THE STATE OF NEW HAMPSHIRE

BOARD OF MANUFACTURED HOUSING

Warren and Eleanor Turner	)	Docket no. 001-99
Judith M. Prescott	)	Docket no. 002-99
Edward Morin	)	Docket no. 003-99
Muriel T. Sweeney	)	Docket no. 004-99
Carl Coolbaugh	)	Docket no. 005-99
Vynia McDermott	)	Docket no. 006-99
Complainants	)	(Consolidated)
v.	)	
	)	
Lyman and Faye Hammond d/b/a	)	
Hammond Village MHP	)	

Hearing held on March 19, 1999, at Concord, New Hampshire.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON MOTION FOR SUMMARY JUDGMENT

The Board of Manufactured Housing ("the Board") makes the following findings of fact and conclusions of law and issues the following Order in the above-referenced matter.

PARTIES

1. Judith M. Prescott was at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire.

2. Edward Morin was at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire

3. Muriel T. Sweeney was at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire

4. Carl Coolbaugh was at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire

5. Vynia H. McDermott was at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire

6. Warren & Eleanor Turner were at all times relevant to this matter, a lawful tenant of the Hammond Village MHP, a manufactured housing community located in Raymond, New Hampshire

7. Hammond Village MHP ("the park") is a manufactured housing community located in Raymond, New Hampshire.

8. Lyman and Faye Hammond are the owners and operators of Hammond Village MHP. For purposes of clarity, Lyman and Faye Hammond and the park shall be treated in this Order as a unified entity and shall be identified as "Respondent."

ISSUE PRESENTED

9. In this matter, Complainants seek a determination with respect to the following issues:

   a) Whether Respondent's requirement that the Complainants replace their partially buried oil tanks with above ground tanks at their cost constitutes an attempt to charge tenants for repair or maintenance of an underground system in violation of RSA 205-A:2, IX;

PRELIMINARY MOTIONS

A. Motion For Summary Judgment

10. Respondent has filed a motion for summary judgment with respect to each Complainant's action. These motions raise essentially identical arguments and will be treated here as a unitary filing.

11. Respondent seeks summary judgment in this matter based on two arguments: First, Respondent suggests that Complainants did not comply with N.H. Admin. R Man 201.14(a) (good faith attempt to resolve) because they failed to respond to its counsel's letter of January 21, 1999, in which Respondent offered to compromise with Complainants regarding the subject of their dispute. *See* paragraphs 10-12 *below*.

12. As an initial matter, this Board has previously ruled that dismissal of an action is not a required sanction for failure to comply with N.H. Admin. R Man 201.14(a). Certify that 5 business days prior to filing a complaint, the potential complainant in writing, shall notify the party against whom the complaint may be filed of the condition which would constitute the complaint. The potential complainant shall make a good faith attempt to resolve the matter without filing a complaint. Any complaint filed with the board shall include a certification that the complainant has complied with this requirement.

13. In this case, the Board need not reach this issue because the record of each complaint indicates that the Complainants all notified Respondent of their dissatisfaction with and objection to the park's original demand that they pay for removal of their oil tanks.

14. The Board rules that these notices constitute substantial compliance with N.H. Admin. R Man 201.14(a); and that, if the Complainants found the reply of the park owner's counsel to be unacceptable, they were under no obligation to respond to that reply before filing for adjudication before this Board.

15. In addition, Respondent moved for summary judgment based on its essential argument that RSA 205-A:2, IX does not apply to the situation presented by the Complaints. At hearing, the Board ruled that all substantive issues raised by the Respondent regarding the applicability of RSA 205-A:2, IX to this matter raised factual issues which required the hearing of evidence. The Board therefore denied Respondent's motion for summary judgment and deferred judgment on the issues raised until after hearing. That judgment is now rendered below.

B. Motion To Recuse Jimmie Purselley

16. For the reasons stated in the record, the Board voted to deny the Respondent's motion to disqualify and recuse Jimmie Purselley from consideration of this matter.

FINDINGS AND RULINGS

17. This matter arises as a consequence of a notice sent by park management to certain park residents, including the Complainants, on or about January 6, 1999. The notice required residents to remove in-ground oil tanks situated beneath their homes and replace them with above-ground tanks at their own expense.

18. Complainants objected to the requirement announced in the January 6 notice. It is their position that they do not own the oil tanks and that, if the park wishes to replace them with above-ground systems, it is free to do so, at its expense.

19. Subsequently, park management altered its position in this matter by notice to residents dated January 21, 1999. In that notice, park management stated that it would remove the residents' in-ground tanks and reinstall them above ground on a cement pad at the park's expense. The notice further provided that the park would be responsible for damage to the tanks during the process of removal and reinstallation; and that residents could, if they wished, purchase new tanks and have

them on site when work crews arrived for removal of the in-ground tank. The park would then absorb the cost of installation of the new tank.

20. In addition, the notice included an "acknowledgment" to be signed by residents as a condition to the park's agreement to perform as indicated in the notice. The acknowledgment contained three elements that Complainants have found objectionable.

21. First, the acknowledgment contained a recitation that: "I understand and agree that the in-ground fuel tank and any replacement tank is, and shall continue to be, my property."

22. Second, the acknowledgment contained a disclaimer of any warranty or guarantee associated either with the removal or reinstallation of the residents' existing in-ground tanks, or with the purchase of a new tank.[1]

23. Third, the acknowledgment recited the residents' acceptance of the park's position that "the park owner has not admitted liability for removal and reinstallation of this [sic] in- ground fuel tank but that the park owner is providing this service to the tenants as a courtesy."

24. Taken together, the Complainants suggest, these provisions amount to an acquiescence to the park's fundamental position that the oil tanks are the property of the residents and not the park. While the park's offer would eliminate any charge to tenants associated with the removal and reinstallation of the tanks, the acknowledgment, if signed, would amount to an acceptance by the residents of liability associated with the future maintenance, repair, or performance of the tanks.

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[1] Complainants also raised the issue of whether this warranty language was intended to absolve park management from any liability for damage to residents' homes caused during or by the removal process. Although the testimony is not wholly clear on this issue, the Board understands Mr. Lyman and counsel to have asserted at hearing that this was not the intent of any language in the acknowledgment and that park management understands and accepts in principle that it would be liable to residents for any damage to their homes caused during or by the projected removal of the tanks by park employees or contractors.

25. Of particular concern to the Complainants is the issue of whether, by signing the acknowledgment, they would be accepting a transfer of potential liability associated with any failure of the tanks and consequent oil leakage, with its attendant environmental impact and costs.

26. Thus, in its present posture, these cases pose the issue of whether the acknowledgment proffered by park management to residents as a condition precedent to management's absorbing the costs of removing and reinstalling in ground oil tanks constitutes an attempt to charge tenants "for repair or maintenance to any underground system, such as oil tanks, or water, electrical or septic systems, for causes not due to the negligence of the tenant or transfer or [an] attempt to transfer to a current tenant responsibility for such repair or maintenance to the tenant by gift or otherwise of all or part of any such underground system." in violation of RSA 205-A:2, IX.

27. This issue turns on two fundamental questions which are in dispute between the Complainants and the park. First, the Board must determine whether, on the facts presented, the in-ground oil tanks installed beneath the Complainants' homes constitute underground systems within the meaning of RSA 205-A:2, IX.

28. Second, if the tanks are indeed underground systems under RSA 205-A:2, IX, then the Board must determine whether the park in fact owns the tanks or whether the tanks have always been the property of the residents. If the residents have always owned the tanks, there is no reason why the park may not seek an acknowledgment of that fact as a condition to voluntarily absorbing the cost of their removal and reinstallation. If, on the other hand, the park owns the tanks, then the acknowledgment would, as Complainants maintain, amount to a transfer of ownership responsibility to the residents, which is forbidden by RSA 205-A:2, IX.

A. Are the Residents In-Ground Fuel Tanks "Underground Systems" Within the Meaning of RSA 205-A:2, IX?

29. The Board acknowledges that there is some dispute in testimony regarding the question of whether the fuel tanks of all complainants are actually installed underground. In fact, it appears from testimony that the tanks are each set in the ground to varying depths and that no single tank at issue in this case can be understood to lie fully underground.

30. Respondent argues that such in-ground placement of individual tanks does not constitute an "underground system" within the meaning of RSA 205-A:2, IX for two reasons: first, that individual tanks do not constitute a "system"; and second, that partially buried tanks should not be construed to be "underground."

31. A majority of the Board rejects these arguments. Rather, the Board rules that it must be guided by the plain language of the statute, as reasonably construed; and that, under this standard, the Complainants oil tanks do qualify as underground systems, subject to RSA 205-A:2, IX.

32. First, the Board notes that the plain language of the statute clearly indicates the intent of the legislature to include single oil tanks within the definition of underground systems. Thus, the statute applies, by its terms to "any underground system, such as oil tanks, or water, electrical or septic systems." The specificity of this language dictates the conclusion that the legislature recognized the common fact that oil tanks are ordinarily stand-alone installations, to which the controlling statutory phrase "system" may not strictly apply. However, by specifying oil tanks as a particular example of a "system," the statute clearly is meant to include oil tanks as "systems" for statutory purposes.

33. For that reason, the Board rules that each of the Complainants' oil tanks are "systems" within the meaning of RSA 205-A:2, IX.

34. Second, the Board cannot adopt Respondent's argument that in-ground tanks are not underground tanks within the meaning of the statute. This result is dictated by both statutory analysis and common sense.

35. The common sense answer is that any situation in which an oil tank is situated partially or fully underground presents identical repair and maintenance issues and all but identical risks of leakage with respect to the buried portion of the tank. Given the specificity of the statute with respect to oil tanks, the Board infers that the issues and risks associated with oil tanks was a primary concern of the legislature in drafting the statute for the benefit of park residents.

36. Taken to its logical conclusion, Respondent's argument would provide park owners with a broad loophole in the statute's coverage, by permitting park owners to transfer repair and maintenance responsibility for oil tanks to residents by the simple expedient of installing them with only a portion of the tank below ground; and to thus evade any responsibility for leakage of the underground portion of a tank, simply by not fully covering it. The Board does not believe the statute can be that easily evaded.

37. Therefore, the Board rules that the Complainants' in-ground tanks do constitute "underground systems" within the meaning of RSA 205-A:2, IX, and are therefore subject to the protections accorded by that statute.

B. Who Owns the Oil Tanks?

38. Respondent's more compelling argument is that the park's actions -- and in particular, its proffer of the acknowledgment -- does not conflict with RSA 205-A2, IX because the park does not, and never has, owned the oil tanks. Rather, according to the Respondent, the oil tanks have been the exclusive personal property of the Complainants since the inception of their tenancies.

39. Complainants point to two facts which they maintain demonstrate that, when the tanks were installed, the Complainants were not understood to have any ownership right with respect to them. First, they note that they had no say in the original placement of the tanks in-ground and beneath the skirting of their homes.

40. Second, they point to language in paragraph 19 of the park Rules and regulations as in effect prior to 1990, which specifically forbade them to take oil tanks with them if they chose to move out of the park .

41. It is agreed that all Complainants in this matter except Muriel Sweeney purchased manufactured housing units for installation on lots in the park between 1985 and 1990.[2]

42. The homes of all Complainants -- including the home ultimately purchased by Ms. Sweeney -- were purchased from, and installed and positioned by, Mr. [William] Lee, of Lee Homes.

43. Because Mr. Lee's business is no longer in existence, he was not able to produce bills of sale which could demonstrate that the oil tanks were separately itemized as equipment purchased by the Complainants in connection with the sale of their homes.[3]

44. There is, however, no dispute that Mr. Lee placed in-ground oil tanks beneath each home in connection with the installation of the home.

45. Mr. Lyman testified that the Complainants (and Ms. Sweeney's predecessor) all had discretion regarding the placement of their homes on their lots and regarding the placement of in-ground tanks beneath their homes.

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[2] Ms. Sweeney purchased her home from a prior resident in or about 1992.

[3] For the reasons set forth below, the Board would not find the fact that the Complainants had purchased oil tanks as separate itemized equipment from Mr. Lee dispositive of the question of whether the Complainants may be deemed owners of the oil tanks today.

46. However, with respect to the in-ground tanks, Mr. Lyman's testimony was not supported by the recollection of any of the Complainants; nor, significantly, by the testimony of Mr. Lee. To the contrary, Mr. Lee testified that the decision to position the tanks in-ground and beneath the skirting of each home was made by him at the instruction of Mr. Lyman; and that homeowners were not typically included in this decision.

47. Moreover, Mr. Lyman himself testified that, in or around 1990, he became aware that the better practice in installing oil tanks was to anchor them above ground on a pad and that he either instructed or agreed with Mr. Lee that future installations of oil tanks in the park would be handled in that way.

48. More troublesome, in the Board's view, is the fact that the rules and regulations of the park in force at the time the oil tanks at issue here were installed forbade residents from taking the oil tanks with them if they moved. This provision is clearly inconsistent with Respondent's position that Complainants have always owned the tanks.

49. In fact, the provision can only be fairly read as indicating that the park itself was asserting ownership rights with respect to the oil tanks upon their placement in-ground.

50. This reading would obtain even if the Complainants could be shown to have separately purchased the tanks from Mr. Lee. Under that scenario, the language of the rules forbidding residents from removing the tanks would indicate that the park considered the tanks to be fixtures appurtenant to the lots which it had rented to the Complainants. It is, of course, settled law that non-removable fixtures become a fixed part of the realty to which they are attached and are owned by the owner of the realty.

51. Mr. Hammond's only response to this argument is to say, in essence, that the plain language of his rules and regulations was in error and of no effect. According to Mr. Hammond, his original rules

were drafted by him and his wife in connection with the opening of their park in or around 1985. He did not have benefit of counsel at the time and he essentially cobbled his rules together from drafts of other parks' rules.

52. In 1990, he revised his rules at the suggestion of counsel. Among the changes he made was the elimination of paragraph 19. According to Mr. Hammond, this change was made because it was inconsistent with his understanding of the Complainants' ownership rights with respect to the actual ownership rights with respect to the oil tanks.

53. At the same time, the Board finds it troublesome that this substantive change in the language of the park's rules and regulations occurred at or around the same time that Mr. Lyman, by his own admission, was becoming concerned about safety and liability issues arising from in-ground tanks; and at or around the time that he ceased allowing the installation of in-ground tanks in his park.

54. Viewed in this light, the language change in 1990 may fairly be understood to be exactly what the RSA 205-A:2, IX forbids: an attempt to transfer responsibility for an underground system to the Complainants by gift.

55. Similarly, the language at issue in the recent acknowledgment appears intended to effectuate the same result: to formalize a transfer of ownership of, and repair and maintenance responsibility for the oil tanks from the park to the Complainants.

56. The Board finds that, on the record before it, the park may not require its tenants to agree to such a transfer.

ORDER

WHEREFORE, the Board enters the following Order:

A. The Board finds that the oil tanks located on the lots rented by the Complainant are the property of the park as a fixture to leased realty.

B. As a fixture to leased realty, the tanks are and must remain as an aspect and term of Complainant's tenancies; and may not be removed by the park without adequate replacement.

C. Respondent has no right to charge the Complainants for any cost associated with removal of the oil tanks and their reinstallation above-ground.

D. The deletion of Paragraph 19 from the parks rules and regulations does not establish that the Complainants have any ownership rights with respect to the oil tanks; and is ineffective to transfer ownership of the tanks from the park to Complainants. RSA 205-A:2, IX.

E. Respondent may not require Complainants to execute the acknowledgment as a condition of waiving any asserted charge for removal of in-ground oil tanks from their lots.

Rulings on Respondent's Requests For Findings of Fact and Rulings of Law

The Board makes the following rulings on Respondent's requests of Findings of Fact and Rulings of Law.[4]

1. Granted if construed to describe the Complaints filed herein.
2. No response required.
3. Granted.
4. Granted to the extent that no evidence in this matter indicates that the Respondent purchased the fuel tanks at issue; otherwise denied.
5. Denied.
6. Denied.
7. Denied.
8. Denied.

A decision of the board may be appealed, by either party, by first applying for a rehearing with the board within twenty (20) business days of the clerk's date below, not the date this decision is received, in accordance with Man 201.27 Decisions and Rehearings. The board shall grant a rehearing when: (1) there is new evidence not available at the time of the hearing; (2) the board's decision was unreasonable or unlawful.

ORDERED, this ____ day of _____, 1999
BOARD OF MANUFACTURED HOUSING

_____
Kenneth R. Nielsen, Esq., Chairman

Members participating in this action:
Stephen J. Baker
Richard R. Greenwood
Rep. Robert J. Letourneau
Kenneth R. Nielsen, Esq.
Jimmie D. Purselley
Florence Quast
Linda Rogers

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Order has been mailed this date, postage prepaid to Warren & Eleanor Turner, Judith M. Prescott, Edward Morin, Muriel T. Sweeney, Carl Coolbaugh, Vynia McDermott, Lyman & Faye Hammond and Jorel V. Booker, Esq.

Dated:_____ _____
Anna Mae Twigg, Clerk
Board of Manufactured Housing

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[4] Respondent submitted Requests for Findings and Rulings in all of the consolidated cases. Because the requests were essentially identical, the Board will treat them as a unified filing and this response shall apply to all cases.