BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Transfer of Facilities and Amendment of Certificate No. 393-W in Columbia County by CONSOLIDATED WATER WORKS, INC.	DOCKET NO. 930971-WU ORDER NO. PSC-94-1357-FOF-WU ISSUED: November 7, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER APPROVING TRANSFER AND AMENDING CERTIFICATE

AND

NOTICE OF PROPOSED AGENCY ACTION ORDER
SETTING RATES AND CHARGES

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that our action setting rates and charges is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

Consolidated Water Works, Inc. (Consolidated or utility) is a Class C water utility providing service to 184 customers in the Azalea Park and Shady Oaks subdivisions in Columbia County. Based on information contained in its 1993 Annual Report, Consolidated reported operating revenues of $31,205 and operating expenses of $29,863, resulting in a net operating income of $1,342.

In March of 1993, Staff received a customer complaint regarding an excessive water bill. During the course of the complaint investigation, Staff learned that Consolidated had recently purchased the facilities of Classic Heritage Homes, Inc. (CHH), a developer-owned system serving the area known as 242 Village. CHH served approximately 30 customers in 242 Village's

development; approximately 25 lots remain undeveloped at this time. CHH did not have a certificate from this Commission for its system serving 242 Village.

Consolidated's purchase of CHH is in violation of Section 367.071(1), Florida Statutes, which requires that all transfers have prior Commission approval. As a result of the unapproved transfer, Consolidated has been operating the acquired system without a certificate, in violation of Section 367.031, Florida Statutes. Staff notified Consolidated that it must file an application for transfer by July 15, 1993. The utility subsequently requested an extension of time to file the application until July 29, 1993. The application, which was ultimately filed on October 4, 1993, contained numerous deficiencies. The utility finally corrected all deficiencies in September, 1994.

Although Consolidated has been a certificated utility since 1983 and should be aware of the applicable statutes and rules of this Commission, by filing the application and correcting the deficiencies, the utility has moved toward compliance. In addition, CHH is quite small, which makes it otherwise unattractive from an acquisition perspective. Therefore, we find it appropriate not to initiate show cause proceedings at this time.

In Exhibit E of the application for transfer, Consolidated stated that no records had been kept by CHH. Staff notified the utility that, in order to establish net book value in this proceeding, the utility would have to perform an original cost study. However, the utility has chosen not to perform an original cost study at this time, but to defer the matter until its next rate case. Therefore, net book value will not be set in this proceeding.

As mentioned previously, in March of 1993, Staff received a customer complaint regarding an excessive water bill. During the investigation into that complaint, as well as investigating complaints from several other customers in the 242 Village subdivision, Staff determined that all of the complaints involved Consolidated's failure to adhere to the requirements of Rule 25-30.335, Florida Administrative Code. The particular portions of Rule 25-30.335, Florida Administrative Code, that were violated were:

> (1) Except as provided in this rule, a utility shall render bills to customers at regular intervals....

(2) If the utility estimates the bill, the utility shall indicate on the bill that the amount owed is an estimated amount.

(4) A utility may not consider a customer delinquent in paying his or her bill until the 21st day after the utility has mailed or presented the bill for payment.

All but one of the complaints were resolved without becoming a docketed matter. The formal, docketed complaint was resolved by Order No. PSC-94-1014-FOF-WU, issued August 23, 1994, in which the Commission granted in part the relief requested by the complainant with regard to the contested bill. In that Order, we expressed concern regarding the utility's provision of billing information to customers, as well as its failure to procedurally adhere to the rule concerning meter testing. Our Staff shall continue to monitor the utility's compliance with the aforementioned rules, and if additional violations occur, we may initiate show cause proceedings at that time.

Agreement for Deed

Pursuant to Rule 25-30.037(2)(q), Florida Administrative Code, an applicant for the transfer of an existing water or wastewater system must provide evidence that the utility owns the land upon which the utility treatment facilities are located, or a copy of an agreement which provides for the continued use of the land, such as a 99-year lease. We may consider a written easement or other cost-effective alternative as evidence of ownership or continued use of the land.

In this docket, Consolidated provided an Agreement for Deed as proof of ownership of the land. The Agreement provides for Consolidated to make monthly payments (beginning April 1993) of $125.00 on the land for up to five years, until the entire purchase price of $7,500.00 is paid. The Agreement further provides that there is no penalty for making pre-payments. When the entire purchase price is paid, CHH agrees to convey legal title by warranty deed to Consolidated. The terms and conditions of the Agreement provide that Consolidated takes immediate possession of the land and liability for taxes on the land. Consolidated is also required to keep the improvements on the land insured for the highest insurable value by a company acceptable to CHH. CHH is the holder and beneficiary of said insurance policy. Finally, Consolidated agreed not to make any improvements on the land that would cause third party liens on the property.

We find that in light of the circumstances of this docket, this Agreement is sufficient to meet the requirements of Rule 25-30.037(2)(q), Florida Administrative Code. In First Federal Sav. & Loan Ass'n v. Fox, 440 So. 2d 652 (Fla. 2d DCA 1983), the Court held that the parties who enter into an Agreement for Deed are in essentially the same position as if the vendor had transferred the legal title and taken back a purchase money mortgage. Id. at 653. The same court also held that under an Agreement for Deed, "the vendor has no right to trespass on the property." Id.

Section 697.01, Florida Statutes, deems certain instruments to be mortgages. An Agreement for Deed is one of those instruments that has been deemed to be a mortgage. Luneke v. Becker, 621 So. 2d 744, 746 (Fla. 2d DCA 1993). Pursuant to Section 697.01, Florida Statutes, Florida is a lien theory state. In a lien theory state, the mortgagor (buyer) may not be ejected from the property. Id. In a lien theory state, the mortgagor retains title to the property and the mortgagee obtains a lien. By statute, the buyer in an Agreement for Deed in Florida is treated as a mortgagor (i.e. titleholder to the property).

Although bare legal title remains in the seller under an Agreement for Deed, equitable title transfers to the buyer, along with possession and the benefits and burdens of ownership of the land. Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114, 118 (Fla. 5th DCA 1982). However, the buyer does not gain legal title to the property until he or she satisfies the terms of the contract. Id. The buyer has possession of the land, subject only to the seller's right to proceed with a foreclosure action upon buyer's own failure to meet the terms of the Agreement. Fox at 653. Case law suggests that an Agreement for Deed provides for the buyer's continued use of the land. Between the buyer and seller, the buyer itself, through not satisfying the terms of the Agreement, is the only party who could cause buyer's loss of the right to possession and control of the land. Therefore, we hereby find Consolidated's Agreement for Deed in this docket as sufficient to meet the requirements of Rule 25-30.037 (2)(q), Florida Administrative Code.

Application

Except as discussed previously, the application is in compliance with Section 367.071, Florida Statutes, and Rule 25-30.037, Florida Administrative Code. The application contained a check in the amount of $150, which was the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. A description of the territory served by the utility is appended to this Order as Attachment A. There are no customer deposits,

guaranteed revenue contracts, developer agreements, customer advances, or leases. Consolidated did not assume any debt of CHH.

Consolidated has shown sufficient technical and financial ability to operate the system. With regard to the financial ability of Consolidated, the application states that its parent company, E & S Development, Inc., has assets in excess of $50,000. We find these assets are sufficient to ensure continued financial stability. With regard to technical ability, we recognize that Consolidated has been a certificated utility since 1983. In addition, the utility's owner, Mr. Jack Espenship, has been in the water treatment business since 1972. Therefore, we find that the requisite technical ability has been demonstrated.

The utility is under a Consent Order with the Department of Environmental Protection (DEP) for failure to adequately test for contaminants, including lead and copper, in each of its subdivisions (Azalea Park, Shady Oaks and 242 Village). The utility was given deadlines of: 1) September 3, 1994, in which to pay a fine of $475; 2) September 30, 1994, in which to perform certain contaminant analyses; and 3) October 4, 1994, in which to submit lead and copper sampling and testing plans for the three subdivisions.

However, as of the October 18, 1994 agenda conference, the utility had not complied with either September, 1994 deadline. In addition, the sampling and testing plans that were due October 4, 1994, were approved for the Azalea Park and Shady Oaks subdivisions only; the plan for the 242 Village subdivision was not approved. The utility has been given until October 31, 1994, in which to submit an approved lead and copper sampling plan for 242 Village. As a result of the utility's noncompliance with the Consent Order, Consolidated now owes an additional $450 in penalties. We shall continue to monitor Consolidated's progress in complying with the Consent Order.

Based on the foregoing, and despite the problems previously discussed, we find that the transfer of the assets from CHH to Consolidated is in the public interest. Certificate No. 393-W shall be amended to incorporate the area previously served by CHH known as 242 Village.

Rates and Charges

Rule 25-9.044(1), Florida Administrative Code, requires the new owner of a utility to adopt and use the rates, classifications and regulations of the former operating company unless authorized to change by this Commission. Consolidated has not requested a

change in the rates for 242 Village, and we see no reason to change the rates at this time. Accordingly, Consolidated shall continue operations for 242 Village under the existing rates until authorized to change by this Commission in a subsequent proceeding.

As mentioned previously, Consolidated stated in its application that CHH kept no records of plant costs, connection charges, or customer deposits. Consolidated has requested approval of the following charges: 1) a customer connection fee of $300, including the cost of meter installation; 2) miscellaneous service charges of $20 for each service; and 3) customer deposits of $17.79.

With regard to the requested customer connection fee, since CHH kept no records, we looked to the corresponding approved charges of Consolidated to determine whether those charges were reasonable to apply to the 242 Village subdivision. Consolidated has an approved meter installation charge of $75 for a 5/8-inch x 3/4-inch meter, and an actual cost installation charge for larger meters.

To approve the utility's requested customer connection fee, including the cost of meter installation, of $300 would be tantamount to establishing a service availability charge. Since there are no plant records to substantiate the requested charge, and since establishing service availability charges is not the purpose of this proceeding, we find that approval of the requested charge would be inappropriate. Therefore, we hereby approve Consolidated's currently approved charge of $75 for the 242 Village subdivision.

With regard to the miscellaneous service charges, Consolidated's requested charges exceed the amounts we typically approve. Therefore, consistent with our practice, we hereby approve the following charges: 1) $15 for initial connections, normal reconnections and violation reconnections; and 2) $10 for premises visits in lieu of disconnection.

The utility has requested customer deposits of $17.79. This amount is equal to the current monthly charge for the 242 Village subdivision, and falls within the guidelines set forth in Rule 25-30.311, Florida Administrative Code. Therefore, we hereby approve Consolidated's requested customer deposits of $17.79.

In addition, the utility may choose to require such deposits of existing, as well as new, customers. However, if the utility elects to require deposits of existing customers, the requirement(s) must be implemented in a nondiscriminatory manner.

That is, there must be specific criteria upon which a deposit of existing customers is collected. Examples of nondiscriminatory requirements include requiring a deposit from: 1) all existing customers, regardless of payment history; or 2) all customers who were delinquent in their bill payments for a given number of consecutive months. Finally, where a deposit has been previously waived or returned, as in the case of existing customers, the utility must provide reasonable written notice of not less than 30 days to those existing customers. This notice must be made separate and apart from any other bill.

The utility has filed a tariff reflecting the transfer of ownership. The utility must submit revised tariff sheets that are consistent with our decision discussed in the body of this Order. Once this has been accomplished, we shall approve the tariff filing effective for services provided or connections made after the stamped approval date.

If no timely protests are filed to the proposed agency action portion of this Order, no further action shall be required and the docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the transfer of the assets from Classic Heritage Homes, Inc., Route 2, Box 673, Newberry, Florida 32669, to Consolidated Water Works, Inc., 2915 East Baya Avenue, Lake City, Florida 32055, is hereby approved. It is further

ORDERED that Certificate No. 393-W, held by Consolidated Water Works, Inc., is hereby amended to reflect the territory which is known as 242 Village and described in Attachment A of this Order which, by reference, is incorporated herein. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that Consolidated Water Works, Inc., shall continue to collect the existing rates charged by Classic Heritage Homes, Inc., until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that Consolidated Water Works, Inc., shall collect the new charges approved in this Order until authorized to change by this Commission in a subsequent proceeding. It is further

ORDERED that Consolidated Water Works, Inc., shall submit to this Commission revised tariff sheets that are consistent with the Commission's decision in this Order. The tariff shall be effective for service rendered or connections made on or after the stamped approval date on the revised tariff sheets. It is further

ORDERED that the rates and charges provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 7th day of November, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: _____
Chief, Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action regarding the rates and charges is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at her office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on November 28, 1994. a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in this matter may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida

Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT A

CONSOLIDATED WATER WORKS, INC.

TERRITORY DESCRIPTION

Azalea Park and Shady Oaks

Township 4 South, Range 16 East --

Section 20: That part of the South 1/5 of said Section 20 lying East of Birley Road and Northwest of State Road 247.

Township 4 South, Range 17 East --

Section 19: The West 2,000 feet of the East 3,150 feet of the South 1,500 feet of the North 2,500 feet EXCEPT the West 597 feet of the North 400 feet thereof.

242 Village

Township 4 South, Range 17 East --

Section 21: The SW 1/4 of the SW 1/4 of the section.