

Final Order No. BPR-2004-00315 Date: **2-2-04**  
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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2003085504

ALFRED J. VENCLIK AND MARY A. VENCLIK, Unit Owners,  
SCHOONER BAY CONDOMINIUM.

**DS 2003-034**

**DECLARATORY STATEMENT**

The State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division), enters this Declaratory Statement pursuant to sections 718.501 and 120.565, Florida Statutes.

PRELIMINARY STATEMENT

Alfred J. Venclik and Mary A. Venclik, Petitioners, filed a petition for declaratory statement requesting an opinion as to whether the association may present for unit owner vote under section 718.112(2)(f)2, Florida Statutes (2003), the option of partially funding reserves with the budgeted amount to be determined by the board at a later meeting, or fully funding reserves but not providing the option of waiving reserves. No hearing was requested or held.

## STATEMENT OF FACTS

The following facts are based on information submitted by Petitioners.

The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement.

1. Petitioners filed their petition with the Division on October 8, 2003.

Notice of the petition was published in the Florida Administrative Weekly on December 12, 2003.

2. Petitioners are unit owner members of Schooner Bay Condominium Association of North Fort Myers, Inc., (the Association) a condominium "association" as that term is defined by section 718.103(2), Florida Statutes (2003).

3. The limited proxy form for the September 25, 2003, unit owner special meeting of the Association included a vote to partially fund reserves, which provides:

Vote either to partially fund reserves or they will have to be fully funded as the State requires. (The Board is in favor of partial funding of reserves, the minimum amount to be determined when the budget is adopted).

\_\_\_\_\_ **IN FAVOR** of \_\_\_\_\_ **OPPOSED TO Full Funding**  
Proposed Amendment of Reserves for 2004.

4. In a letter dated September 16, 2003, the Petitioners' attorney, Christopher J. Shields, requested the Board of Directors of the Association to postpone the special meeting and revise the proxy form so that unit owners could vote to waive the funding of reserves.

5. Joseph E. Adams, attorney for the Association, responded to the September 16, 2003, letter by stating that the board has the right to choose how

to phrase votes on proxy statements and that the board is not legally obligated to submit the question of waiving reserves to a unit owner vote.

6. The Board held the special meeting of unit owners on September 25, 2003, and the unit owners voted to partially fund reserves.

7. The Association filed a Motion to Dismiss and Petition to Intervene (in the event that the Declaratory Statement was not denied) with the Division on December 11, 2003. In the Motion to Dismiss, the Association argues that section 718.112(2)(f), Florida Statutes, does not require a board to present a vote to waive reserves to the unit owners, but has the discretion to place the issue on the agenda in the manner presented with only the options of full funding or partial funding. The Association further argues that the Division should decline to issue a declaratory statement where the declaratory statement "seeks disapproval of conduct which has already occurred" and where, as it argues is the case here, that a decision would constitute the adoption of an unpromulgated rule because a decision would have widespread applicability.

#### CONCLUSIONS OF LAW

8. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes (2003). Section 120.565(1), Florida Statutes, provides:

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.

9. Petitioners have standing to seek a declaratory statement.

10. Under the Condominium Act, associations are required to budget for reserve expenditures every year. Unit owners may vote to waive or reduce the amount of reserves in the budget proposed by the board. Section 718.112(2)(f), Florida Statutes, provides:

2. In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds \$10,000. The amount to be reserved shall be computed by means of a formula, which is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates or extension of the useful life of a reserve item caused by deferred maintenance. **This subsection does not apply to an adopted budget in which the members of an association have determined, by a majority vote at a duly called meeting of the association, to provide no reserves or less reserves than required by this subsection. . . . If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves, and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect. . . .**

§ 718.112(2)(f), Fla. Stat. (2002) (emphasis added).

11. Section 718.112(2)(b)2, Florida Statutes (2002), provides that “[l]imited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.”

12. The Division’s rule requires reserves to be fully funded unless properly waived or reduced. Fla. Admin. Code R. 61B-22.005(6). The Division’s rule restricts a vote to waive or reduce reserves to each annual budget. Fla.

Admin. Code R. 61B-22.005(8) (2002) ("Any vote to waive or reduce reserves for capital expenditures and deferred maintenance required by Section 718.112(2)(f)2., Florida Statutes, shall be effective for only one annual budget.").

13. The Division recently issued a declaratory statement on a similar issue of the validity of a limited proxy that allowed unit owners to vote to waive or reduce funding of reserves by voting on the amount of the monthly assessment that would result from their choice. *In re: Petition for Declaratory Statement, Regis S. Streitman, Unit Owner, The Shores Club Condominium Association, Inc.*, Case No. BPR No. 2003056407 (Sept. 4, 2003). In *Streitman*, the Division explained that it is the board's responsibility to establish reserves in the budget and to fully fund any reserves that the unit owners do not vote to waive or reduce. *Id.* ¶ 17 at 6-7 (citing to Dep't of Bus. & Prof'l Reg., Div. of Land Sales, Condominiums, & Mobile Homes, Budgets & Reserve Schedules: A Self-Study Training Manual for Beginners p. 31 (reprinted July 2003) (available on the division's website at [http://www.myflorida.com/dbpr/lsc/condominiums/publications/budgets\\_and\\_reserves.pdf](http://www.myflorida.com/dbpr/lsc/condominiums/publications/budgets_and_reserves.pdf)). The Division determined that the association's use of a limited proxy, designating a vote for full funding of reserves with maintenance fees at a stated dollar amount, less than full funding of reserves with maintenance fees at a stated dollar amount, or waiver of reserves with maintenance fees at a stated dollar amount, does not satisfy the requirements of section 718.112(2)(b)2 and 718,112(2)(f)2, Florida Statutes, and rule 61B-22.005(8), Florida Administrative Code (2002), because the amount of the partial funding for each reserve fund was not disclosed in the proposed budget presented to the members along with the limited proxy. *Id.* at 8.

14. Petitioners did not submit the budget that corresponded to the proxy, so this opinion is limited to a review of this association's specific proxy for the September 25, 2003 meeting as it is worded with the view, as in *Streitman*, that this opinion will assist the board in preparing proxy statements for future meetings. First, the proxy is confusing. The proxy permits an owner to vote in favor of partial funding or to oppose full funding. There is no option that permits the owners to vote to waive all reserves, and there is no specific clear-cut option to vote to fully fund reserves. A vote opposing funding may be a vote to partially fund reserves or a vote to waive all reserves depending on how it is interpreted. If the opposed vote is interpreted as a vote to partially fund, then the owners were not given an opportunity to vote to waive all reserves, which would mean that either way a unit owner voted, the vote would be for partial funding. In that case, the vote would be meaningless and nothing more than a rubberstamping of the board's predetermined decision to partially fund reserves. Second, section 718.112(2)(f)2, Florida Statutes, does not require a board to put the question of full funding to a unit owner vote unless the unit owners initiate a special meeting for that purpose as may be provided by the governing documents. Art. 4, Revised Bylaws. So, where a board determines to fully fund reserves, the board is not required to conduct a unit owner vote unless the unit owners call a special meeting to vote on reserves under the bylaws. This section does not require full funding where a majority of unit owners vote at a meeting "to provide no reserves or less reserves than required." § 718.112(2)(f)2, Fla. Stat. The section rephrases this requirement as a unit owner vote to "waive or reduce" reserve

funds. *Id.* The statute clearly contemplates a unit owner vote to waive or reduce-to not fund any reserves or to partially fund reserves.

15. The board is correct that it is not required to put the issue of full funding of reserves to a unit owner vote in the absence of a special unit owner meeting called for that purpose. However, if the board elects to put the issue of less than full funding of reserves to a unit owner vote, it must comply with the directive given in section 718.112(2)(f)2, Florida Statutes, and present a clear option to “waive or reduce” the funding of reserves. The proxy did not provide unit owners with the option to vote to “waive or reduce” funding of reserves. It is not clear from the proxy statement what option the unit owners were given. Because the budget, the vote, and the state of the funding of reserves was not provided, this statement is limited to a determination that the terms of this specific proxy failed to comply with section 718.112(2)(f)2, Florida Statutes, and future proxy statements issued by this board should clearly provide the unit owners with an option of voting to “waive or reduce” the funding of reserves.

16. The board argues that the petition should be dismissed because it would rule on past actions of the Association and the board and not provide guidance to the board as to future actions. Novick, 816 So. 2d at 1240 (citing Chiles v. Dep’t of State, Div. of Elections, 711 So. 2d 152 (Fla. 1st DCA 1998)). The board argues that a decision would constitute invalid rulemaking because it would have widespread applicability. The Division rejects both of these arguments in this case. This issue is capable of repetition at each annual meeting of this association. This statement provides guidance to the board in

issuing limited proxies for future meetings. Finally, this statement is limited to this specific proxy. It is doubtful that any other condominium association is using similar proxy language. The Division has no evidence that is happening. So, the decision is limited to this one fact situation and does not have widespread applicability.

For the reasons stated above it is hereby:

ORDERED that the limited proxy, which provided unit owners the option of partially funding reserves or opposing funding of reserves, did not comply with sections 718.112(2)(b)2 and (f)2, Florida Statutes, and Florida Administrative Code Rule 61B-22.005(6), which require a board that has decided not to fully fund reserves, to provide unit owners with the option of voting in person or by proxy at a meeting to waive or reduce the funding of reserves.



DONE this 30th day of January, 2004, at Tallahassee,  
Leon County, Florida.



  
ROSS FLEETWOOD, 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 ORDER DENYING PETITION FOR DECLARATORY STATEMENT  
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 Alfred J. and Mary A. Venclik, 3490 North Key Drive, Apt. 517C, North Fort Myers, Florida 33903, this 3rd day of February, 2004.

Robin McDaniel  
ROBIN MCDANIEL, Docket Clerk

Copies furnished to:  
Ross Fleetwood, Director

Janis Sue Richardson,  
Chief Assistant General Counsel

Ms. Virginia Groth,  
3490 N. Key Drive, Apt. 106C,  
North Fort Myers, Florida 33901.