

No. 47766-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

NARROWS REAL ESTATE, INC., dba RAINIER VISTA MOBILE
HOME PARK,

Respondent,

v.

MHDRP, CONSUMER PROTECTION DIVISION, OFFICE OF THE
ATTORNEY GENERAL,

Appellant.

AMICUS CURIAE BRIEF OF MANUFACTURED HOUSING
COMMUNITIES OF WASHINGTON

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A. IDENTITY AND INTEREST OF AMICI

Manufactured Housing Communities of Washington (“MHCW”) is the preeminent Washington organization for mobile home parks. It has lobbied on issues pertaining to the Manufactured/Mobile Home Landlord Tenant Act, RCW 59.20, (“MHLTA”) in Olympia and participated in litigation pertaining to the Act. Its members have an abiding and intense interest in the construction of that Act.

B. STATEMENT OF THE CASE

The facts in this case are articulated in the briefing of the respective parties, and are incorporated by reference.

C. ARGUMENT

The interpretation of the term “actual utility costs” at issue here affects more than just the litigants in this matter. The Court of Appeals of Minnesota, addressing a similar issue, acknowledged that resolution of such questions “may impact landlord-tenant relationships statewide.” *Persigehl v. Ridgebrook Investments Ltd. P’ship*, 858 N.W.2d 824, 830 (Minn. Ct. App. 2015).

If this Court affirms the ALJ’s ruling that “actual utility costs” does not include the actual costs park owners incur to distribute water within their property – costs that are not paid for by utility companies and

not reflected in utility bills – it will impact many park owners and homeowners statewide.

(1) The MHTLA Empowers Homeowners While Seeking a Balanced, Practical Approach to the Unique Circumstances of a Mobile/Manufactured Home Park Tenancy

One purpose of MHLTA is to give low-income seniors and citizens stable, affordable housing. Washington State Bar Association, Washington Real Property Deskbook § 15.3 (3d ed. 1997). When first enacted in 1977, the law sought primarily to prevent unfair retaliatory evictions, which could be very costly for tenants. SB 2268 Judiciary Committee Report, March 25, 1977. The Legislature recognized the unique factual circumstances of the manufactured/mobile home landlord – tenant relationship: the tenant owns a manufactured home as personal property, but rents the land upon which it sits from the owner of the real property. *Id.* Over the years, both the Legislature and the Courts of Appeal have sought to achieve a practical balance between the needs of tenants and owners of manufactured home communities.

Over the past decade and a half, Washington courts have issued a number of rulings identifying another important goal of MHLTA: the encouragement of quality, privately owned and sustainable parks that can provide tenants the stability they need. *See McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001); *Seashore*

Villa Ass'n v. Hagglund Family Ltd. P'ship, 163 Wn. App. 531, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012); *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC, LLC*, 169 Wn.2d 265, 236 P.3d 193 (2010).

These prior rulings strike an important balance between the rights of park owners and tenants under MHTLA. Courts interpreting the statute must strive not only to protect manufactured housing community residents. They must also practically balance the competing interests of the tenants of a manufactured home community, and the owner of the manufactured home community. *See, e.g., McGahuey*, 104 Wn. App. at 183.

In *McGahuey*, tenants argued that it was unfair, despite proper advance notice from the park owner, to include in their leases new provisions requiring the tenants to pay separately for utilities, and imposing a vehicle fee. *Id.* at 182. The Court of Appeals rejected this interpretation of the MHTLA, and noted that the Legislature's approach to the landlord-tenant relationship was more "practical" and "balanced" than the position the tenants advocated. *Id.*

- (2) "Actual Utility Costs" Include Park Utility Maintenance and Infrastructure; If Park Owners Did Not Pay those Costs, Utility Providers Would Incur those Costs and Utility Bills Would Be Higher

The MHDRP argues that “actual utility costs” as used in RCW 59.20.070(6) could only mean the literal cost of the commodity charged by the utility, in this case, the cost of water charged by the utility provider. The Administrative Law Judge agreed with this conclusion, finding that infrastructure and administrative costs are “business costs” and not “actual utility costs.” AR 1641.

What the MHDRP ignores is that when a utility provider sends a bill to a utility customer, that bill includes not simply the cost of the commodity itself, but also “operating costs,” including administrative costs, and the costs to build, maintain, and repair the utility’s infrastructure that actually delivers that utility to the customer’s home. RCW 80.28.010; *U.S. W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wn.2d 48, 54, 949 P.2d 1321 (1997). Utilities are allowed to include in their rates all of the costs of doing business, not just the price of the commodity they provide. *N. Coast Power Co. v. Kuykendall*, 117 Wash. 563, 566, 201 P. 780, 781 (1921); *In re Petition of PNM Gas Servs.*, 129 N.M. 1, 8, 1 P.3d 383, 390 (2000). A water provider incurs costs to send out bills and collect payments. *Id.* Also, when infrastructure is failing, the utility provider charges ratepayers the actual costs required to make improvements. *Id.*

Thus, in a water company's bill – which the MHDRP claims is the correct measure of “actual costs” – the “actual costs” of water that they charge to customers is more than the price of water itself: it is the price of the physical and administrative apparatus that delivers the water.

When a park owner provides administration and infrastructure supporting delivery of the park's utility service to its many customers, it relieves the utility provider of those costs. *Hillsboro Properties v. Pub. Utilities Comm'n*, 108 Cal. App. 4th 246, 251, 133 Cal. Rptr. 2d 343 (2003). The “actual costs” of the utility – at least those costs associated with delivering that utility from the park's border to the park's inhabitants – are shifted from the utility provider to the park owner. In some jurisdictions, for example California, the utility company must discount the utility rates to compensate ratepayers for relieving the company of the burden of these infrastructure costs. *Id.*

Shifting the costs of providing a utility service from the utility provider to the park owner does not make those costs vanish. They are still the “actual costs” required to ensure that water comes out of the homeowner's tap, they simply are not costs incurred by the utility provider, thus not reflected in the utility provider's bill. Nonetheless they are still “actual utility costs” regardless of whether they are incurred by the utility company or the park owner.

For example, MHCW has observed a growing trend among its members of installing water meters to measure and charge tenants for their actual water consumption. Water meters provide water conservation by identifying leaks in tenants' homes and excessive usage by tenants. By installing water meters, communities can decrease water consumption by over 30%.

Some communities install water meters to measure usage of water supplied by a public utility or by a private well. In both instances, the community maintains a private water system which distributes water to each tenant's lot from either a master meter for a public utility, or from a private well. In each instance, the community owner incurs expenses to maintain its private water system, install a water meter, read the water meter, and bill for water usage.

Also, MHCW has observed that community owners will often hire a third party vendor to complete the administrative task of reading the water meters and billing each tenant for their water usage. These vendors typically charge \$3-5 dollars per lot to provide this service. This charge is then included in the actual water expenses for which each tenant is charged.

Similarly, some community owners include their expenses to maintain their private water distribution system from its source for water

(i.e. a public utility master meter, or a private well) to each individual tenant lot, as part of the actual water costs for which each tenant is charged.

In providing a private water distribution system to its tenants, and charging its tenants for the actual cost it takes to do that, MHCW members are not profiting from what it pays to obtain water from any public utility. Instead, these community owners are recovering their actual expenses as a private provider of water service and not a public “utility” as that term is used in RCW 59.20.070(6).

This Court has acknowledged that the MHLTA allows for separate fees for actual utility costs as long as they do not “exceed the actual cost *of the service*,” and did not distinguish between those costs incurred outside park boundaries and inside park boundaries. *McGahuey*, 104 Wn. App. at 183 (emphasis added).

Because the “actual costs” of a utility as charged by the utility provider include administrative and infrastructure costs, the term “actual utility costs” charged by a park owner has the same meaning. If the MHDRP concedes that “actual utility costs” means those costs included in a water company’s bill, it is also conceding that “actual utility costs” includes administration and infrastructure costs. If the amount the water company charges for water includes those charges, and if the park owner

has relieved the water company for those costs, thus reducing the utility bill accordingly, then those “actual utility costs” are part of the costs identified in RCW 59.20.070.

(3) Requiring Park Owners to Recoup These Costs Via Rent Increases Instead of Via Itemized Billing Increases Eliminates Transparency and Discourages Long-Term Rent-Controlled Leases

The MHDRP does not suggest that the Legislature intended park owners to operate at a loss in order to provide utilities to homeowners. Instead, the agency suggests that park owners should recoup these actual utility costs by imposing blanket rent increases. Br. of MHDRP at 18. The MHDRP says that including intra-park utility costs in the utility fees, rather than in the form of rent increases, decreases transparency. *Id.*

There is no logic in suggesting that *hiding* a park owner’s actual utility costs inside a rental rate is consistent with protecting homeowners or with the MHLTA.

This Court has acknowledged that the Legislature intended to allow park owners to charge utility fees separately from, and in addition to, rental rates. *McGahuey*, 104 Wn. App. at 183. This Court noted that allowing separate utility fees encouraged long-term renewable leases and accounted for the long notice period park owners must obey before rent increases are instituted:

So long as utility charges do not exceed the actual cost of the service and fees and charges are not retaliatory, the statute permits the landlord to impose them.

This is a practical approach for the Legislature to take. It recognized that mobile homes are difficult and expensive to move and, to protect tenants from the instability inherent in most rental arrangements, it provided for automatic renewal and a long notice period for rent increases. But it did not require that all original lease terms remain in force through every automatic renewal because renewals could extend for countless years. By not regulating them, the Legislature did allow changes in the lease terms to permit the landlord to charge for utilities, so long as they were limited to the actual cost. This is nothing more than a practical acknowledgment that costs increase and those using a service may be required to pay for it.

Id. Thus, there is no MHLTA violation, nor any public policy threat, to requiring park owners to demonstrate their actual utility costs, including costs included in maintaining and administering a park's utility infrastructure. On the contrary, requiring the utility fees to reflect actual costs ensures that homeowners pay only for the actual costs of the service, rather than a non-transparent "rent increase" to compensate for these fluctuating costs.

D. CONCLUSION

A utility bill does not reflect the actual costs of the utility that park owners incur. Utility companies do not pay the costs of building, maintaining, repairing, and administering water systems within mobile/manufactured home parks. As long as a park owner demonstrates

what these actual utility costs are, recouping them is not prohibited under the MHLTA.

DATED this 27 day of April, 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Jack W. Hanemann". The signature is written in a cursive style and is positioned above a horizontal line.

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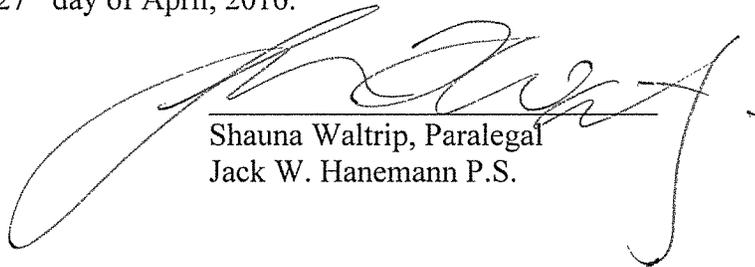
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I certify that on this day, I caused this brief to be filed via electronic transmission with the Washington State Court of Appeals, Division II, and via the Court of Appeals' electronic transmission service caused to be e-served a copy to the following parties:

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Transmittal Letter

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