

Final Order No. BPR-94-04603 Date 8-4-94**FILED**

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon J. Moore

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

IN RE:

Petition for Declaratory Statement;
Wynmoor Community Council, Inc.,

DBPR Docket No. DS94029

DECLARATORY STATEMENT

Comes now, the undersigned as Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and issues this Declaratory Statement as follows:

FINDINGS OF FACT

1. On February 7, 1994, the Division received a Petition for Declaratory Statement submitted by the Wynmoor Community Council, Inc. Attached to the petition were the bylaws and articles of incorporation of the council. In response to the Petition, the Division duly noticed receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly. No Petition for intervention or similar document was filed with the Division. Upon request, the record was supplemented with a recorded copy of the declaration of condominium, bylaws, and articles of incorporation of Abaco Village, a Condominium, on June 14, 1994.

2. The Wynmoor Community Council, Inc. (Council) is a corporation created by its articles of incorporation. The purpose of the council, as stated in the articles of incorporation, article II, is to provide an entity for the operation of the community council properties pursuant to the provisions of the Condominium Act. The community council properties are properties owned by the council in its own name. Individual unit owners in forty-four separate condominiums have use rights to the property owned and administered by the council. The property consists of real property used in common by the individual unit owners and consisting of a theater, tennis courts, a golf course, a clubhouse, certain community roads, and other facilities.

3. Each individual unit owner is a member in a separate condominium association which operates the common elements of each respective condominium. The individual unit owners are, by the articles of incorporation, made members in the council for the sole purpose of enjoyment of all facilities located on the community council properties¹. However, the individual unit owners, albeit members in the council for purposes of enjoyment of use rights, have no direct vote on the board of directors of the community council. The condominium documents given to the original purchasers fully explain the operation of the council, and the council documents are expressly made an exhibit to the condominium

¹As per the documents given to the original purchasers, the board of the council is empowered to levy a fine against a unit owner only for violations of the council bylaws or rules and regulations of the council. A fine may only be imposed after due process, including a hearing, has been given.

documents. By virtue of these documents, each unit owner was informed at purchase that individual unit owners would have no vote in the operation of the council, and that the owners would be assessed for a portion of council expenses. By the documents, purchasers were informed that the council operated through its board composed of representatives elected or appointed by each condominium association.

4. Voting members on the community council include one representative from each condominium association. Each director or voting member of the council may cast the number of votes equal to the number of units in the respective condominium which he or she represents. Votes are taken on issues affecting community affairs. A representative from each condominium association is designated or elected to the board of the council in the manner provided in the separate condominium association bylaws.

5. The questions presented are whether the council constitutes an "association" as defined by section 718.103, Florida Statutes; whether the council is required to mail its annual budget to each individual unit owner or simply the council representative pursuant to section 718.112, Florida Statutes; and whether individual unit owners or simply their representatives are required to effectively waive council reserves under section 718.112(2)(f), Florida Statutes.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to section 718.501, Florida Statutes, and section 120.565, Florida Statutes.

2. A condominium "association" is defined by section 718.103(2), Florida Statutes, to mean:

"Association" means, in addition to those entities responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which condominium unit owners have use rights, where unit owner membership in the entity is composed exclusively of condominium unit owners or their elected or appointed representatives, and where membership in the entity is a required condition of unit ownership. [Emphasis added].

It must be concluded that the council is a condominium association within the meaning of the statute. It is an entity that operates or maintains real property which does not constitute the common elements of a condominium, and condominium unit owners have use rights in the property. Moreover, unit owners, through their elected or appointed representatives, are interest holders in the council, and membership, albeit limited, is, pursuant to the condominium and council documents, a required condition of unit ownership. Accordingly, the council is a condominium association regulated by Chapter 718, Florida Statutes. Compare, Downey v. Jungle Den Villas Recreation Association, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988).

3. As the council is a condominium association, it follows *a fortiori* that the council is subject to the operational

requirements of Chapter 718, Florida Statutes. Section 718.112(2)(e), Florida Statutes, sets forth the requirements for a budget meeting:

(e) Budget meeting. - The board of administration shall mail a meeting notice and copies of the proposed annual budget of common expenses to the unit owners not less than fourteen (14) days prior to the meeting at which the budget will be considered. If the bylaws or declaration provides that the budget may be adopted by the board of administration, the unit owner shall be given written notice of the time and place of the meeting of the board of administration which will consider the budget. The meeting shall be open to the unit owners....

The precise issue presented is whether the individuals or their elected or appointed representatives are the "unit owners" for purposes of distribution of the proposed annual budget. In this respect, the previous declaratory statement issued by the Division in Vogel v. Number One Condominium Association, Case No. 85A-401 (August 20, 1987) is relevant. In that declaratory statement, the Division was asked to determine whether the master association, which was also a condominium association, was required to provide a copy of its budget to its board of directors or to the individual unit owners. In that case, the sub-associations (individual condominium associations) operated the common elements of their respective condominiums, and the master association had operational jurisdiction over master association property. The Division concluded:

5. It is concluded that where, as here, the sub-associations exert Chapter 718 authority over the common elements of the condominiums, the master association exercises no significant operational powers with respect to the common elements of the condominiums, and where the controlling documents provide that the members of the master are the sub-associations, the master's "members" or "unit owners" within the purview of section 718.112(2)(e), Florida Statutes, should be construed to be the various sub-association members within the master association, and not the individual unit owners in the condominium.

The Division sees no compelling justification for departure from the precedent announced in the Vogel declaratory statement. Although the individual unit owners are, in the instant case, members in the council for purposes of enjoyment of use rights in properties owned by the council, they are not made voting members for budgetary or other purposes. Accordingly, the statute should be construed to require that a copy of the proposed council budget be distributed in advance to the voting membership², or in this case the various representatives on the board of directors of the council.³

²Section 718.106, F.S., provides that full voting rights are an appurtenance to the unit as is membership in the association. It follows, then, that the reference in section 718.112(2)(e), F.S., to "unit owners" refers to voting members of the association.

³Individual unit owners are provided access to the council budget by the operation of section 718.111(12)(a)11., 15., Florida Statutes, which states that the official records of the association include accounting records and any other record relating to the operation of the association. Once a condominium association representative to the council is provided a copy of the proposed council budget, the budget becomes an official record of the condominium association, and unit owners may obtain access to the document from their condominium association under section 718.111(12), Florida Statutes.

6. Next, it must be decided whether reserves may be waived by unit owners or their elected or appointed representatives pursuant to section 718.112(2)(f), Florida Statutes. Under the 1993 statute:

718.112(2)(f) Annual budget. -

1. ...

2. In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance....This subsection does not apply...to budgets in which the members of an association have, by a vote of the majority of the members present at a duly called meeting of the association, determined for a fiscal year to provide no reserves or reserves less adequate than required by this subsection.... [Emphasis added].

As provided by the foregoing, the requirement of funding reserves does not apply in any year in which the association has determined, through a vote of its membership, to waive or reduce reserves.⁴ The issue presented is whether the vote of the members required to waive or reduce reserves refers to a vote of all individuals who are unit owners or the designated voting representatives on the council. The statute, by referring to "a vote of the majority of the members present" must be construed in this context to refer to a majority of the members *entitled to vote* on the issue. Pursuant to the council and condominium documents, individuals who are unit owners have no vote in council affairs, and it is only their representatives that are entitled to exercise voting privileges.

⁴Pursuant to Committee Substitute for Senate Bill 1936, effective for votes taken on or after October 1, 1994, the vote required to waive or reduce reserves pertaining to their condominium is a majority of the total voting interests.

Accordingly, the statute is interpreted to refer to a vote of the representatives, and not of the individuals who are unit owners.⁵

7. In summary, it is determined that copies of the proposed council budget need only be provided to the voting representatives on the council. Also, the vote to waive or reduce the council reserves is a vote of the representatives, and not of the individuals who are unit owner members.

DONE AND ORDERED this 2nd day of August, in Tallahassee, Leon County, Florida.



Henry M. Solares
HENRY M. SOLARES, DIRECTOR
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Pat T. Ravo, Administrator, Wynmoor Community Council, Inc., 1310 Avenue of the Stars, Coconut Creek, Florida 33068, this _____ day of _____, 1994.

Carolyn Howard, Docket Clerk

⁵Obviously, the individual unit owners are entitled to vote to waive or reduce reserves at the condominium association level.

RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY THE 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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CAROLYN HOWARD, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUM, AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

Copies furnished to:

Faye S. Mayberry, Chief
Bureau of Condominiums

Karl M. Scheuerman
Lead Attorney

WYNMOOR.DS