

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

Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2003094710

EMIL A. PAVONE, JR., and
WILLIAM H. MILLS, SR., unit owners.

DS 2003-042

DECLARATORY STATEMENT

Emil A. Pavone, Jr., and William H. Mills, Sr., Petitioners, filed a petition for declaratory statement requesting an opinion as to whether section 718.112(2)(c), Florida Statutes, requires committee meetings at which a quorum of the board is present or might be present, to be noticed as a board meeting and an agenda provided.

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. Petitioners requested a hearing at the discretion of the Division, and no such hearing was held.

1. Petitioners filed their petition with the Division on November 24, 2003. Notice of the petition was published in Florida Administrative Weekly on January 30, 2004.
2. Petitioners own units in Bayfront Tower Condominium. Bayfront Tower Condominium Association Residential, Inc., (Bayfront Tower) is the condominium "association" as that term is defined in section 718.103(2), Florida Statutes (2003), responsible for the operation of Bayfront Tower Condominium.

3. The petition explains that Bayfront Tower had received a letter from the Division dated November 7, 2003, notifying Bayfront Tower of certain violations that the Division wanted to resolve by informational resolution. The letter stated in part that the Division had evidence that Bayfront Tower had not properly noticed a board and/or committee meeting where a quorum of Board members were in attendance and conducting association business.

4. According to the petition, Bayfront Tower made the following response to this Division letter:

Because of this finding, all future committee meetings will clearly notice the fact that board members will be in attendance. Committee meetings are always properly noticed and it is our policy that all committee meetings are open to every association member. Our committee meetings are not closed meetings! It should be noted that during committee meetings the board members have not and shall not in the future take any action binding on the board of directors or the condominium association. Board members attend committee meetings either in their capacity as ex-officio members of the committee or as owners.

5. Petitioners subsequently filed a petition for declaratory statement with the Division. Petitioners ask how section 718.112(2)(c), Florida Statutes, applies to the following questions:

Is any meeting at which Association business is discussed, and at which a quorum of Board members are present, in fact a Board meeting?

If such a meeting is indeed a Board meeting, is an agenda for the Board meeting required?

If such a meeting is indeed a Board meeting, may it be merged into a Committee Meeting having an identical agenda?

Is it permissible to notice **all** Committee Meetings as Board Meetings, even when it is unknown whether a quorum of the Board will, in fact, be present, in order to get around the provision of the law requiring due notice of Board meetings?

May a quorum of the Board participate fully in a Committee Meeting,

(a) asking questions concerning, and discussing agenda items;

(b) agreeing upon future Board action, although taking no action binding upon the Board or Association at that Committee Meeting?

Does incorporating a statement that "board members will be in attendance" at a Committee Meeting satisfy the statutory requirement for notice of a Board Meeting?

6. Bayfront Tower filed a response letter with the Division on February 2, 2004.

This letter provides in part: "It is the policy of the Bayfront Tower that committee meetings are open to all members of the association. All notices of committee meetings clearly indicate that board members may be in attendance. . . . It is our position that owners do not surrender their property rights when elected to the Board of Directors."

7. In response to Bayfront Tower's letter to the Division, Petitioners argue that Bayfront Tower's policy does not comply with chapter 718, Florida Statutes. Petitioners also reply to the argument that board members do not surrender their property rights by stating: "[a]cceptance of Board Membership implies voluntary acceptance of *limitations* on those elected."

8. Article III, section 11(e), of the Bayfront Tower Bylaws provides that the board of directors has the power to:

Designate one or more committees, which to the extent provided in the resolution designating said committee shall have the powers of the Board of Directors in the management of the business and affairs of the corporation.

Such committee to consist of at least three (3) members of the corporation, one of whom shall be a director. The committee or committees shall have such name or names as may be determined from time to time by the Board of Directors and said committee shall keep regular minutes of their proceedings and report the same to the Board of Directors, as required.

9. The Bayfront Tower Bylaws do not exempt committee meetings from the notice requirements provided in section 718.112(2)(c), Florida Statutes (2003).

CONCLUSIONS OF LAW

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

11. Petitioners as unit owners are substantially affected by the board and committee meeting notice requirements of chapter 718, Florida Statutes, and the Division's rules promulgated thereunder.

12. Section 718.112(2)(c), Florida Statutes (2003), provides in pertinent part:

Meetings of the board of administration at which a quorum of members is present shall be open to all unit owners....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....Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this paragraph. Meetings of a committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this section, unless those meetings are exempted from this section by the bylaws of the association.

13. Rule 61B-23.001, Florida Administrative Code (2003), provides in pertinent part:

(1)(a) "Meeting of the board of administration" means any gathering of the members of the board of directors, at which a quorum of the members is present, for the purpose of conducting association business.

(emphasis added).

14. Under section 718.112(2)(c), Florida Statutes, a committee that takes final action on behalf of the board or makes a recommendation to the board regarding the association budget is subject to the provisions of section 718.112(2)(c), Florida Statutes. These provisions include adequate notice of the meeting where such notice is posted continuously for 48 hours and a right of the unit owners to attend these meetings, speak at the meetings, and tape record or videotape the meetings. When noticing such meetings, the meetings must be noticed as committee meetings. Additionally, committee meetings where final action is not taken on behalf of the board or recommendations as to the association budget are not made, are also specifically made subject to the provisions of section 718.112(2)(c), Florida Statutes, unless exempted by the condominium bylaws. If not exempt in the condominium bylaws, these committee meetings must be noticed pursuant to section 718.112(2)(c), Florida Statutes. However, if these committee meetings are exempt under the condominium bylaws from the provisions of section 718.112(2)(c), Florida Statutes, then no notice of these meetings need be given by the condominium association (unless the meetings meet the definition of board meetings under rule 61B-23.001(1)(a), Florida Administrative Code). For example, a landscaping committee of a condominium association that has no authority to act in place of the association must follow the provisions of section 718.112(2)(c), Florida Statutes, where

the bylaws of that association are silent as to the notice requirements for committee meetings. However, a committee such as a condominium budget committee, whose purpose is to make recommendations to the board about the condominium budget, must always be noticed pursuant to section 718.112(2)(c), Florida Statutes, regardless of what the condominium bylaws provide.

15. The Bayfront Tower Bylaws do not exempt committees from the requirements of section 718.112(2)(c), Florida Statutes. Therefore, under the facts presented herein, all of Bayfront Tower's committee meetings must be noticed pursuant to the provisions of section 718.112(2)(c), Florida Statutes. This means that Bayfront Tower must notice all committee meetings as committee meetings and provide notice pursuant to the procedures outlined in the statute.

16. However, where a committee meeting is also a board meeting pursuant to rule 61B-23.001(1)(a), Florida Administrative Code, the meeting must be noticed pursuant to the provisions of section 718.112(2)(c), Florida Statutes, and the notice must provide that such a meeting is a board meeting. In deciding whether or not a committee meeting is a board meeting within the definition of rule 61B-23.001(1)(a), Florida Administrative Code, there are two elements that must be shown: (1) A quorum of board members is present, and (2) the purpose of the meeting is to conduct association business. In Division Declaratory Statement Lerner v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, April 4, 1983, the Division interpreted the phrase "for the purpose of conducting condominium business." The Division determined that this phrase included a meeting between a quorum of the board of directors and the management company for the "sole purpose of transmitting

information regarding operation of the condominium. . . . This is so even if no formal discussion by board members is held and no votes are taken.” Thus, the phrase “for the purpose of conducting association business” should be construed broadly.

17. A committee meeting necessarily has the purpose of conducting association business. Under the Bayfront Tower Bylaws, a committee “shall have the powers of the Board of Directors in the management of the business and affairs of the corporation” to the extent provided for in the resolution creating the committee. (Article III, § 11(e)). Even if the committee cannot act for the board, the purpose of any condominium committee, at the very least, is to discuss some subset of condominium business and make recommendations to the board. Therefore, the purpose of committee meetings will always be to conduct association business, and where a quorum of the board of directors is present, committee meetings will necessarily be board meetings, and must be noticed as such.¹

18. Petitioners ask: “Is any meeting at which Association business is discussed, and at which a quorum of Board members are present, in fact a Board meeting?” Pursuant to the plain language of rule 61B-23.001(1)(a), Florida Administrative Code, the answer to this question is yes, any meeting, including a committee meeting at which a quorum of the board of directors is present and at which association business is discussed is a board meeting.

19. The petition asks whether there needs to be an agenda of the board meeting. Pursuant to the language of section 718.112(2)(c), Florida Statutes, anytime there is a

¹ It also appears that the author of the condominium bylaws for Bayfront Tower was aware of this statutory requirement. The bylaws provide: “Such committee to consist of at least three (3) members of the corporation, one of whom shall be a director.” Where only one committee member is a member of the board of directors, a quorum will not be reached, and the meeting will, therefore, not be a board meeting.

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board meeting (or any committee meeting in the case of Bayfront Tower), the meeting must be noticed and the notice shall “incorporate an identification of agenda items.”

Therefore, an agenda must be posted with the notice for all board meetings. Bayfront Tower may post one agenda for the meeting, but, where a quorum of board members are present at a committee meeting, the meeting must be noticed as both a committee meeting and a board meeting.

20. Petitioners ask: “If such a meeting is indeed a Board meeting, may it be merged into a Committee Meeting having an identical agenda?” The Division understands this question as asking whether Bayfront Tower may notice a committee meeting where a quorum of the board of directors is present as only a committee meeting where there is only one agenda. Section 718.112(2)(c), Florida Statutes, and rule 61B-23.001, Florida Administrative Code, mandate that where a committee meeting is a board meeting under the definition found in the rule, the meeting must be noticed as a board meeting. Therefore, Bayfront Tower must label the meeting as a board meeting where the meeting would meet the definition of board meeting under rule 61B-23.001, Florida Administrative Code, even if the meeting is also a committee meeting with the same agenda.

21. The petition asks whether it is permissible to notice every committee meeting as a board meeting in order to comply with section 718.112(2)(c), Florida Statutes. The statute does not expressly prohibit Bayfront Tower from noticing every committee meeting as a board meeting. However, section 718.112(2)(c), Florida Statutes requires “adequate notice of all meetings.” This “adequate notice” standard should be interpreted with the legislative purpose of section 718.112(2)(c), Florida Statutes; that is,

to give unit owners the opportunity to attend board meetings and take part in condominium governance. See Fla. H.R. Comm. On Judiciary, CS for CS for HB 1465 (1991) Staff Analysis 2-3, 8 (final May 7, 1991). This ability would be inhibited if every committee meeting of Bayfront Tower is noticed as a board meeting only because of the possible contingency that a quorum of the board of directors might attend. Reading section 718.112(2)(c), Florida Statutes with that purpose in mind, committee meetings should only be noticed as board meetings when Bayfront Tower reasonably believes that a quorum of the board will be in attendance. The Division is aware that when a committee meeting is not noticed as a board meeting there is a possibility that a quorum of the board of directors will be in attendance. However, where the statutory sufficiency of notice given for a specific meeting is questioned, remedies for petitioner may be available under section 718.1255, Florida Statutes.²

22. Additionally, the petition asks to what extent the board members may participate in committee meetings. Where a quorum of the board of directors is in attendance at a committee meeting, and the meeting is properly noticed as a board meeting, the board members may participate concerning any item of business noticed in the agenda.

23. Lastly, the petition asks whether incorporating the statement "board members will be in attendance," satisfies requirements for notice under section 718.112(2)(c),

² On numerous occasions, arbitration orders have addressed the statutory validity of specific instances of notice under section 718.112(2)(c), Florida Statutes, through the lens of equity. See, e.g., Stephens v. Townhouse at Nova 1, Case No. 93-0203, Partial Summary Final Order and Order to Show Cause Regarding Count One of the Petition, Nov. 20, 1995; Terzis v. Ocean Dunes of Hutchinson Island Condo. Ass'n, Inc., Case No. 94-0385, Summary Final Order, Jan. 31, 1995; Dehne v. Ocean Club III Condo. Ass'n, Inc., Case No. 93-0137, Summary Final Order, Jan. 31, 1994

Florida Statutes, of a board meeting. This statement is not sufficient to meet the statutory requirements of notice for board meetings. It is not evident from this statement that the meeting being noticed is a board meeting. Simply indicating that board members will be in attendance is not enough to meet the "adequate notice of all meetings" requirement under section 718.112(2)(c), Florida Statutes. Notice of a board meeting that takes place concurrently with a committee meeting should give enough information to put unit owners on notice that the meeting is both a board meeting and a committee meeting.


24. Lastly, Bayfront Tower, in its response letter to the petition, states that "owners do not surrender their property rights when elected to the Board of Directors." Bayfront Tower's argument is that board members should be able to attend committee meetings as unit owners, and not in their capacity as board members. However, under rule 61B-23.001(1)(a), Florida Administrative Code, anytime a quorum of the board of directors meets where there is discussion of association business, the meeting must be noticed as a board meeting pursuant to section 718.112(2)(c), Florida Statutes. This is so to protect the unit owners and give them an opportunity to participate in condominium governance. Where there is a quorum present, the intent of the individual members of the board of directors to attend committee meetings in a nonofficial capacity does not mean that they have any less authority to make decisions concerning condominium business. Therefore, in order to allow unit owners meaningful participation in condominium governance, anytime a quorum of the board of directors attend a committee meeting, the meeting must be noticed as a board meeting even though the original intention of the board members was to attend the meeting as only unit owners, and not board members.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that all committee meetings of Bayfront Tower where association business is discussed must be noticed as board meetings where a quorum of the board of directors will be in attendance, and an agenda for such board meeting must be given with the notice, pursuant to section 718.112(2)(c), Florida Statutes.

DONE and ORDERED this 17th day of February, 2004.




ROSS FLEETWOOD, Director
Department of Business and
Professional Regulation,
Division of Florida Land Sales,
Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, FL 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 Emil A. Pavone, Jr., Bayfront Tower, Unit 1304, One Beach Drive SE, St. Petersburg, Florida 33701-3925; and William H. Mills, Sr., Bayfront Tower, Unit 1404, One Beach Drive SE, St. Petersburg, Florida 33701-3925, this

19th day of February, 2004.

Robin McDaniel
Robin McDaniel, Docket Clerk

Copies furnished to:
Ross Fleetwood, Director

Janis Sue Richardson,
Chief Assistant General Counsel