

Department of Business and Professional Regulation
AGENCY CLERK

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By: Brandon M. Nichols

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2004011033

JACK MENDELSON, Unit Owner,
Victoria Village "H" Condominium Association, Inc.

DS 2004-010

DECLARATORY STATEMENT

Jack Mendelson (Mendelson), Petitioner, unit owner member and president of Victoria Village "H" Condominium Association, Inc., filed a Petition for Declaratory Statement requesting an opinion as to whether a unit owner can have access to secret ballots cast by directors of condominium master association in its election of officers under section 718.111(1)(b), Florida Statutes, in order to independently verify the vote.

STATEMENT OF FACTS

The following facts are based on information submitted by Mendelson and Wynmoor Community Council, Inc. (Wynmoor). The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. The parties did not request a hearing, and none was held.

1. Mendelson filed his petition with the Division on April 4, 2004. Notice of the petition was published in Florida Administrative Weekly on May 11, 2004. The Division received Wynmoor's response to the petition on May 27, 2004.

2. Mendelson is a unit owner member of Victoria Village H, an "association" as that term is defined by section 718.103(2), Florida Statutes.

3. Wynmoor is a master association comprised of forty-four separate condominium associations, including Victoria Village H. Wynmoor is governed by a Council Board of Directors, which exercises all voting rights.

4. According to the Wynmoor Bylaws, "[t]he unit owners of each association shall be entitled to elect one unit owner of the association as their Representative on the [Wynmoor] Council Board [of Directors]" Sec. 2.2, Bylaws at 4. Further, the Wynmoor Bylaws provide that "[e]ach Representative on the Council Board of Directors shall be entitled to cast that number of votes as there are units in the condominiums represented." Sec. 2.6(a), Bylaws at 6. The number of units in each separate association that comprises Wynmoor varies from as few as 16 units to as many as 376 units.

5. The Wynmoor Council Board elects individuals to serve as officers of the Council Board of Directors "by a majority of the votes cast." Wynmoor Council Board members cast votes for officers by secret ballot at a board meeting. Sec. 3.29(c), By-laws at 8.

6. On February 5, 2004, the Wynmoor Council Board reelected its six officers. Three of the six positions had been contested. Mendelson states that one of the candidates for a contested position requested an inspection of the ballots and the tally sheets in order to verify the vote count. The Wynmoor Council Board President denied the request stating that an inspection of the ballots and tally sheet would compromise the secrecy of the ballots. Because each member of the board's vote is counted in proportion to the number of unit owners of the association he represents, each ballot indicates the

weight it should receive, making it possible to infer who voted for whom by viewing the ballots.

7. Mendelson's Petition asserts that "the right to challenge the count transcends the right to secrecy" because "denial of the right to challenge an election count opens the door to suspicion of possible vote manipulation by incumbents intent on being reelected."

CONCLUSIONS OF LAW

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

2. Mendelson, as a condominium unit owner, is substantially affected by the section 718.111(1)(b), Florida Statutes.

3. Wynmoor is a proper party to intervene.

4. Section 718.111(1)(b), Florida Statutes, provides, in part:

Directors [of the association] may not vote by proxy or by secret ballot at board meetings, except that officers may be elected by secret ballot.

5. Section 3.2 of the Wynmoor Bylaws provides, in part:

(b) At the first meeting in the calendar year, following the induction of the new Representatives to the Council Board of Directors, and at the Annual Meeting, immediately prior to the election proceedings, nominations for the President and each of the other officer positions shall be made and seconded from the floor by any accredited Representative. Each nominee shall be afforded an opportunity to make a brief statement on his or her own behalf.

(c) At the second meeting of the calendar year, election shall be by a majority of the votes cast. Voting shall be by secret ballot.

6. Therefore, section 718.111(1)(b), Florida Statutes, permits and section 3.2,

Wynmoor Bylaws, requires members of the Wynmoor Council Board of Directors to cast votes for officers by secret ballot at a board meeting.

7. Section 718.111(12)(a), Florida Statutes, provides that a condominium association shall maintain the official records of the association, which include “[b]allots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners, which shall be maintained for a period of 1 year from the date of the election, vote, or meeting to which the document relates.” Also, section 718.111(12)(a)15, Florida Statutes, provides that in addition to the specific list of items deemed official records are “all other records of the association not specifically included . . . related to the operation of the association.”

8. The secret ballots cast by Wynmoor Council Board members to elect officers are ballots, papers relating to voting, and records related to the association’s operation; therefore, the secret ballots constitute official association records pursuant to section 718.112(12)(a), Florida Statutes.

9. Section 718.111(12)(c), Florida Statutes, provides that “[t]he official records of the association are open to inspection” by unit owners with three exceptions: (1) lawyer-client confidential communications; (2) information regarding the approval of unit transfer; and (3) unit owner medical records. In a previous Declaratory Statement, the Division held that “the statute requires disclosure and narrowly limits non-disclosure to only [these] three kinds of information.” In Re Petition for Declaratory Statement: No. 2 Condo. Ass’n Palm Greens at Villa Del Ray, Inc., Docket No. 2003047827 (May 7, 2003).

10. A unit owner cannot have access to secret ballots that are distinctive and identifiable under section 718.111(12), Florida Statutes, while maintaining the secrecy of the ballots for officer elections permitted by section 718.111(1)(b), Florida Statutes.

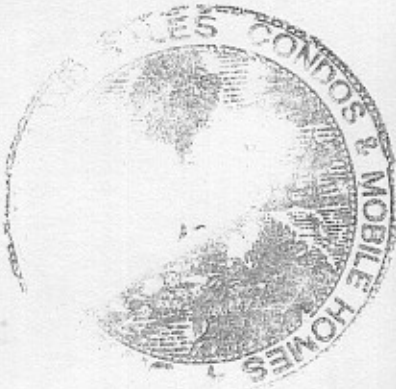
11. Section 718.111(12), Florida Statutes, is a general statute that describes the types of association records normally open for unit owner inspection, while section 718.111(1)(b), Florida Statutes, is a more specific statute authorizing the use of secret ballots for officer elections. "It is a well settled rule of statutory construction . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.'" Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) (citing Stewart v. DeLand-Lake Helen Special Rd. & Bridge Dist., 71 So. 42 (Fla. 1916), quoting State ex rel. Loftin v. McMillan, 45 So. 882 (Fla. 1908)). Therefore, the more specific section 718.111(1)(b), Florida Statutes, controls. The secret ballots used for officer elections are not open for unit owner inspection pursuant to section 718.111(12), Florida Statutes.

12. Mendelson, though, is not without a method for verifying the results of an officer election by secret ballot. Pursuant to section 718.1255, Florida Statutes, Mendelson may petition the Division for arbitration. A neutral arbitrator can review the vote count without making the secret ballots public.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that a unit owner cannot have access to secret ballots cast by directors of condominium master association in its election of officers under section 718.111(1)(b), Florida Statutes, in order to independently verify the vote.

DONE and **ORDERED** this 30th day of July, 2004.



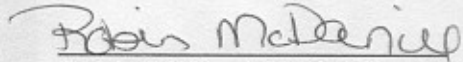

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 32399-1030

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 Jack Mendelson, 2904 Victoria Place, M-4, Coconut Creek, Florida 33066, and to counsel for Wynmoor Community Council, Inc., Robert Rubinstein, Esq., Becker & Poliakoff, P.A., P.O. Box 9057, Ft. Lauderdale, Florida 33310, on this 12th day of August, 2004.


Robin McDaniel, Division Clerk

Copies furnished to:
Michael T. Cochran, Director

Janis Sue Richardson,
Chief Assistant General Counsel