

ALLOWABLE PROSPECTUS AMENDMENTS

Rule 61B-31.001(4), Florida Administrative Code, provides the only mechanism for obtaining DBPR approval of prospectus amendments. Allowable amendments include:

- (1) amendments consented to by each affected home owner and the park owner;
- (2) amendments to reflect changes in the name or address of the owner of the park, name of the mobile home park or the name of the park manager or management company;
- (3) amendments to add, delete or modify user fees for homeowners, as long as the park owner does not violate section 723.031 by charging a user fee for a service previously included in lot rental amount unless a corresponding reduction in lot rental amount is provided;
- (4) amendments to correct scrivener's errors;
- (5) amendments to reflect changes to the mobile home park property description due to a change in land use, condemnation or other legal action which changes the mobile home park property or a portion thereof;
- (6) amendments made to conform the prospectus to requirements of federal, state and local government ordinances, statutes, and regulations, including, but not limited to, the Fair Housing Act, the Americans with Disabilities Act, or the Telecommunications Act of 1996, where there is no charge to the home owner.
- (7) amendments to reflect changes in facilities or structural amenities after a natural disaster as long as the requirements of section 723.037 are met;
- (8) amendments to revise, renew, or extend an underlying ground lease.

Park owners need to amend their prospectuses to disclose any changes which have been made in the park but as to which disclosure has not previously been given in the prospectus (assuming that the change is the subject of an allowable amendment). For example, before April 30, 2000, without 100% written consent of all of the home owners in the park, a park owner could not get his prospectus amended to reflect the existence of a swimming pool added after the date of approval of that prospectus. Under rule 61B-31.001(4)(p) which allows "amendments to describe new facilities, services or utilities in the park" a prospectus amendment regarding the new swimming pool is a proper subject for approval by DBPR.

Remember that pursuant to section 723.017, the prospectus is an advertising document. As such, anything which is determined to be "false or misleading" within the text of the prospectus is the possible subject of a DBPR enforcement action. While arguably a defense previously existed that the prospectus could not be amended to reflect changes in the park because DBPR would not approve the requisite amendment, that defense (if it is available at all) is now weakened at least as to the types of changes which fall within the ambit of the new amendments.

2001 REVISIONS TO CHAPTER 723 AND RESULTING PROSPECTUS AMENDMENTS

Revisions to Chapter 723, Florida Statutes, resulting from the 2001 session of the Florida legislature have necessitated certain amendments be made to prospectuses in use in manufactured housing communities across the state. Those amendments and how the amendment process will be handled by the Department of Business and Professional Regulation are briefly summarized below.

(1) **Cover Page Amendment:** The first paragraph on the cover page of the prospectus is to be modified as follows:

~~THIS PROSPECTUS (OFFERING CIRCULAR) CONTAINS IMPORTANT MATTERS TO BE CONSIDERED IN LEASING A MOBILE HOME LOT. THIS PROSPECTUS CONTAINS VERY IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS AND YOUR FINANCIAL OBLIGATIONS IN LEASING A MOBILE HOME LOT. MAKE SURE THAT YOU READ THE ENTIRE DOCUMENT AND SEEK LEGAL ADVICE IF YOU HAVE ANY QUESTIONS REGARDING THE INFORMATION SET FORTH IN THIS DOCUMENT.~~

This amendment can only be made to prospectuses approved after July 1, 1986, and need only be made to the most current prospectus which you are delivering to new (non-resale) home owners. (Again, a prospectus approved prior to July 1, 1986, would not qualify even if it is the most current one approved for a given community.)

(2) **Pass Through Charges/Proportionate Share**

A “pass-through charge” is defined in section 723.003(10) as:

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.

(Emphasis added.)

The following definition of “proportionate share” as it applies to pass through charges has been added to Chapter 723:

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

This new definition is based on a concept of the collective share of all home owners versus a share to be paid by the community owner. This notion of the individual home owner’s share of governmental and utility charges (which would include “pass through charges”) assessed against a community has long been incorporated into prospectuses through reference to the individual home owner’s “pro rata” share of such costs. Thus, the vast majority of prospectuses

contain language similar to the following in reference to the home owners' obligation to pay governmental and utility charges:

These types of charges shall be charged to Home Owner(s) after providing notice as required by Chapter 723, Florida Statutes, to the Home Owner(s) on a pro rata basis as defined below. "Pro rata" means that percentage derived by dividing the number of mobile home spaces leased by a Home Owner by the total number of occupied mobile home spaces in the Park.

The new definition modifies the way pass through charges may be assessed and thus references to pass through charges based on the individual home owner's pro rata share must be modified. This is in keeping with Rule 61B-31.001(5)(d) which states:

If the home owner is responsible for pass-through charges, a statement of that fact and a description of the manner in which the pass-through charges will be assessed. The manner shall include the method of allocating the charges.

There are three important points to remember about amendments regarding implementation of the new "proportionate share" definition:

1. This definition applies only to pass through charges and not to other kinds of governmental and utility charges which otherwise might be authorized under a community's prospectus(es) and lot rental agreement(s).

2. An amendment to correct current disclosures regarding the assessment of pass through charges need be made only as to the prospectus(es) currently being delivered to new (non-resale) home owners. In most cases this will be only the prospectus most recently approved by DBPR.

3. Once an amendment to a given prospectus is deemed adequate by DBPR, that amendment must be delivered to every existing home owner whose tenancy is governed by that same prospectus. Thus, for example, if the only prospectus currently being delivered to new non-resale purchasers is a "P2" then a copy of the "proportionate share" amendment, once deemed adequate by DBPR, must be delivered to all community home owners to whom a "P2" prospectus was previously delivered.

PROSPECTUS "SUPPLEMENTAL FILINGS" TO ADD LOTS TO YOUR PARK

Under Rule 61B-30.002(3), Florida Administrative Code, a prospectus may be amended to include disclosure regarding additional lots to be added to the park. However, by DBPR policy, that "amendment" only applies in cases where the prospectus discloses the total number of lots to be included in the park and that the park is to be developed in phases. In such a case, a "supplemental filing" disclosing the new lots to be added may be approved after filing of a completed Supplemental Filing Statement (DBPR Form 406), payment of the additional filing fees as specified in Section 723.011(1)(c)1. or 2., Florida Statutes, and submission of revised prospectus pages (those setting forth the park property description and the site plan for the park). [A supplemental filing differs from an amendment in that, like a new prospectus filing, an approved supplemental filing may only be delivered to "new" (non-assuming) home owners.]

Development of a park in phases thus makes sense both from the perspective that the annual DBPR and HRS filing fees will be less, but also that the prospectus filing fees themselves may be reduced. One drawback of this method is that the park's records regarding the number of approved lots must be kept current and accurate. The park owner is obligated to pay the proper amount of annual filing fees; DBPR's billing for those fees (which is provided as a courtesy) may not accurately reflect the addition of lots. Failure to pay the proper amount could subject an offending park owner to an enforcement action including payment of the statutorily mandated 10% late penalty.

The addition of lots to a park may also be accomplished by the filing of a new prospectus which discloses that the park is being developed in phases. As far as DBPR is concerned, such disclosure in a new prospectus is not limited by disclosures in other prospectuses regarding the total number of lots in the park. Nonetheless, the mere fact that DBPR may approve a new prospectus disclosing the addition of lots not previously disclosed does not preclude the rights of home owners to challenge the proposed addition.