

Final Order No. BPR-2005-04198 Date: 8-5-05
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND
MOBILE HOMES

DS 2005-019

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005022178

LEONARD LEOPOLD, Unit Owner,
Waterview Condominium Association, Inc. of Aventura

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DECLARATORY STATEMENT

Leonard Leopold (Leopold), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether the board of directors may prohibit unit owners from speaking at an organizational meeting called for the purpose of selecting officers and whether the board could appoint directors to committees without noticing this as an agenda item in the meeting notice under section 718.112(2)(c), Florida Statutes.

PRELIMINARY STATEMENT

On April 11, 2005, the Division received a petition for declaratory statement from Leopold, unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on June 24, 2005. Leopold agreed to allow additional time for the Division to review his petition. No hearing was requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Leopold. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Leopold is a unit owner of Waterview Condominium Association, Inc. of Aventura (Waterview), a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. A new board was elected at the December 16, 2004 annual meeting.

3. After that election, the following undated notice was posted:

THERE WILL BE A BOARD OF DIRECTORS MEETING ON WEDNESDAY, DEC. 22 AT 4PM. IN THE RECREATION ROOM. THE PURPOSE OF THIS MEETING IS TO ELECT OFFICERS FOR 2005. THE MEETING WILL BE BRIEF AND NO RESIDENTS CAN SPEAK FROM THE FLOOR.

4. According to Leopold's petition and the enclosed minutes from the December 22 board meeting, the board elected officers as noticed. Then, the board proceeded to act on an unnoticed item at the December 22, 2004 meeting. The newly elected president of the board appointed directors of various committees.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

2. Leopold has standing to seek this declaratory statement.

3. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's

opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

4. Rule 28-105.001, Florida Administrative Code, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

5. In Novick v. Department of Health, the court stated: "[A] petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied." 816 So. 2d 1237, 1238 (Fla. 5th DCA 2002) (citing Chiles v. Dep't of State, 711 So. 2d 151 (Fla. 1st DCA 1998)). The purpose of a declaratory statement "is to allow a petitioner to seek a proper course of action in advance." Id. Because Leopold's question about prohibiting residents from speaking at the December 22, 2004 board meeting addresses past conduct, the first issue raised in the petition is now moot. The board has already elected its officers without the benefit of residents speaking from the floor. Thus, the first part of the petition is properly denied.

6. However, for future reference, it is important to note that section 718.112(2)(c), Florida Statutes, provides that unit owners have the statutory right

to attend all board meetings at which a quorum of the board is present, and the right to attend such board meetings includes the right to speak.

7. Leopold's question regarding the validity of the board's actions on the unnoticed item, the appointment of committee directors, is not moot because the Division assumes that the appointed committee directors are still serving. The relevant portion of section 718.112(2)(c), Florida Statutes, provides:

Adequate notice of all meetings, which notice shall specifically incorporate an identification of agenda items, shall be posted conspicuously on the condominium property at least 48 continuous hours preceding the meeting except in an emergency. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action shall be noticed and ratified at the next regular meeting of the board.

8. In order to have complied with section 718.112(2)(c), Florida Statutes, the Waterview Board must have provided advance notice of its December 22, 2004 meeting, including a complete list of agenda items to be addressed. The only way the board could be excused from this notice/agenda requirement is if the board was acting on an emergency basis.

9. The unnoticed item upon which the board acted does not constitute an emergency. Division arbitration decisions have utilized the dictionary definition of "emergency" to conclude that an emergency in the context of section 718.112(2)(c), Florida Statutes, requires an unforeseen combination of circumstances calling for immediate action. See In Re: Petition for Arbitration Mait v. Flanco Condo Ass'n, Inc., Final Order, Case No. 92-0131. Appointing committee directors is not an unforeseen combination of circumstances calling for immediate action. See In re: Petition for Arbitration, Petito v. Greenglades

Condo. Ass'n, Summary Final Order, 5, Case No. 93-0239 (“The need to appoint officers should not be equated with an emergency....”)

10. Because the unnoticed item does not constitute an emergency, the board should have complied with the noticing agenda requirements of section 718.112(2)(c), Florida Statutes. The notice of the board’s December 22, 2004 meeting did not include an agenda item indicating discussion/appointment of committee directors. Since the board did not properly notice as an agenda item the appointment of committee directors as required by section 718.112(2)(c), Florida Statutes, the board’s action of December 22, 2004 on this unnoticed agenda item is invalid.

11. However, in Wimbledon Townhouse Condo. I Ass’n Inc. v. Wolfson, the court permitted the board to subsequently ratify prior board actions which were conducted without prior notice. 510 So. 2d 1106 (Fla. 4th DCA 1987). Thus, the Waterview Board could easily correct this problem by ratifying its action of December 22, 2004 on the unnoticed item at a subsequent and properly noticed board meeting.

ORDER

Based upon the findings of fact and conclusions of law, the question of petitioner’s right to speak at a board meeting is denied as moot and it is declared that the board could not appoint directors to committees without noticing this as an agenda item in the meeting notice under section 718.112(2)(c), Florida Statutes, which action may be ratified by the board at a properly noticed meeting.

DONE and ORDERED this 27th day of July, 2005, at
Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND
MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68,
FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE
PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE
REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE
PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF
APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE
AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE,
TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE
RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Leonard Leopold, 20515 E. Country Club Drive, Apt. 2244, Aventura, Florida 33180 this 9th day of August, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel