

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

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

IN RE: PETITION FOR DECLARATORY STATEMENT,

Decoplage Condominium Association, Inc.,

DOCKET NO. CD2002-063

Petitioner.

DS 2002-019

DECLARATORY STATEMENT

Petitioner, Decoplage Condominium Association, Inc., requests an interpretation as to whether unit owner e-mail addresses are official records subject to inspection under the circumstances presented.

ISSUE PRESENTED

Whether unit owner e-mail addresses are official records of the association accessible by unit owners on request under section 718.111(12)(c), Florida Statutes (2002), where the addresses are collected as part of the association's approval process in the transfer of units under section 718.111(12)(c)2, Florida Statutes, and the unit owners have an expectation of privacy in their e-mail addresses, where the association sends information to unit owners by e-mail as an additional, courtesy method of delivery, where the association does not require a response to its e-mail, and where it sends required notices to unit owners by the official means directed under the Condominium Act.

STATEMENT OF FACTS

The following facts are based on information submitted by the Petitioner. The Division relies on the statement of facts set out in the petition without taking any position

with regard to the validity of the facts.

1. The Decoplage Condominium Association, Inc. ("Decoplage"), filed its petition with the Division on December 5, 2002. Notice of the Petition was published in the Florida Administrative Weekly on December 20, 2002.

2. Decoplage is the "association" as that term is defined in section 718.103(2), Florida Statutes, of The Decoplage Condominium ("Condominium"), located in Miami-Dade County, Florida, which was created pursuant to chapter 718, Florida Statutes.

3. Decoplage has been collecting e-mail addresses as part of its approval process in the transfer of units and by other means.

4. Decoplage uses the e-mail addresses it collects only as an additional, courtesy method to disseminate information already provided by other means. All information that Decoplage distributes by e-mail to unit owners is also distributed by other official means or the information in the e-mails is otherwise available to all unit owners pursuant to the Condominium Act. Decoplage has not required or anticipated any response to its e-mails.

5. A unit owner has requested access to the unit owner e-mail addresses and Decoplage is uncertain as to its obligations under sections 718.111(12)(a), (b), and (c), Florida Statutes.

6. An investigator for the Department of Business and Professional Regulation, sent letters to Decoplage requesting the association to release the e-mail addresses. The investigator stated that the e-mail addresses collected by the association were part of the official records of the association and, therefore, must be

provided as an official record if requested pursuant to section 718.111(12)(b), Florida Statutes. Decoplage, however, questions whether it can release the requested e-mail addresses because it believes that, under the particular facts here, the release is specifically prohibited by section 718.111(12)(c)2. Additionally, Decoplage believes that release of the e-mail addresses may be prohibited based on the unit owners' expectation of privacy.

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.
3. Section 718.111(12)(a), Florida Statutes (2002), requires condominium associations to maintain all items that fall within fifteen identified categories as official records. Section 718.111(12)(a)7, Florida Statutes, requires the association to maintain a current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The statute does not mention e-mail addresses. However, section 718.111(12)(a)15, Florida Statutes, provides that the association shall maintain all records that are related to the operation of the association, which will constitute, along with the other specifically listed items, the official records of the association.
4. Section 718.111(12)(c), Florida Statutes, states that "[t]he official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times." The statute exempts only three

types of association records from disclosure to unit owners. These exceptions are: any documents protected by the attorney-client or work-product privilege while litigation is pending, “[i]nformation obtained by the association in connection with the approval of the lease, sale or other transfer of a unit,” and unit owner medical records. § 718.111(12)(c)1, 2, and 3, Fla. Stat. (2002).

5. The foregoing provisions set forth in plain and unambiguous language the legislature’s intent that unit owners have unfettered access to association records, including all records related to the operation of the association, upon request, as long as the information does not fall into one of the three categories in section 718.111(12)(c), Florida Statutes. Decoplage contends that the *content* of the e-mail messages distributed to the unit owners should be available to all unit owners, but that the e-mail *addresses* are not an operational element of the association under the present Condominium Act. Therefore, the association takes the position that the e-mail addresses are not “official records” of the association requiring disclosure upon request. Additionally, Decoplage argues that the e-mail addresses could not be related to the operation of the association if neither the Florida Statutes nor the Florida Administrative Code authorizes the use of e-mails as a valid form of communication and e-mails are only a secondary form of communication. As is discussed below, the duties of a condominium association include distributing official information. The methods used to distribute that information are also related to the operation of the association, and, thus, unit owners should have access to the e-mail addresses under these facts.

6. Although there does not appear to be any case law or opinions relating to whether e-mails are official records of associations, an arbitration decision has

concluded that where records are related to duties that are vested in the association, such as maintenance and repair, the records constitute official records under section 718.111(12), Florida Statutes, because they are "related to the operation of the association." *Aldrich v. Tahitian Gardens Condo. Ass'n, Inc.*, Arb. Case Nos. 96-0055; 96-0070 (Summary Final Order, Aug. 5, 1996). Section 718.111(3), Florida Statutes, provides that the powers of the association include maintenance, *management*, and operation of the property. Because the duty of management is vested in the association, any records pertaining to the management of the association constitute official records and shall be open to inspection to unit owners pursuant to section 718.111(12)(c), Florida Statutes. Further, as part of the management and operation of the condominium property, the association is required to post or distribute notices of meetings, elections, and other official business pursuant to the Condominium Act and the association bylaws. Although the Act does not mention e-mailing such information, since Decoplage is using e-mail as a supplemental means of distributing the information, both the content of the e-mail and the information relating to the means of distributing the information is related to the operation of the association.

7. Decoplage argues that unlike other information in the official records, e-mail addresses have an economic value to vendors, repair personnel, realtors, and others. Decoplage asserts that unit owners may have provided their addresses with an expectation of privacy and the expectation that the association would not disclose the addresses to others. These reasons are insufficient. As the Division has previously stated: "there [is] no right of privacy to be asserted by a corporate condominium entity that supercedes the unambiguous mandate of the condominium law." *Division of Fla.*

Land Sales, Condo., & Mobile Homes v. Vantage View, Inc., Final Order, Division Docket No. CC97033 (May 19, 1998) (Anderson, ALJ). A unit owner cannot have a greater expectation of privacy in an e-mail address than in the financial and personal information disclosed in an association's rental records, which were determined to be accessible under section 718.112(2), Florida Statutes. *St. Augustine Ocean & Racquet Club Condo. Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg.*, 753 So. 2d 794 (Fla. 5th DCA 2000) (holding that assuring the proper conduct of a condominium association is a compelling state interest which is not overruled by Florida's constitutional guarantee of privacy).

8. Generally, individuals must have a reasonable expectation of privacy before a constitutional right of privacy against governmental intrusion exists. See *Board of County Commissioners of Palm Beach County v. D. B.*, 784 So. 2d 585 (Fla. 4th DCA 2001) (holding that adult entertainer did not have reasonable expectation of privacy in address required for county license); see also, *Winfield v. Division of Pari-Mutuel Wagering, Dep't of Bus. Reg.*, 477 So.2d 544, 548 (Fla. 1985) (holding that "article I, section 23, of the Florida Constitution, does not prevent the Division of Pari-Mutuel wagering from subpoenaing a Florida citizen's bank records without notice"); cf. *United States v. Hambrick*, 225 F.3d 656, 2000 WL 1062039 (4th Cir. 2000) (unpublished opinion) (holding that person did not have expectation of privacy in an Internet Provider e-mail address under 4th amendment of U.S. Constitution, which guarantees freedom from unreasonable search and seizure).

9. The Condominium Act provides a limited exception from disclosure for applicants for transfer of a unit, who are prospective tenants and buyers and not unit

owners. Applicants, who provide their e-mail address to the association in connection with the lease, sale or other transfer of a unit, do not have an expectation of privacy to their e-mail addresses under section 718.111(12)(2)(c)2, Florida Statutes (2002). *In Re: Petition for Declaratory Statement, St. Augustine Ocean & Racquet Club Condo. Ass'n*, Docket No. DS98182 (February 1, 1999). Even if e-mail addresses were deemed confidential by law, once the association incorporates the e-mail address for management purposes and receives association e-mails that are for routine operation of the association, the expectation is lost as the association's business records are open for unit owner inspection under section 718.111(12)(2), Florida Statutes. *St. Augustine*, 753 So. 2d at 794; *cf. Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001) (finding that people lost expectation of privacy in addresses and e-mail content when information is shared with third party internet bulletin board provider). To find otherwise would allow the narrow exception to swallow the open records provision.

10. Under the association's reasoning, the unit owner's name, which would have been provided in the transfer application as well as phone number and the unit to be transferred would remain private under the exception when this information is clearly an official record. Because the Condominium Act provides unit owners with a right of access to association records, unit owners could not have an expectation of privacy in their e-mail addresses, which are used to send them association notices. The leasing restriction is related to the type of personal and financial information acquired as part of the approval process. *See Accardi v. Leisure Beach South, Inc.*, Arb. Case No. 00-0955 (Final Order, June 19, 2001) (stating that 718.111(12)(c)2 does not exempt the lease but information made confidential by other laws, such as social security numbers

and medical information). This information is not used by the association in its management capacity to provide notices to unit owners. An e-mail address is like a street address; it provides a location for the receipt of electronic mail just as a street address provides a location for the delivery of letters. Street addresses have an economic value to vendors, repair personnel, realtors, and others, just as e-mail addresses do; yet street addresses are clearly official records that are open to unit owners. There is nothing inherently private about an e-mail address any more than there is a physical address. Therefore, an e-mail address is not confidential under section 718.111(12)(c)2, Florida Statutes. See *Accardi v. Leisure Beach South, Inc.*, Arb. Case No. 00-0955 (Final Order, June 19, 2001).

11. Association members may inspect and copy association e-mail notices and address lists used to send notices upon request. §718.111(12)(c), Fla. Stat. The association may adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspections and copying. *Id.* The records, however, must be made available regardless of the reason for the request. *In Re: Petition for Declaratory Statement, Monte Carlo Towers Ass'n, Inc., v. Wertz, et al.*, Case No. 89L-105, October 20, 1989.

12. In its current form, the Condominium Act requires the association to provide unit owner access to all records related to the operation of the association. The statute provides that any information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit is exempt from unit owner access. Decoplage asserts that the e-mail addresses at issue are included in the exception because some of them are collected during the approval process and, therefore, the

unit owners have a statutory expectation of privacy. There can be no expectation of privacy when the statute clearly gives notice that any records related to the operation of the association may be inspected. See *Vantage View*, Division Docket No. CC97033 (May 19, 1998).

13. In consideration of the foregoing, the e-mail addresses sought are subject to unit owner inspection as they constitute records related to the operation of the association and are not statutorily protected private records under present condominium law.

ORDER

WHEREFORE, based upon the findings of facts and conclusions of law, it is **ORDERED** that an applicant's e-mail address, which is collected as part of the association's approval process in the transfer of units, is accessible to unit owners under section 718.111(12)(c), Florida Statutes (2002).

DONE and ORDERED this 7th day of March 2003.



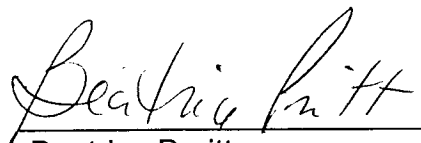
[Signature]
ROSS FLEETWOOD, Director
Division of Florida Land Sales,
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NOTICE OF RIGHT TO APPEAL

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 David C. Arnold, Attorney for Petitioner, 8301 S.W. 164 Street, Miami, Florida 33157-3640, this 10th day of March, 2003.



Beatrice Pruitt,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General Counsel