

MEMORANDUM

To: Tiffany Woods BOD Candidates
From: Karl A. Burgunder, Attorney at Law
Re: Tiffany Woods Election Issues
Cc: Anne Smith, LCAM
Date: April 27, 2009

Ladies and Gentlemen:

As you may be aware, Gary Underwood, on behalf of the Tiffany Woods Homeowners Association, Inc., has engaged my services for research and analysis into several legal issues which arose as a result of the Association's March 17, 2009 annual election of Directors and the potential election outcome in the event of a legal challenge to the results as tentatively determined by Pinnacle Property Management.

FACTS:

My research and conclusions expressed herein assume the following facts being substantially true:

- The HOA Board is currently comprised of 7 seats, each for a term of one year
- Cumulative voting is prohibited (as per HOA bylaws)
- Voting is to be by "secret ballot" (as per HOA bylaws)
- Proper notice of the annual meeting and election was given
- In addition to the seven incumbent directors, all of whom previously indicated their desire to run for re-election, one other individual, Greg Holt, expressed interest in having his name placed on the ballot form, which was done
- Nominations were also taken from the floor at the annual meeting. The persons whose names appear on the attached ballot and in the minutes of the annual meeting are the floor-nominees.
- Prior to the election, in February, 2009, the current Board was advised by Anne Smith, LCAM, owner of Pinnacle Property Management (PPM) (who was unofficially assigned and charged by the President of the HOA to conduct the election on its behalf in an impartial manner on behalf of the entire Association, and who accepted such appointment) of the language that was placed on the ballot regarding the consequences of a voter voting for more than 7 candidates - ballot disqualification. A sample ballot form was distributed prior to the election to the current Board for comment. No directives were given to the property manager to modify the proposed ballot.
- In addition to the names of the eight candidates and blank spaces for an additional 6 write-in candidates, the ballot form also included the following language at the top:

"There are seven (7) open positions; you may vote for up to seven (7) candidates. Voting for more than seven (7) candidates will invalidate this ballot. Mark vote by placing a checkmark in the box to the left of your desired candidate"

- I was personally present at the meeting, serving as acting Chair at the request of the President and with the consent of the entire Board, and personally announced and instructed those in attendance to vote for not more than 7 candidates per ballot.
- Multiple persons held general proxies for the election of directors from lot owners who did not attend the annual meeting
- Tracy Ayotte, LCAM, PPM's representative, was personally present at the annual meeting and undertook to conduct the election on behalf of the Association. Prior to actual voting, Ms. Ayotte tabulated the total number of proxies held by each homeowner on a sign in sheet used for that purpose
- Ms. Ayotte wrote the total number of votes that could be cast for each ballot (the voter's own vote, plus all proxy votes) on the top of each ballot form, and distributed a ballot to each eligible voter present in person at the meeting.
- One proxy brought in by Gary Underwood, for someone by the last name Bromfield, states that the proxy is only to be used to amend the bylaws (the homeowner wrote this in and PPM did not catch it).
- There was one duplicate proxy for a Mr. Richard Distephano. He signed two on different dates – one to Cathy Starnes on 3/6/09 and one to Blair Walters on 3/17/09. This was probably an easy mistake for the homeowner to make as PPM mailed proxies to everyone from PPM's office, as per its standard protocol, but then some Board members and others went door to door with blank proxy forms in an attempt to get people to sign them over to them. Ms. Walters had 3 votes as she owns 2 properties and had the one proxy. The proxy Ms. Starnes brought in was also included in her number of votes.
- In addition, PPM received several proxies in their office by mail.
- After several of the Board members left my office after meeting with me regarding the CCR amendments, they went to the PPM offices and took all of the proxies PPM had on hand. This is not typical. PPM normally keeps proxies on premises so they can get a head-start on the count and make sure there are no duplicates. Instead, they were unable to do this and had to deal with all of them when the members brought them into the meeting.
- The quorum requirements for the annual meeting were met (45 total votes in person or by proxy – TW has 74 homes)
- After the ballots were distributed at the appropriate time at the annual meeting, voting took place and a call was made for ballots to be turned back in (i.e. the votes were "cast") to Ms. Ayotte.
- After tabulation, Ms. Ayotte brought to my attention two ballots which indicated votes for 8 candidates on each.
- The two questioned ballots were claimed to have been cast by two persons whose total number of votes eligible to be cast (proxy votes plus the voter's own vote) equaled the respective numbers circled on the tops of the questioned ballot forms. One of these individuals marked a line through the check mark in the box next to Greg Holt's name on both questioned ballots while Ms. Ayotte held them.
- Ms. Ayotte, who was uncomfortable in announcing the results the results and not knowing how to proceed, brought the matter to my attention as the HOA attorney.
- The meeting was recessed without an announcement of the results in order to allow for research in how best to proceed under the circumstances, and accordingly, the election was not "certified" by any officer, director, or other representative of the Association.
- Ms. Ayotte maintained physical custody of the original ballot forms and proxies, until such time as she relinquished physical custody of the same the following day upon my

instructions, to Anne Smith. Ms. Smith has retained sole physical custody of the original ballots, and they continue to remain in her possession under lock and key.

- No one has been allowed to inspect or handle the original documents. I have been provided with photocopies of the two disputed ballots and the proxies.
- If the two mis-cast ballots in question are disqualified from consideration, the outcome of the election changes, with only one of the current directors being re-elected instead of all seven.
- This is a highly contested election – it is unlikely that consensus would be reached among the parties involved to do a re-vote.
- There are no HOA governing documents, procedures, resolutions, or Board minutes that address election issues other than the Bylaws, the Articles of Incorporation, and the CCR's.
- Taking all of the above into account, and disqualifying the two “over-voted ballots” at issue, PPM again verified the results based on the proxies counted and the single voters at the meeting. Accordingly, the results of the election as determined by PPM are as follows:

Candidates Elected:

Linda Lockey: 29 votes

Janel Dixon: 27 votes

Greg Holt: 26 votes

Josue Nieves: 26 votes

Doug Welson: 26 votes

Steve Dobbins: 26 votes

Mike Mazur: 25 votes

Candidates Not Elected:

Judy Starks: 21 votes

Gary Underwood: 20 votes

Pamela Fields: 19 votes

Helen (Cathy) Starnes: 19 votes

Kathie Holland: 19 votes

Bob Penn: 19 votes

ISSUES:

I have identified the following potential issues that have arisen as a result of the foregoing events:

1. Although generally the ballots and proxies make up part of the records of the Association and are thus, in theory, available to any member making a proper request to inspect/copy them, ballots for election of directors are supposed to be cast in secret (as per the bylaws). Because the total number of votes cast, including all proxies voted by the proxy holder, was written at the top of the ballot, an issue may arise given the fact that anyone examining the proxies will likely deduce the identity of the voter of the questioned ballots and thus may negate that voter's "right" (if any) of ballot secrecy. This is a threshold issue that should be answered before all election records to the membership and/or their attorneys.

2. Are voting “do overs” or replacement ballots authorized by law if a "mistake" in marking a ballot is made? How can a mistake even be determined? How does one (or can one) identify a particular ballot and question the voter if ballots are supposed to be secret? Does it matter that the over vote was detected only after the ballot was collected (i.e., is “cast”)?
3. Was the ballot form properly approved by the BOD in advance? Is approval even necessary? By persons casting and turning in their votes, did voters waive any objections to the ballot form or tacitly agree to the language printed on it regarding the consequences for improperly marked ballots?
4. Is there any requirement in the law for providing a separate ballot to voters for each proxy such voter holds? Does the HOA’s prior practice matter if no objections were made by any voter when ballots were distributed at the meeting?
5. Who has a right to be present when original ballots and proxies are made available for inspection – candidates (including floor nominees) or all homeowners in the HOA? What kind of notice is needed to be given of the re-convened meeting?
6. What body of law sets forth the final word on election procedure: Is it Fla. election law, Fla. corporate law, or Fla. HOA law (Chapter 720)?
7. Were the ballots sufficiently “secret” to satisfy the bylaws, given that the number of proxies held by each respective voter, if any, was marked on the ballot form and circled?
8. Who, if any, needs to “certify” the final results of the election the election must “What happens if the BOD fails to certify the results of the election within a "reasonable" time?
9. What is the authority of the current BOD and the officers pending certification of the election?

ANALYSIS

Florida Statute § 720.303(9) specifically provides that HOA “[e]lections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association.” Because the Legislature is loathe to involve itself in dictating to HOAs in this regard, and because HOA election disputes must be resolved through mandatory binding arbitration, there are virtually no published court cases that provide guidance. However, a recent arbitration decision rendered by the State of Florida Department of Business and Professional Regulation (DBPR) – Division of Florida Land Sales, Condominiums, and Mobile Homes styled as: In Re: Petition for Arbitration – HOA David B. Parker, Petitioner v. East Linden Estates Homeowner’s Association, Inc., Respondent Case No. 2007-04-5781, is very similar to the instant situation and may well be used by an affected candidate in an arbitration proceeding as persuasive authority for the proposition that any ballots “returned” to a voter for modifications after being cast taints the ballots and requires them to be invalidated independent of the fact that the ballots were incorrectly marked with more than 7 votes each when originally “cast.” The Parker case is set forth in the accompanying research appendix to this memorandum.

Unfortunately, the Tiffany Woods HOA Bylaws are of little assistance in resolving the current conundrum as they are somewhat sparse, at least as far as these issues go. Nonetheless, Bylaws Art. XIV, § 2, p. 18 does specifically require elections to be conducted via “secret ballot”. While it does not define “secret ballot”, it seems self-evident that any ballot or process by which said ballot would no longer be ‘concealed’ or its contents or identity of the voter ‘concealed’ would violate that provision. Thus, the examination of ballots on which the number of proxies was noted, thereby communicating to most any of the members present at the election which persons submitted said ballots would seem to be contrary to the Bylaws. So while the election ‘records’ would be part of the HOA records per se, there are certainly some confidentiality concerns about allowing public/homeowner examination of those ballots. Unfortunately, as there are no cases, there is no guidance as to how best to handle this situation, but again, it seems self-evident allowing general inspection of the ‘secret’ ballots could invalidate the election in and of itself.

As to whether “do-overs” are in order, the only guidance available is from standard, i.e. governmental, election law. However, in those elections, there are no proxies, so guidance by analogy is limited. Again, the Bylaws do not address this question, and Florida HOA Statutes clearly indicate that the Bylaws must control. There are provisions under standard election laws for duplicate ballots to be created by the vote takers but this is only where a clear error has been made on the face of the ballot and the voter’s selection is discernible. See 21 Fla. Jur 2d Elections § 148; see also Fla. Stat. § 101.5614. Though the general public can be present while ballots are reviewed and tallied, the voter cannot create a duplicate ballot and in fact has no access to the ballot once cast. *Id.* If the voter’s intention cannot be discerned from the face of the ballot and the ballot is erroneously marked, as was the case here, then said ballot “may not be counted”. *Id.* But again, this is not a situation where there are proxies, which essentially creates significantly more votes than just the individual votes of the voters casting the disputed ballots.

Because there are no proxy-votes in standard elections, there is no requirement for separate ballots for each voter. But again, since HOA bylaws control, and the HOA bylaws are silent on that issue, it would appear that the use of a single ballot with the proxies indicated on top, though perhaps problematic from secrecy standpoint, is not otherwise violative of the controlling regulations.

The answer to the remaining questions is expectedly redundant: there is no case law because the HOAs govern themselves through their Bylaws. The Bylaws here provide little to no guidance on these questions. A search of DOAH cases provided no results. Even ALLSTATES searches through Westlaw produced no useful results, leading me to conclude rather quickly that Florida is not the only jurisdiction where the Legislature prefers the HOA govern themselves, as we discussed. Any HOA disputes, by statute, must be addressed through mandatory arbitration by DPBR. Fla. Admin. Code § 61B-80.101, et seq. provides the method and procedure for such dispute arbitration (again, no cases). Though Fla. Stat. § 718.1255(4) indicates non-binding arbitration for “disputes” involving HOAs, Section 718.1255(5) refers election disputes to “the division’s rules for recall arbitration disputes”, which takes you back to Fla. Admin. Code’s requirement that election disputes be resolved through mandatory binding arbitration. The process for said arbitration is laid out both in the Fla. Admin. Code as well as on the DPBR website at the following link: www.myflorida.com/dbpr/lsc/arbitration/html. I have also included excerpts for your reference in the attached research appendix.

As it appears unlikely any consensus could be reached to conduct a re-vote, I am of the opinion that the two ballots on which 8 candidates were selected are invalid on their face, and cannot be counted, despite the tremendous impact this will have on the election results. Even if this were not the case, that marks were made on these ballots after they'd been cast also, under Parker, appears to operate to invalidate the ballots.

As to the issue of whether separate ballots should have been issued for each proxy held, since no elections rules, resolutions, or prior Board meeting minutes have been brought to my attention regarding such practice, I have assumed that no such written requirements calling for separate ballots exists. I believe the general principle of waiver would apply to this situation, i.e., because no voter timely objected to the single ballot practice when a ballot was distributed to him/her, a strong argument could be had that any such requirement, if it even existed, was waived by each respective voter who "cast" a ballot without voicing any objection.

In closing, it appears that the disputed ballots containing over votes are subject to legal challenge by affected candidates on two grounds, namely: 1.) that voting for more than 7 candidates per ballot invalidates the ballots by the plain wording of the instructions as contained on the ballots themselves, and 2.) the attempt to nullify the "extra" votes contained on the ballots, by the reasoning set forth in the above cited Parker arbitration case, will invalidate those ballots as well. It appears that the results of the election are as stated above, and that the Association, through its property manager or legal counsel, should personally notify the successful candidates of their election. Because the neither the Bylaws nor any applicable provision of Florida Statutes provides for interim authority of the former Board while a potential election dispute is pending, the plain language of the Bylaws will apply to this case, to wit: that the terms of the former Board and the Association officers are one year terms and thus ended on March 17, 2009. Newly elected candidates are entitled to assume office immediately upon acceptance.

Accordingly, I recommend that the "Board" meeting currently scheduled for April 28th be treated as the organizational meeting of the new Board, and that all candidates, both successful and unsuccessful, be given personal notice of the meeting by regular mail, in addition to the normal posting requirements for Board meetings. At this meeting, a representative of PPM should bring the original ballots and proxies to the meeting for limited inspection by all candidates (taking care to cover the portion of the ballots containing the number of proxy votes so as to ensure ballot secrecy.) After inspection, the PPM representative should retain these original ballots and proxies. In the future, I would recommend that a dual envelope procedure be adopted in order to better ensure ballot secrecy as required by your governing documents. New officers should be elected at this meeting and all other necessary Board business conducted as well.

Although hopefully a consensus can be reached as to the final result of the election, once again I must restate the fact that Florida law clearly provides that any election dispute between a

member and an association must be submitted to mandatory binding arbitration with the Division of Florida Land Sales, Condominiums, and Mobile Homes in lieu of any form of lawsuit.

Best Regards,

/s/

Karl Burgunder

Enc: Research appendix