The Department has charged the Respondent with violations of Sections 723.003(10), 723.031(5)(b), and 723.037(1), asserting that the Respondent assessed an improper pass-through charge, which fact must be established by a preponderance of the evidence.

27. First, the Department alleges that the Respondent assessed an improper pass-through charge by violating Section 723.003(10). This section is the statutory definition of "pass-through charge," which states as follows:

> (10) The term "pass-though 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.

28. In Werner v. State, Department of Insurance and Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997), the court vacated the final order, which had adopted the hearing officer's recommended order, in part because the orders erroneously concluded that the appellant had violated a definition of the Florida Statutes. According to the court, "[t]hese provisions

are merely definitional and do not themselves authorize any disciplinary action." Werner, 689 So. 2d at 1214.

29. The lesson of Werner is that definitions simply provide clarification of terms expressed in the subsequent provisions of the statute at hand; one cannot be penalized for "violating" a definition, thus this prong of the administrative charge must fail, even though the charge at issue is, in fact, a lawful pass-through charge in the context of this case.

30. Second, the Department alleges that the Respondent charged an improper pass-through charge in violation of Section 723.031(5)(b), Florida Statutes, which states as follows:

> (5) 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).

31. The Department argued that the improvements to the Park's southwest entrance were not "governmentally mandated capital improvements" as contemplated by the definition of pass-through charge," and therefore, the costs could not be so

charged. The Department did not present any evidence or make any argument that the pass-through charge was not based upon the "necessary and actual direct costs" of the southwest entrance construction. Therefore the sole issue to be determined as to whether there was a violation of Section 723.031(5)(b) turns on whether the construction of the emergency vehicle entrance on the southwest portion of Palm Paradise constituted a "governmentally mandated capital improvement."

32. "One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature." WFTV, Inc. v. Wilken, 675 So. 2d 674, 677 (Fla. 4th DCA 1996) quoting Green v. State, 604 So. 2d 471, 473 (Fla. 1992). Chapter 723 does not provide specific definitions for the terms governmentally mandated or capital improvement.

33. In Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro Beach, 263 So. 2d. 209 (Fla. 1972), the court turned to Black's Law Dictionary, 890 (4th ed. Rev. 1969) for the definition of "improvement."

34. There, the Town of Hillsboro Beach approved the setting aside of funds for the offshore dredging of sand to extend the beach 75 feet eastward as an anti-erosion measure. Hillsboro Island House Condominium Apartments, Inc., 263 So. 2d

at 211. The Supreme Court, relying on Black's, held that the project satisfied the definition of "improvement" in that "[t]he work will go beyond repair, and will extend the beach area an additional 75 feet seaward not only to enhance its utility and beauty, but also to adapt the beach itself as a means of averting erosion damage." Id. at 213.

35. The evidence in this case is more than sufficient to establish that the present southwest entrance to Palm Paradise is a governmentally mandated capital improvement within the meaning of the Mobile Home Act. There is no evidence that Valentine sought to make this improvement; instead it was forced upon him after he had expended considerable effort to resist.

36. Finally, the Department alleges that the Respondent charged an improper pass-through charge by violating Section 723.037(1). This section addresses the notice requirement of the "pass-through charge" and states as follows:

> (1) A park owner shall give written notice to each affected mobile home owner and the board of directors of the homeowners' association, if one has been formed, at least 90 days prior to any increase in lot rental amount or reduction in services or utilities provided by the park owner or change in rules and regulations. The notice shall identify all other affected homeowners, which may be by lot number, name, group, or phase. If the affected homeowners are not identified by name, the park owner shall make the names and addresses available upon request. Rules adopted as a result of restrictions imposed

> by governmental entities and required to protect the public health, safety, and welfare may be enforced prior to the expiration of the 90-day period but are not otherwise exempt from the requirements of this chapter. Pass-through charges must be separately listed as to the amount of the charge, the name of the governmental entity mandating the capital improvement, and the nature or type of the pass-through charge being levied. Notices of increase in the lot rental amount due to a pass-through charge shall state the additional payment and starting and ending dates of each pass-through charge. The homeowners' association shall have no standing to challenge the increase in lot rental amount, reduction in services or utilities, or change of rules and regulations unless a majority of the affected homeowners agree, in writing, to such representation.

37. As noted above, the Department did not contend that there was any deficiency in notice to unit owners, and there is ample evidence that the owners were well aware of every step of the process.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner, Department of Business and Professional Regulation, Division of Florida Land Sales, Mobile Homes, and Condominiums, enter a final order dismissing the Notice to Show Cause filed in this case.

DONE AND ENTERED this 10th day of December, 2002, in Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
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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.