

Final Order No. BPR-2003-01242 Date: 5-7-03
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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,

Jerry A. Cooke, Unit Owner,
No. 2 Condominium Association Palm Greens
at Villa Del Ray, Inc.,

BPR No. DS2003-007
Docket No. 2003047827

Petitioner.

DS 2003-007

DECLARATORY STATEMENT

Petitioner, Jerry A. Cooke, a unit owner and member of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. (Cooke), requests a declaratory statement on whether unit owner votes cast in a straw poll are official records of the association that are open to inspection and copying by unit owners under section 718.111(12)(c), Florida Statutes. The Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) finds that they are.

STATEMENT OF FACTS

The following facts are based on information submitted by Cooke and Sidney H. Firestone (Firestone). The parties had previously filed the governing documents for the condominium and the recreation association. The Division relies on the statement of facts set out in the petition, Firestone's response, and the governing documents without taking any position with regard to the validity of the facts. The facts presented are those that are not contested.

1. Cooke filed a petition with the Division on March 17, 2003. Notice of the Petition was published in the Florida Administrative Weekly on April 4, 2003.

2. Firestone, Vice President of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc., filed a petition for declaratory statement containing four issues, one of which was the same as that posed by Cooke. The association is accepted as an intervenor and its petition will be treated as a response to Cooke's petition.

3. Cooke is a "unit owner," as that term is defined in section 718.103(28), Florida Statutes, and member of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. (Association).

4. Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. is a "condominium association" as those terms are defined by section 718.103(2), (11), Florida Statutes. According to the governing documents, the Association is a voting member of the recreation master association. The unit owners, who are members of the Association, are members of the master association and vote through the Association as their representative on the board of the master association. See Number One Condo. Ass'n, Inc. Palm Greens at Villa Del Ray, Inc. Declaratory Statement (June 25, 1980) (finding that phase I and the master association were condominium associations under ch. 718, Fla. Stat.).

5. On February 3, 2003, the Association sent a Preference Statement to the unit owners seeking input on how the Association should vote on a proposal by the "Recreation Condominium Board" of the master association to improve the clubhouse. The straw poll sought unit owner input on whether the unit owners preferred an

expansion and improvement of the clubhouse or only a renovation without expansion. The preference statements were to be returned by February 14, 2003.

6. On February 15, 2003, Cooke sent a written request to inspect the preference statements to the board of directors and the president of the Association. Cooke asked to see the records on Monday, February 17, 2003.

7. On February 19, 2003, the president wrote Cooke advising him of the outcome of the 545 preference votes received.

8. On February 25, 2003, Cooke again wrote the president of the Association requesting an inspection of the preference votes on Wednesday, February 26, 2003.

9. According to Cooke, the president telephoned him to say that the straw poll votes would not be available for inspection as the votes were not official records of the Association. The president told Cooke that the board would consult legal counsel on how it should respond to his request to view the votes.

10. Cooke asked the board to vote to release the straw poll votes to him at its March 3, 2003 meeting. The president telephoned Cooke to say that the board had determined that the straw poll votes were privileged and that a release would invade the privacy of the unit owners who had voted. The board denied Cooke access to the votes.

11. On behalf of the association, Firestone asserts that a release of the preference forms would be "a serious invasion of privacy of the individual Unit Owners." The board would feel compelled to obtain a unit owner's consent to the release prior to doing so because the owners "expected the forms to stay under the control of the Condo 2 Board of Directors." Firestone asserts that the board's unwillingness to allow

an inspection of the forms is related to its belief that Cooke will use the information to contact certain unit owners who preferred a renovation without the expansion to “try to convince them to change their preference.” The board wishes to prevent any “possible harassment.” Firestone, petition at 1-2.

12. Neither Cooke nor Firestone requested a hearing.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this Order in accordance with sections 120.565 and 718.501, Florida Statutes (2002).

2. Petitioner is substantially affected by the provisions in chapter 718 which govern the operation of condominium associations and unit owners’ rights to inspect the official records of the association.

3. Section 718.111(12), Florida Statutes, provides that a condominium association shall maintain official records of the association, which records include “ballots, 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.” § 718.111(12)(a)12, Fla. Stat. In addition to the list of specific records deemed “official” are “all other records of the association not specifically included” in the list that are “related to the operation of the association.” Id. § 718.111(12)(a)15.

4. The Preference Statements, while not designated as a “vote” or “ballot” or “proxy” may be considered “other papers relating to voting by unit owners” because the statements, or straw poll, indicate the unit owners’ position on a matter to be voted on

by the Association's representative in the master association, the "Recreation Condominium Board." Even if the Preference Statements were not election records, these statements are related to the operation of the association, which would classify them as official records of the association under section 718.111(12)(a)15, Florida Statutes.

5. Section 718.111(12)(c), Florida Statutes, gives every unit owner the right to inspect and copy the official records of the association at reasonable times with three limited exceptions: (1) lawyer-client confidential communications; (2) information given for the approval of a transfer of a unit; and (3) unit owner medical records. None of the exceptions apply to the straw poll. Further, the association did not publish any statement of confidentiality in the cover letter or the Preference Statement. Cooke, ex. A. Firestone's assertion that the unit owners had an expectation of privacy in the preference statement is not evident from the face of the documents. Even if the unit owners had an expectation of privacy in this straw poll, it would not change this result because the statute requires disclosure and narrowly limits non-disclosure to only three kinds of information, which do not apply to the straw poll.

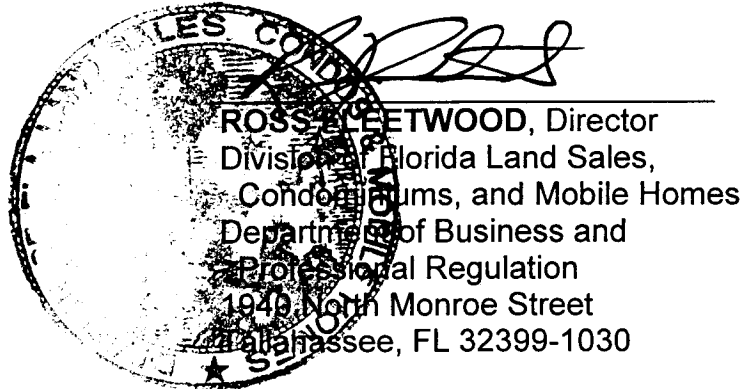
6. The Preference Statement votes are official records of the Association. The votes are not privileged or confidential. The votes are open to unit owner inspection and copying at reasonable times.

ORDER

WHEREFORE, based upon the findings of facts and conclusions of law, it is ORDERED that the straw poll votes are official records of the association, which are

open to unit owner inspection in accordance with section 718.111(12)(a) and (c), Florida Statutes (2002).

DONE and ORDERED this 6th day of May 2003.



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 Jerry A. Cooke, 13769 D Date Palm Court, Delray Beach, Florida 33484, and Sidney H. Firestone, Vice President, No. 2 Condominium Association Palm Greens at Villa Del Ray, Inc., 5801 Via Delray, Delray Beach, Florida 33484, this 8th day of May, 2003.

Carol Windham
Carol Windham,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General