

PASS THROUGH CHARGES

The term "pass through charge" is currently defined in Section 723.003(10), Florida Statutes, 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.

Based on this definition it is apparent that the *statutory* definition of "pass through charge" includes all construction costs required to complete and hookup a governmentally-mandated capital improvement as well as any related impact fees.

Regarding the disclosure which must be given before a pass through charge may be assessed, section 723.031(6), Florida Statutes, provides in pertinent part:

(6) *Except for pass-through charges*, as defined in this chapter, failure on the part of the mobile home park owner or developer to disclose fully all fees, charges, or assessments prior to tenancy, unless it can be shown that such fees, charges, or assessments have been collected as a matter of custom between the mobile home park owner and the mobile home owner, shall prevent the park owner or operator from collecting said fees, charges or assessments. . . (Emphasis added.)

Based on section 723.031(6), it is clear that "except for pass through charges," a home owner is responsible only for those fees and charges disclosed to him prior to the initiation of his tenancy or established by custom in the park. Still, as the above-quoted section makes plain, *no prior disclosure is required before pass through charges may be made the financial responsibility of home owners.*

Based on the commonly understood meaning of the words, "governmentally mandated" means ordered or required by a government agency. No definition of "capital improvement" is provided in Chapter 723; however, the Florida Supreme Court has considered this term in other contexts. First, in *Trianon Park Condominium v. City of Hialeah*, the Supreme Court enumerated a list of cases dealing with capital improvements such as buildings and roads, landfills, railroad crossings, drainage systems and jails. In *Hillsboro Island House Condominium Apartment, Inc. v. Town of Hillsboro Beach*, the Supreme Court relying on the definition of "improvements" as found in the fourth edition of Black's Law Dictionary (4th ed. rev. 1979) concluded that a beach erosion control project was a "capital improvement." The definition, as relied on by the Court, provides that an improvement is:

[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adopt it for new or further purposes.

The definition relied on by the Court in *Hillsboro Island* was expanded in the fifth edition of *Black's Law Dictionary* by the addition of the following:

Generally, building, but may also include any permanent structure or other development, such as . . . sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset. Such expenditures are capitalized as part of the asset's costs. Contrast with Maintenance and Repair.

Black's Law Dictionary (5th ed. rev. 1979). Thus, it is apparent that a "capital improvement" is a value or utility enhancing addition to property constituting more than maintenance or repair.

An additional section of Chapter 723 which pertains to pass-through charges is section 723.046, Florida Statutes, created as a result of the 1992 legislative amendments, which provides:

723.046 Capital costs of utility improvements.--In the event that the costs for capital improvements for a water or sewer system are to be charged to or to be passed through to the mobile home owners or if such expenses shall be required of mobile home owners in a mobile home park owned all or in part by the residents, any such charge exceeding \$200 per mobile home owner may, at the option of the mobile home owner, be paid in full within 60 days from the notification of the assessment, or amortized with interest over the same duration and at the same rate as allowed for a single-family home under the local government ordinance. If no amortization is provided for a single house, then the period of amortization by the municipality, county, or special district shall be not less than 8 years. The amortization requirement established herein shall be binding upon any municipality, county, or special district serving the mobile home park. History.--s. 11, ch. 92-148.

The additional disclosures and timing of matters related to pass through charges should be spelled out in the notice of pass through charge.

It should also be noted that prior to 1986, the term "pass through charges" was defined by Rule 7D-31.01, Florida Administrative Code, as essentially all governmental and utility charges. This was the rule definition of the term prior to the 1986 amendments to Chapter 723 in which, or as a result of which, the definition of the term was changed to that which remains in the statute to this day. While this apparent discrepancy is not a problem, in that "pass through charges" are dealt with differently than other types of governmental fees or charges under Chapter 723 and that only those things which are currently defined as pass through charges in the statute may be treated as such.

Conversely, in a dispute regarding the community owner's right to make home owners responsible for a given governmental fee or charge, the community owner should not be limited to the current statutory definition of the term "pass through charge" if the home owners' prospectus includes that term and was approved prior to 1986.

It should also be noted that in *Bearden v. Homeowners of Alligator Park, Inc.*, the appellate court upheld a lower court's denial of a park owner's attempt to "pass through" to home owners the costs of improvements to a park sewage treatment facility. In the case, the court held that the park owners "were not entitled to recover the disputed costs of improvement to the sewage system as 'pass through charges' pursuant to section 723.003(10) because the improvements were not demonstrated to be governmentally mandated capital improvements as required by the statute."

The case involved improvements to the park's sewage treatment facility which improvements were partially required by a consent order negotiated with the State Department of Environmental Protection (DEP) and partially made to upgrade the existing facility. The decision upheld the lower court's ruling which accepted the home owners' argument that the improvements were not "governmentally mandated." However, the decision does not reflect the basis for the conclusion reached by the trial court. That basis was apparently that the improvements were necessitated by the park's failure to properly maintain the sewage treatment facilities and were the result of a consent agreement voluntarily entered into by the park.

This case underscores why park owners must ensure that park facilities are kept in proper condition and why it is essential to establish a clear record that any improvements to the park which are made at the “request” of a government agency are in fact being required by that agency.

Many local governments are now aware of the controversy which surrounds government required improvements in mobile home parks and thus will make a concerted effort to avoid the use of words such as “mandated” “ordered” or “required” in any documentation or correspondence regarding the improvements. Nonetheless, park owners will be ill advised to proceed with park improvements without such written confirmation if they later intend to claim that the charges are “governmentally mandated” and to pass through to home owners the costs authorized by Chapter 723 relating to such improvements.