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November 21, 2018

Via E-Mail

Keith Hetrick
General Counsel
The Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: Docket 20180142-WS - Initiation of show cause proceedings against Palm Tree Acres Mobile Home Park, in Pasco County, for noncompliance with Section 367.031, F.S., and Rule 25-30.033, F.A.C.

Dear Mr. Hetrick:

Our law firm represents the owners and operators of the Palm Tree Acres Mobile Home Park, a small mobile park and a mobile home subdivision in Pasco County, Florida (the "Park") consisting of approximately 244 tenants, 222 of which rent their mobile home lots (the "Non-Lot Owner Tenants") and 22 own their lots but rent access to the Park's facilities, including its water and wastewater facilities located on the Park's premises (the "Lot Owner Tenants"). On November 12, 2018 the attorney for 19 of the Lot Owner Tenants provided you with an Order Granting in Part and Denying in Part, Plaintiff's Motion for Summary Judgment as to Count I ("Order on Plaintiff's Summary Judgment Motion") issued by the circuit court in Pasco County on October 15, 2018, wherein the court confirmed that whether the lot owners are "tenants" or whether the Park is a "landlord" under section 367.022(5), Florida Statutes are issues "exclusively within the jurisdiction of the Public Service Commission." However, for some reason the attorney failed to apprise you of other parts of the order wherein the court found (i) the Park to be a "mobile home park" and a "mobile home subdivision", and (ii) there is a "tenancy" between the Park, as a mobile home subdivision, and the Lot Owner Tenants. We respectfully believe those findings are informative in addressing the fundamental issue in this docket, namely should the Commission exercise its regulatory jurisdiction over the Park's provision of water and wastewater to tenants of the Park that own their own lots. Even more perplexing, the attorney for the Lot Owner Tenants failed to apprise you that on October 15, 2018, the same circuit court issued a separate Order Granting the Defendant's Motion for Partial Summary Judgment ("Order on the Park's Summary Judgement Motion) (attached as Exhibit "A") finding that the Park has a constitutional right to discontinue providing water and sewer to the Lot Owner Tenants.

Because this matter has been pending for several months now, and as your staff continues to develop its recommendation, we believe it important to recap the Park's positions in this docket and fully apprise your staff on how the referenced orders relate to the Park's positions.

The Park's Positions

The Park's fundamental positions in the docket are detailed in my letters to staff dated April 9 and 30, 2018, and Mr. Bobo's letter to staff dated June 6, 2018 (attached as Composite Exhibit "B"). Those positions can be briefly summarized as follows. Recognizing that utility regulation can be extremely costly for small water and wastewater providers and their end users[1], the Park's owners have purposefully structured their business model to ensure that the Park is not a utility. The Park owners did this by bundling access to water and wastewater, garbage collection, fitness center, community center and other common area facilities, as part of the tenants' rent with no specific compensation paid for the provision of water and wastewater services. Consequently, the Park owners have operated the Park for over thirty years with the understanding that the Park is not a utility by virtue of the "landlord-tenant" exemption in section 367.022(5), Florida Statutes, which provides "[l]andlords providing service to their tenants without specific compensation for the service" are not subject to regulation by the Commission as "utility".

A few years ago, a small group of disgruntled Lot Owner Tenants approached the Park and requested it unbundle the rent and provide them with water and wastewater service on a stand-alone basis. When the Park explained that this would cause it to lose its "landlord-tenant" exemption and become a regulated utility, the disgruntled Lot Owner Tenants began an orchestrated effort to disqualify the Park from using the "landlord-tenant" exemption. They did so primarily by arguing they are not "tenants" because they own the lots upon which their mobile homes are situated.

The Park has explained while the term "tenant" is not defined in chapter 367, the Park is a mobile home subdivision under chapter 723, Florida Statutes, and as such there is a tenancy relationship with the lot owners who rent access to common elements under sections 723.002(2) and 723.058, Florida Statutes. The Park also has advised disgruntled Lot Owner Tenants that should the Commission find the Park's status as a non-utility is jeopardized by it continuing to provide them water and wastewater, it will no longer do so.

In response, the disgruntled Lot Owner Tenants filed a lawsuit against the Park and its owners in the Circuit Court of Pasco County. The case is styled, *Nelson P. Schwob, et al v. James*

[1] To further inform the Commission, the Park has commissioned an independent study which confirms that it would be extremely costly if the Park were to become a utility in order to serve the Lot Owner Tenants. The Park will be prepared to present the study to the Commission at its agenda conference on December 11, 2018 to apprise the Commission, staff and all of the parties of the significant costs associated with the Park becoming a utility.

C. Goss et al, Case no. 2017-CA-1696-ES, Division B ("*Schwob*"). Two issues have been prominent throughout the litigation:

1. The Lot Owner Tenants have consistently argued that Chapter 723, Florida Statutes, does not apply to them because they own their lots ; and,

2. The Park's insistence that it has a deeply rooted constitutional right to refuse to provide water or sewer (or any services) to neighboring landowners.

As explained below, the court decided these issues in favor of the Park on October 15, 2018, in two separate orders on competing summary judgement motions filed by the disgruntled Lot Owner Tenants and the Park. Both orders should be informative to the Commission as it addresses whether it should exercise its regulatory jurisdiction over the Park's provision of water and sewer to tenants that own their own lots.

Order Granting The Park's Summary Judgment Motion

As mentioned , a material constitutional issue in *Schwob* has been whether the disgruntled Lot Owner Tenants can compel the Park to offer them access to and use of the Park's water and wastewater facilities. The Park owners filed a motion for summary judgment asserting that the demands of the disgruntled tenants destroy the Park owners' constitutionally protected right to use or not use their private property, and to exclude others from such private property. Those constitutional claims were filed well before the Commission staff issued its Notice of Apparent Violation. [2]

From the outset, the Park has been clear if the Commission determines that the Park's non-utility status is jeopardized by it continuing to provide Lot Owner Tenants with access to the Park's water and wastewater facilities, it will no longer do so. On October 15, the circuit court expressly ruled that the Park has a constitutional right to discontinue providing water and wastewater services to the Lot Owner Tenants:

> Therefore, it is hereby **ORDERED, ADJUDGED, and DECLARED** that Defendant Palm Tree Acres Mobile Home Park has a right under Article I, § 3, Fla. Const. and Amend. V, U.S. Const. to refuse to use its property to benefit others.

[2] While the constitutional issue in *Schwob* was pending, the Park has agreed to continue to provide the disgruntled tenants with use of the Park's water and wastewater facilities, and not to charge for them for that use. Under Section 367.021(12), Florida Statutes, a "utility" subject to the Commission's regulation "means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." (Emphasis added.) Thus, setting aside for a moment whether the Park qualifies for the exemption under Section 367.022(5), the Park believes it is not a utility subject to the Commission's jurisdiction so long as it does not charge the disgruntled tenants for the use of the Park's water and wastewater facilities.

> This includes the right to discontinue providing water and sewer service to other property owners. Whether it chooses to exercise that right, is for [the Park] to decide.

Order on Park's Summary Judgement Motion at 3. As explained below, the Park continues to believe that the tenancy existing between it, as a mobile home subdivision, and the Lot Owner Tenants should qualify the Park for the landlord-tenant exemption under section 367.022(5), Florida Statutes. However, if the Commission determines that the lot owners are not tenants for purposes of section 367.022(5), then the Park will exercise its constitutional right to discontinue providing water and wastewater to those lot owners. In that event, since the Park is not operating under any regulatory compact with the State and has not been awarded any monopoly service area, there is nothing to prohibit the disgruntled Lot Owner Tenants from obtaining water and wastewater from other sources.

Order on Plaintiff's Summary Judgment Motion

The owners of the Park have repeatedly reminded the disgruntled Lot Owner Tenants that they <u>are</u> tenants because the Park is both a "mobile home park" and a "mobile home subdivision", and section 723.058 expressly recognizes that a "tenancy" can exist between a mobile home subdivision and an owner of a lot in a mobile home subdivision. In his email of April 30, 2018, the attorney for the Lot Owner Tenants flatly rejected that the Park is a "mobile home subdivision" stating in pertinent part:

> The Park is a mobile home **park**, not a mobile home **subdivision**. . . . The entire argument in Mr. May's most recent letter is premised on the claim that our clients own lots in a mobile home *subdivision*, which is clearly not the case. . . . Because Palm Tree Acres is a mobile home *park* and not a mobile home *subdivision*, none of the arguments set out in this letter have merit.

(Emphasis in original.) The parties' disagreement over whether the Park is a "mobile home subdivision" has now been settled in favor of the Park. The court's Order on Plaintiff's Summary Judgment Motion expressly found that "the Park is a mobile home subdivision" and that:

> those portions of Chapter 723, Florida Statutes, that relate to mobile home subdivisions apply to the relationship between the Plaintiffs [lot owners] and Defendant, Palm Tree Acres Mobile Home Park. This includes §723.035, §723.037, §723.038, §723.054, §723.055, §723.056, §723.058, and §723.068 by operation of §723.002(2). It also includes §723.058 and §723.074. **To the extent the terms "tenancy," "lot rental amount", and "maintenance fee" are used in these statutes, those terms apply to the Plaintiffs [the lot owners] and the Defendant Palm Tree Acres Mobile Home Park.** The application of these terms to the Plaintiffs [lot owners] and Defendant Palm Trees Acres Mobile Home Park under Chapter 367, Florida Statutes, is exclusively within the jurisdiction of the Public Service Commission.

Order on Plaintiff's Summary Judgement Motion at 4. (Emphasis added.)

Although the Court made no finding whether the lot owners are "tenants" for purposes of section 367.022(5), and reserved that determination to the Commission, the order should be informative to the Commission as the court did find that a "tenancy" exists between the Lot Owner Tenants and the Park. Section 367.022(5) specifies that the Commission has no jurisdiction when a landlord provides water or wastewater service to tenants without specific compensation. While the Legislature has not defined what constitutes a "landlord" or a "tenant" for purposes of the landlord-tenant exemption, it likewise has given no indication that a tenancy under Chapter 723 would not qualify for the exemption. At minimum there is a reasonable doubt whether a tenancy under Chapter 723 would qualify for the exemption, which in turn should cause the Commission not to regulate the Park as a utility. *Lee Cnty. Elec. Co-op., Inc. v. Jacobs*, 820 So. 2d 297, 300 (Fla. 2002) ("Any reasonable doubt regarding the PSC's regulatory powers compels the PSC to resolve that doubt against the exercise of jurisdiction.")

Furthermore, while the Commission has the right to construe chapter 367, words in a statute are to be given their plain and ordinary meaning. As the Supreme Court held in *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992):

> 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. *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources,* 453 So. 2d 1351 (Fla. 1984). If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary. *Gardner v. Johnson,* 451 So. 2d 477 (1984). [Emphasis Supplied]

Black's Law Dictionary (5th ed. 1979) broadly defines "landlord" as:

> He of whom lands or tenements are holden. He who, being the owner of an estate of land, or a rental property, has leased it to another person, called the 'tenant'. Also, called 'lessor.'

(Emphasis added.) The Park's owners hold common areas, recreational facilities, water and wastewater facilities, roads and other facilities that in turn are leased to the Lot Owner Tenants for a monthly rent. Under the above dictionary definition, there should be no doubt that owners of the Park are "landlords" of the Lot Owner Tenants of that "rental property".

* * *

We trust that this puts the two recent orders from the circuit court in context. Should you or your staff have any questions please do not hesitate to contact me. Thank you and we look forward to appearing before the Commission on December 11.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May, Jr.

DBM:kjg
Enclosures

cc: Jennifer Crawford (w/Encl.)
Johana Nieves (w/Encl.)
Margo Duval (w/Encl.)
Richard Harrison (w/Encl.)
Patricia Christensen (w/Encl.)
Commission Clerk (w/Encl.)
Trent Goss (w/Encl.)
Allen Bobo (w/Encl.)

EXHIBIT A

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

2017 – CA – 1696

NELSON P. SCHWOB, et al.,
Plaintiffs,

V.

JAMES C. GOSS; EDWARD HEVERAN; MARGARET E. HEVERAN; and PALM TREE ACRES MOBILE HOME PARK,
Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This Cause having come before the Court on Defendant Motion for Partial Summary Judgment, and the Court having considered the motion, the response by the Plaintiffs, and the summary judgment evidence, this Court enters this Order and Judgment as to Count I of Defendants' Amended Counterclaim:

FINDINGS OF FACT

The Court finds that there is no genuine issue of material fact to the following:

1. The Plaintiffs are fee simple owners of lots within the Palm Tree Acres Mobile Home Park. They also own the mobile home that exists on their respective lots.
2. The Defendant Palm Tree Acres Mobile Home Park (hereinafter "Palm Tree Acres") owns in fee simple 183 of the 244 lots. These lots are leased to other residents.
3. Palm Tree Acres offers certain amenities to include water and sewer service and access to other recreational areas. These amenities are offered in a single package for a single fee; there is no *a la carte* pricing for any particular amenity.
4. When the Plaintiffs purchased their lots from the developer, there was a deed restriction that required Palm Tree Acres to provide water and sewer service to the Plaintiffs. Subsequent to the Plaintiffs purchasing their lots, Palm Tree Acres purchased the remaining lots from the developer. A predecessor court has adjudicated that these deed restrictions

expired by operation of the Marketable Record Title Act and are no longer in force or effect.

5. There is presently no other written contractual agreement between the Plaintiffs and Palm Tree Acres to provide any amenities, and more specifically, there is no written contractual agreement for Palm Tree Acres to provide water and sewer service to the Plaintiffs. However, for many years, the Plaintiffs had been paying the fee that Palm Tree Acres charged to its other residents for water, sewer, and recreational amenities.
6. The water that is provided to all of the residents of Palm Tree Acres, including the Plaintiffs, is pumped from a well that exists on property owned in fee simple by Palm Tree Acres.

The Court finds that the Plaintiffs and the Defendant Palm Trees Acres Mobile Home Park are in doubt as to the affect of Chapter 367, Fla. Stat.; Article I, § 3, Fla. Const; and Amend. V, U.S. Const. to their rights, obligations, status, or other equitable or legal relations as it pertains the Defendant's actions in discontinuing water and sewer service to the Plaintiffs, and that declaratory judgment is appropriate.

ANALYSIS AND CONCLUSIONS OF LAW

Palm Tree Acres asserts that it has a constitutional right to refuse to use its property for the enjoyment of others, and that, if it chooses to do so, it can discontinue water and sewer service to the Plaintiffs. The Plaintiffs argue that in providing water and sewer service, Palm Tree Acres is a public utility, and §367.165(1), Fla. Stat. prevents a public utility from discontinuing service until certain requirements are satisfied.

This Court previously stated in the August 21, 2017 Order Granting in Part, Denying in Part Defendants' Motion to Dismiss Count 3, etc., that it has no jurisdiction regarding the enforcement of Chapter 367, Florida Statutes. This includes the determination of whether an entity is or is not a utility. See Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990); Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978). Assuming, though, that the Court had the jurisdiction to make the threshold finding of whether Palm Tree Acres were a utility and could, therefore, prohibit it from discontinuing service until compliance had be made with §367.165(1), Fla. Stat., this Court is clearly without jurisdiction to

make the evidentiary finding of whether Palm Tree Acres had, in fact, complied. For the same reasons that this Court determined it lacked jurisdiction to regulate the rates charged to provide water and sewer service as requested by the Plaintiffs in Count 3 of its Third Amended Complaint, the Court also has no jurisdiction to regulate the manner in which a utility terminates operations. Therefore, the Court finds that §367.165(1) does not authorize the Court to prohibit termination of water or sewer service, and that authority lies exclusively with the Public Service Commission.

However, the Court does have jurisdiction to make a determination as to constitutional rights. Under this narrow issue, Palm Tree Acres prevails. Property rights are one the most basic rights protected by both the Florida and United States Constitutions. These rights include the ability to use, and not to use, the property as the owner of the property sees fit. The government may impose regulations on how a property is used, and neighboring property owners can seek to enjoin their neighbors from offensive or nuisance use of property. However, the Court is unaware of, and the Plaintiffs have not provided, any authority that the Court can compel a property owner to use its property in a manner solely for the benefit of a neighboring property owner.

Therefore, it is hereby **ORDERED, ADJUDGED, and DECLARED** that the Defendant Palm Tree Acres Mobile Home Park has a right under the Article I, § 3, Fla. Const. and Amend. V, U.S. Const. to refuse to use its property for the benefit of others. This right includes the right to discontinue providing water and sewer service to other property owners. Whether it chooses to exercise that right, is for the Defendant to decide.

DONE and ORDERED in Dade City, Pasco County, Florida this 15 October, 2018.

Electronically Conformed 10/15/2018

Hon. Gregory G. Groger
Circuit Court Judge

CC:
Richard Harrison
J. Allen Bobo
Jody B. Gabel

COMPOSITE EXHIBIT B

Holland & Knight

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April 9, 2018

Via E-Mail: mduval@psc.state.fl.us

Margo A. DuVal
Senior Attorney
Florida Public Service Commission
2540 Shumard Oak Bouleard
Tallahassee, FL 32399-0850

Re: Response to Notice of Apparent Violation

Dear Ms. Duval:

Our law firm represents the owners and operators of the Palm Tree Acres Mobile Home Park, a mobile park and a mobile home subdivision in Pasco County, Florida (the "Park"). We are in receipt of the Notice of Apparent Violation dated March 8, 2018, in which you allege that the Park "appears" to be operating as a utility without a certificate of authority in violation of Section 367.031, Florida Statutes, and Florida Administrative Code Rule 25-30.033. More specifically, you suggest that the Park is "not exempt from the Commission's jurisdiction under Section 367.022(5), F.S., as [the Park] appears to be selling water and/or wastewater service to non-tenants for compensation." The Park respectfully declines your invitation to complete an application for a certificate of authority because, as explained below, it does not sell water and/or wastewater services to non-tenants for compensation and is not a utility.

The Park's owners have operated the Park for more than three decades. The Park is small and has only 244 tenants. The owners have recognized that utility regulation carries with it layers of regulatory fees and expenses, along with rigorous working capital, depreciation, and accounting requirements, that can be extremely costly for small water and wastewater providers and their end users. Thus, in order to control costs the owners of the Park have purposefully structured their business model and the way they operate the Park's premises to ensure that the Park is <u>not</u> a public utility regulated by the Commission. Under Section 367.022(5), Florida Statutes, "[l]andlords providing service to their tenants without specific compensation for the service" are not utilities regulated by the Commission and are not subject to Chapter 367, Florida Statutes. The Park does <u>not</u> provide water and wastewater services to any non-tenants. Rather, the Park only provides its

tenants with access to and use of the Park's water and wastewater facilities, garbage collection system, and other common area facilities, including a fitness center and community center. Access to and use of these facilities are all bundled into the tenants' rent; there is no specific compensation paid for the provision of water and wastewater services. Consequently, the owners have operated the Park for over thirty years with the understanding that the Park is not a public utility under Section 367.022(5). The exemption under Section 367.022(5) is self-executing and there is no requirement that the Park's owners apply for the exemption.

Any question concerning the application of the exemption to the Park has only arisen as the result of a small group of disgruntled tenants at the Park. As background, the Park has two types of tenants: (i) those that rent the lot on which their mobile homes are located and rent access to and use of other facilities on the Park's premise (the "Non-landowner Tenants"); and (ii) those that own the lot upon which their mobile homes are located and rent access to and use of other facilities on the Park's premise (the "Landowner Tenants"). Non-landowner Tenants pay the owner/operator of the Park a fixed monthly rent which covers the value of the lot as well as access to and use of other facilities on the Park premises, including the Park's water and wastewater facilities, garbage collection system, and other common area facilities including unrestricted access to the Park's community center, fitness center, and swimming pool. Landowner Tenants meanwhile pay a lower fixed monthly rent that covers the value of the access to and use of other facilities on the Park's premises, including water and wastewater facilities, garbage collection system, and other common area facilities including unrestricted access to the Park's community center, fitness center and swimming pool. The rent paid by all tenants of the Park is fixed and does not fluctuate based on the amount of water or wastewater the tenant uses.

A few years ago, a small group of disgruntled Landowner Tenants began to attempt to prevent the Park from qualifying for the landlord tenant exemption in section 367.022(5), and to force the Park to become a regulated utility despite the Park's operation as a non-utility for over three decades. They did so by disavowing their tenancies, primarily arguing that they are not "tenants" because they own the lots upon which their mobile homes are situated. The owners of the Park have repeatedly reminded these disgruntled tenants that they <u>are</u> tenants since they rent access to various parts of the Park's premises including its water and wastewater facilities, garbage collection system, and other common area facilities such as the fitness center, community center and swimming pool, all of which is bundled into their fixed monthly rent.[1]

The owners of the Park have explained the Park has no intention of becoming a public utility. They also have explained that if the Park's status as a non-utility is jeopardized by it continuing to provide these disgruntled tenants with access to and use of the Park's water and wastewater facilities and other common area facilities, it will no longer do so. At the same time, the Park has made it clear that it would not block the disgruntled tenants from obtaining water and

[1] The term "tenant" is not defined in Chapter 367, Florida Statutes. However, the legislature recognizes that a mobile home lot owner can be a tenant under the Mobile Home Act, Chapter 723, Florida Statutes. See, e.g., §§ 723.002(2) and 723.058(3), Fla. Stat. In addition, the term "tenant" is broadly defined in section 715.102(5), Florida Statutes to include "any paying guest, lessee, or sublessee of any premises for rent, whether a dwelling unit or not."

wastewater from other sources. Indeed, the Park is not operating under any regulatory compact with the State. It has not been given any exclusive franchise service area and has no corresponding obligation to serve. Thus, there is nothing to prohibit the disgruntled tenants from obtaining water and wastewater from other sources.

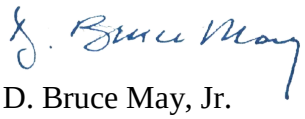
Nonetheless, these disgruntled Landowner Tenants proceeded to initiate independent litigation against the Park and its owners in the Circuit Court of Pasco County. The case is styled, *Nelson P. Schwob, et al v. James C. Goss et al*, Case no. 2017-CA-1696-ES, Division B ("*Schwob*"). A material constitutional issue in *Schwob* is whether the disgruntled Landowner Tenants can compel the Park owners to offer them access to and use of the Park's water and wastewater facilities. No authority allows the disgruntled Landowner Tenants to compel the Park owners to provide such access and use. The Park owners have alleged that they cannot be forced to provide a neighbor with access to and use of their private water and wastewater property when the neighbor has no ownership rights in that private property. In fact, the demands of the disgruntled tenants destroy the Park owners' constitutionally protected right to use or not use their private property, and to exclude others from such private property. The Park owners are entitled to the full bundle of ownership rights constitutionally guaranteed to all owners of real property by Article I, Section 2 of the Florida Constitution. Any infringement on the Park owners' full and free use of their privately-owned property is a direct limitation on, and diminution in value of, the property. Consequently, any court order forcing or directing the Park owners to allow the plaintiffs in *Schwob* to access and use the Park's private water and wastewater property would violate the Park owners' basic constitutional rights. Those constitutional claims were filed well before the Commission staff issued its Notice of Apparent Violation and remain pending before the circuit court. Only the circuit court can adjudicate this pending constitutional issue.

Importantly, while that circuit court litigation is pending, the Park has agreed to continue to provide the disgruntled tenants with use of the Park's water and wastewater facilities, and <u>not</u> to charge for them for that use. Indeed, the disgruntled tenants are not paying for the use of the Park's water and wastewater facilities. Under Section 367.021(12), Florida Statutes, a "utility" subject to the Commission's regulation "means a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public <u>for compensation</u>." (Emphasis added.) Thus, setting aside for a moment whether the Park qualifies for the exemption under Section 367.022(5), the Park is not a utility subject to the Commission's jurisdiction so long as it does not charge the disgruntled tenants for the use of the Park's water and wastewater facilities.

Until the circuit court rules on the Park owners' pending constitutional claims concerning whether they may be compelled to provide a neighbor with access to their water and wastewater property, the Commission should refrain from further action. It would be counterproductive and inefficient to proceed with a show cause proceeding at the Commission when this fundamental constitutional issue is pending before the circuit court, and where the Park is not charging the disgruntled tenants for use of the Park's water and wastewater facilities.

Sincerely,

HOLLAND & KNIGHT LLP



D. Bruce May, Jr.

DBM:kjg

cc: Office of Public Counsel
Richard Harrison, Esq.
Keith Hetrick, Esq.
Allen Bobo, Esq.

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April 30, 2018

Via E-Mail: mduval@psc.state.fl.us

Margo A. DuVal
Senior Attorney
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Supplemental Response to Notice of Apparent Violation

Dear Ms. Duval:

This letter supplements my letter to you dated April 9, 2018, which responded to your Notice of Apparent Violation. The reason for this supplement is to alert staff that moving forward with a show cause proceeding against Palm Tree Acres Mobile Home Park ("Palm Tree") carries unintended consequences and industry-wide policy implications.

Your Notice of Apparent Violation appears to assume that the landlord/tenant exemption in section 367.022(5), Florida Statutes, only applies where the supplier of water or wastewater meets the definition of "landlord" in section 83.43(3), Florida Statutes, and the end user meets the definition of "tenant" in section 83.43(4), Florida Statutes. But the Legislature did not reference those definitions in section 83.43 when it established the landlord/tenant exemption, although it certainly knew how to do so.[1] If you are intent on limiting the landlord/tenant exemption to landlords and tenants as defined in Chapter 83, there are many mobile home parks around the state of Florida that would no longer qualify for the exemption and would suddenly become utilities regulated by the Florida Public Service Commission. We respectfully submit that was never the intention of the Legislature.

Chapter 83 governs landlord/tenant relationships in which the landlord owns or leases the "dwelling unit" that is being rented to the tenant. A "landlord" is defined in section 83.43(3), Florida Statutes, as "the owner or lessor of a dwelling unit." A "tenant" is

[1] *See, e.g.*, § 553.895(1), Fla. Stat. (Legislature specifically referenced the definitions in Section 83.43 for purposes of imposing fire safety requirements).

defined in section 83.43(4), Florida Statutes, as "any person entitled to occupy a dwelling unit under a rental agreement."

A "dwelling unit" is defined in Section 83.43(2) as:

> (a) A structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household.
>
> (b) A mobile home rented by a tenant.
>
> (c) A structure or part of a structure that is furnished, with or without rent, as an incident of employment for use as a home, residence, or sleeping place by one or more persons.

Thus, a "dwelling unit" is defined to mean a mobile home being rented or some other "structure or part of a structure" that is rented. A mobile home lot is not a "dwelling unit" under Chapter 83, Florida Statutes. Section 83.43(5), which defines "premises," clearly differentiates a "dwelling unit" from a "mobile home lot." *See id.* ("'Premises' means a dwelling unit and the structure of which it is a part and a mobile home lot and the appurtenant facilities and grounds, areas, facilities, and property held out for the use of tenants generally.").

Throughout Florida there are many mobile home park owners[2] and mobile home subdivision developers,[3] like Palm Tree, that do not rent "dwelling units" as defined in section 83.43(2), Florida Statutes. Instead, they rent either (a) mobile home lots for the placement of a mobile home, in the case of a mobile home park owner, or (b) common areas, recreational facilities, roads, and other amenities, in the case of mobile home subdivision developers. While those mobile home park owners and mobile home subdivision developers may not fall under the definition of "landlord" in section 83.43(3), they are considered landlords for the purposes of the Florida Mobile Home Act, Chapter 723, Florida Statutes (the "Mobile Home Act").[4]

Tenancies in mobile home parks and mobile home subdivisions like Palm Tree are governed by provisions of the Mobile Home Act rather than those of Chapter 83. For example, Section 723.004(3), Florida Statutes, provides:

> 723.004 Legislative intent; preemption of subject matter.—

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[2] § 723.003(13), Fla. Stat. (defining a "mobile home park owner" as "an owner or operator of a mobile home park"); *see also* § 723.003(12), Fla. Stat. (defining "mobile home park" as "a use of land in which lots or spaces are offered for rent or lease for the placement of mobile homes and in which the primary use of the park is residential").

[3] *See* § 723.003(14), Fla. Stat. (defining a "mobile home subdivision" as "a subdivision of mobile homes where individual lots are owned by owners and where a portion of the subdivision or the amenities exclusively serving the subdivision are retained by the subdivision developer").

[4] The courts have recognized that the unique landlord/tenant relationship under Chapter 723, Florida Statutes, is "distinct from a traditional landlord/tenant relationship." *Fed'n of Mobile Home Owners v. Fla. Manufactured Hous. Ass'n.*, 683 So. 2d 586, 588 (Fla. 1st DCA 1996) (citing *Stuart v. Green*, 300 So. 2d 889, 892 (Fla. 1974)).

> . . . .
>
> (3) It is expressly declared by the Legislature that the relationship between landlord and tenant as treated by or falling within the purview of this chapter is a matter reserved to the state and that units of local government are lacking in jurisdiction and authority in regard thereto. All local statutes and ordinances in conflict herewith are expressly repealed.

Mobile home park landlords and mobile home subdivision landlords look to Chapter 723—not Chapter 83—for their rights and duties. For example, section 723.062, Florida Statutes, allows the park owner as "landlord or the landlord's agent" to remove personal property or a mobile home following an eviction. Another example is found in section 723.085(2), Florida Statutes, which requires a park owner to "comply with the provisions of s. 723.061 in determining whether the homeowner may qualify as a tenant."

Likewise, the Mobile Home Act expressly provides that mobile home subdivision developers have a landlord/tenant relationship with the lot owners who rent access to common elements. Section 723.002(2), Florida Statutes, specifies that the Mobile Home Act applies to mobile home subdivisions like Palm Tree and owners of lots in mobile home subdivisions:

> 723.002 Application of chapter.—
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> . . . .
>
> (2) The provisions of ss. 723.035, 723.037, 723.038, 723.054, 723.055, 723.056, 723.058, and 723.068 are applicable to mobile home subdivision developers and the owners of lots in mobile home subdivisions.

Section 723.058, Florida Statutes, expressly recognizes that a "tenancy" can exist between a "mobile home subdivision developer" and the "owner of a lot in a mobile home subdivision." Moreover, section 723.0751 recognizes that a lot owner tenant can rent access to "common areas, recreational facilities, roads, and other amenities . . . in a mobile home park." Those lot owner tenants are also afforded protections under Chapter 723. They are subject to the rules that govern tenants in section 723.035, Florida Statutes. They are expected to pay rent and are entitled to receive 90-day notice of any rent increases under section 723.037, Florida Statutes. They can use the alternative dispute resolution procedures of section 723.038, Florida Statutes, to object to rent increases, reductions in service, and changes in rules. Section 723.0751(3) even allows lot owner tenants who rent access to common areas, recreational facilities, roads, and other amenities, and share those amenities with tenants that rent a mobile home lot, to be represented by the mobile home owners' association.

There can be no doubt that the owners of Palm Tree, as park owners and mobile home subdivision developers, are landlords, and mobile home lot owners are tenants under Chapter 723.

However, some have suggested that the definitions of landlord and tenant under Chapter 83 must be used by the Commission because of a prior decision in Docket No. 910385-SU, Order No. 24806 (July 11, 1991) (*Oak Leafe*). That prior ruling, which was rendered five years before the Florida Legislature eliminated any requirement that a landlord apply for the exemption,[5] should not bind the Commission here. *Oak Leafe* did not involve tenancies under Chapter 723, nor did it involve a mobile home park or a mobile home park subdivision. Instead, the subdivision in *Oak Leafe* was a traditional single family home subdivision subject to Chapter 83, and the Commission had no reason in that docket to even address the tenancies that are governed by Chapter 723.

If the Commission ignores the unique landlord/tenant relationships established under Chapter 723, and relies exclusively on the definitions of landlord and tenant as set forth in Chapter 83, Florida Statutes, it would exclude many mobile home park owners and subdivision developers from the benefits of section 367.022(5), Florida Statutes. Nowhere in Chapter 367 does the legislature express the intent to so restrict the exemption.

For the foregoing reasons, and for the reasons explained in my earlier letter of April 9, we would respectfully ask that Commission staff not move forward with a show cause action against Palm Tree.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May, Jr.

DBM:kjg

cc: Office of Public Counsel
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[5] *See* Ch. 96-407, s. 3, Laws of Fla.

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June 6, 2018

Margo A. DuVal
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Re: Palm Tree Acres Mobile Home Park Notice of Apparent Violation

Dear Ms. Duval:

Please allow us to respond to your letter of May 21, 2018, and provide the clarifications you requested. A brief recital of the history, our disagreement on the Section 367.022(5) exemption and an explanation of the pending litigation is necessary to put our response in perspective.

I. **The History**.

Ed Heveran and James Goss ("Owners") purchased Palm Tree in 1984. At that time, the former developer had sold some of the individual mobile home lots (the "Lots") to purchasers in fee simple (the purchasers shall be referred to as the "Lot Owners"). Owners intended to continue operating the remaining lots at Palm Tree as a rental mobile home park.

At the time Owners purchased Palm Tree, Chapter 723, Florida Statutes, the Mobile Home Act (the "Act") had recently been enacted. The Act was a new set of regulations governing mobile home parks and mobile home subdivisions. Under the Act, Palm Tree became a hybrid type of property containing some subdivision lots, with the remaining lots being offered for to mobile home owners ('Homeowners"). Accordingly, Palm Tree is a mobile home park and a mobile home subdivision. As explained by Section 723.004 of the Act, the tenancies in mobile home parks and mobile home subdivision are governed by the Act and not Chapter 83 of the Florida Statutes. Both types of tenancies were defined respectively in Sections 723.003(14) and (9), Florida Statutes.

> **723.003 Definitions.**—As used in this chapter, the term:
>
> (14) "Mobile home subdivision" means a subdivision of mobile homes where individual lots are owned by owners and where a portion of the subdivision or the amenities exclusively serving the subdivision are retained by the subdivision developer.
>
> (9) "Mobile home lot" means a lot described by a park owner pursuant to the requirements of s. 723.012, or in a disclosure statement pursuant to s. 723.013, as a lot intended for the placement of a mobile home.

A rudimentary set of covenants had been recorded by the former developer which governed the Lots (the "Covenants"). Although the Covenants were not clear, they allowed the Lot Owners the option of electing between the receipt of water and sewer services only, or to rent access to all of the park's facilities, services, amenities and management, and receive water and sewer services as part of the monthly rent. For over 30 years, all of the Lot Owners elected the latter option and rented access to all of the park's amenities and facilities for a monthly rent of roughly equal to half of the rent payable by the other mobile homeowners. The Covenants have been extinguished by the Marketable Record Title Act, and the Court has confirmed that they are no longer effective.

Pursuant to Section 723.0751(3), Florida Statutes, the Lot Owners shared common areas, recreational facilities, roads and other amenities with the owners of mobile homes. This allowed the Lot Owners to participate with the Homeowners to negotiate rents payable to Owners. Under this process, a separate rent was negotiated for the Lot Owners and the Homeowners.

This process continued until Mr. Schwob filed the initial lawsuit in 2014 (the "Action"). In 2015, a number of other Lot Owners joined as plaintiffs in the Action. There are approximately 19 Lot Owners who are currently involved in the Action.

II. **The Section 367.022(5) Exemption**.

As you have heard, Owners maintain that providing water and sewer services to both types of "tenants" is exempt from Public Service Commission ("PSC") regulation pursuant to the self- executing exemption found in Section 367.022(5), Florida Statutes (the "Exemption"). As Mr. May accurately indicated in his correspondence to you of April 9 and 30 2018, the Act provides that the relationship between Owners and mobile home subdivision Lot Owners and Homeowners falling within the purview of Chapter 723 is a "landlord tenant" relationship. *See*, Section 723.004(3), Florida Statutes. As such, we maintain that the Exemption applies.

Up until now, the PSC staff has narrowly interpreted the Exemption to apply only to leases of a "dwelling" as specified by Section 83.43, Florida Statutes. If the lease of a dwelling is required for the Exemption, no mobile home park or mobile home subdivision will qualify. As we have urged, we maintain that this narrow interpretation is not authorized. The legislature has made clear that the landlord tenant relationships in mobile home parks and mobile home subdivisions like Palm Tree are governed by the Act and not Chapter 83. The legislature is presumed to know of the common meaning of words. *See, State v. Bodden*, 8777 So.2d 680 (Fla. 2004). It did not define landlord or tenant in Chapter 367, and there is no authority suggesting that it intended the terms landlord or tenant to be limited to the lease of a dwelling.

To the extent that staff may shift its position, ignore the landlord-tenant relationships under the Act, and try to rely on a "dictionary" definition of landlord, we would respectfully point out that Black's Law Dictionary (Fifth Edition) defines landlord as follows:

> **Landlord.** He of whom lands or tenements are holden. He who, being the owner of an estate in land, or a rental property, has leased it to another person, called a "tenant." Also, called "lessor."

This "dictionary" definition supports Owner's interpretation of the Exemption. Owners held common areas, recreational facilities, roads, water and wastewater facilities, and other amenities that were leased to the Lot Owners for a monthly rent. Owners were "landlords" of the Lot Owner "tenants" of that "rental property."

III. **Our Discussions, The Action And the Partial Payments.**

We have repeatedly discussed our differing opinions on the issues. We have tried to reach a compromise to allow the courts to resolve the fundamental and primary constitutional issue between the Lot Owners and Owners, specifically *whether Owner's have a constitutional right to use their property for any use, or no use at all.* As you know, Owner's maintain that requiring them to provide the neighboring landowners with water and sewer services takes from the constitutionally protected bundle of rights associated with land ownership.

This constitutional issue has been alleged in the Action and a summary judgment motion on the issue is pending before the circuit court.

Understanding that the staff of the PSC disclaims application of the Exemption and has requested that water and sewer services not be disconnected during the litigation, on Friday, February 23, 2018, during our informal conference, we agreed not to charge the Lot Owners for water and sewer services while the issue was being determined. There is no way to accurately determine usage since there are no water or sewer meters servicing the individual Lots.

While Owner's initially sued for the reasonable value of the services provided, we informed the Circuit Court that we had agreed with the PSC staff not to charge while the litigation was pending. We are also amending our pleadings to drop the implied contract claims for the reasonable value of water and sewer service. The Lot Owner's counsel was present when the Court was advised of our changed position on May 22, 2018.

Most of the Lot Owners have tendered a monthly sum of $90 to Owners. How they arrived at this sum in unknown. Some continue to use all the park's facilities and other amenities. Others receive only access, garbage, water and sewer. Some provide restrictive endorsements on the checks, some say nothing.

These tendered payments have not been accepted by Owners. Most are now stale, worthless checks. If the Lot Owners feel that they need the protection of a monthly tender, they can deposit in the court registry. Owner's cannot accept the payments, or a waiver argument could be created.

Owners will pursue their claim in circuit court to protect their constitutional rights. We have found no authority suggesting that a landowner must provide access to his water and sewer systems for a neighboring landowner – and we maintain that none exists. The Court will ultimately decide the fundamental constitutional issue.

In the meantime, we confirm our agreement not to charge the Lot Owners for water and sewer use. We assume that they will continue to tender whatever payments their counsel recommends. These payments will not be accepted or processed.

We hope that this clarifying information is helpful to the staff.

Sincerely,

LUTZ, BOBO & TELFAIR, P.A.

J. Allen Bobo

JAB/ljp
cc: Office of Public Counsel
Keith Hetrick
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