

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

IN RE PETITION FOR DECLARATORY STATEMENT

MARTH CHRISTENSEN, Unit Owner,
LEGACY DUNES CONDOMINIUM ASSOCIATION, INC.

DS 2010-043

Docket No. 2010027999

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes (2009).

PRELIMINARY STATEMENT

On June 1, 2010, the division received a Petition for Declaratory Statement from David R. Lenox, attorney for Legacy Dunes Condominium Association, Inc. (Legacy Dunes), an association, seeking an opinion on whether unopened ballots received by Legacy Dunes for an election that was cancelled and rescheduled are official records open to unit owner inspection under section 718.111(12)(c), Florida Statutes (2009). Legacy Dunes did not request a hearing.

On June 2, 2010, the division received a response from Marth Christensen, a unit owner in Legacy Dunes.

The division acknowledged receipt of the petition on June 14, 2010. The division informed Mr. Lenox and Legacy Dunes that a full current set of governing documents was needed before the petition may be reviewed, and that a copy of the petition must be served on the developer and notice of having done so filed

with the division. The division notified the developer on July 8, 2010. On June 22, 2010, Legacy Dunes, through Mr. Lenox, sent a copy of the condominium declaration and the association bylaws to the division.

Notice of receipt of the petition was published in Florida Administrative Weekly on June 25, 2010.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Legacy Dunes and Mr. Christensen. The division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. The annual meeting for Legacy Dunes was scheduled for May, 2010, at which time an election for the new board was to take place.¹

2. Ballots were provided to the members of the association and prior to the board's decision to reschedule the annual meeting to July, a number of ballots were received by Legacy Dunes.²

3. The ballots that were received by Legacy Dunes were not opened and because the annual meeting was rescheduled and a new mailing to the owners had been made, the ballots were not going to be used for any purpose.³

4. Marth Christensen, a member of Legacy Dunes, requested the right to examine the ballots, or at a minimum, to examine the envelopes in which the ballots were sealed.⁴

¹ Pet for Decl Stmt at 1 (May 27, 2010)

² Id.

³ Id.

⁴ Id. at 2

5. Mr. Christensen requested to inspect the ballots in order to insure that the association members would have enough votes to validate the upcoming rescheduled election.⁵ He claims that the owners should be able to see how many qualified ballots were returned so that they could conduct a get-out-the-vote campaign for the rescheduled election.⁶

6. Article 4.3 of the Bylaws of Legacy Dunes Condominium Association, Inc. states that “[w]here balloting is required, Directors shall be elected by a plurality of the votes cast in the election, provided that at least twenty percent (20%) of the eligible voters cast ballots.”⁷

7. Mr. Christensen alleges that at the May, 2009 annual meeting, the management company hired by the board reported that an insufficient number of ballots had been received to meet this 20% threshold needed for a valid election of a new board and that the existing board was held over for another year.⁸ Because of suspicion that a number of ballots were “lost in the mail,” Mr. Christensen has engaged in this campaign to ensure that all owners receive voting materials and that the submitted ballots will be received and counted.⁹ Mr. Christensen alleges that he is entitled to inspect the ballots as official records of the association under section 718.111(12)(c), Florida Statutes.¹⁰

8. Legacy Dunes claims that it is not clear why Mr. Christensen feels the need to examine the ballots and seeks the division’s opinion on whether

⁵ Fax from Marth Christensen (June 2, 2010)

⁶ Id.

⁷ Art 4.3, Bylaws of Legacy Dunes Condominium Association, Inc

⁸ Fax from Marth Christensen

⁹ Id.

¹⁰ Id. at 2

unopened ballots received for an annual meeting election which is cancelled and later rescheduled constitute official records subject to unit owner inspection, and whether the ballots may be opened under section 718.111(12)(c), Florida Statutes.¹¹

CONCLUSIONS OF LAW

9. The division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

10. Section 120.565, Florida Statutes, provides:

(1) 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.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

11. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

12. As a condominium association, Legacy Dunes has standing to petition for a declaratory statement.¹²

13. As a condominium unit owner, Mr. Christensen has standing to intervene and respond.¹³

¹¹ Pet for Decl Stmt at 2

¹² §§ 718.103(2), 120.565, Fla. Stat. (2009).

14. Section 718.111(12)(c), Florida Statutes, provides in relevant part:

The 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 right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying.

15. Section 718.111(12)(a)(12), Florida Statutes, with emphasis added provides in pertinent part:

(12) OFFICIAL RECORDS.-

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

12. 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.

16. Legacy Dunes requests the division's opinion as to whether unopened ballots that were received for an election that has been rescheduled constitute official records subject to unit owner inspection under section 718.111(12)(c), Florida Statutes.

17. Section 718.111(12)(c), Florida Statutes, provides that the official records of the association are open to inspection by any association member. However, section 718.111(12)(c), and relevant case law provide for a number of exceptions that establish that certain records are not accessible to unit owners. In interpreting the statute, an appellate court held that ballots, sign-in sheets, and

proxies were election materials that did not exist until the election.¹⁴ Although that case dealt with sealed voting proxies, ballots are treated the same way under the statute. A court noted that section 718.111(12), Florida Statutes, which designates “ballots, sign-in sheets, voting proxies, and all other papers relating to elections” as official records, groups voting proxies together with ballots and sign-in sheets, neither of which exist before an election.¹⁵ Additionally, the court interprets section 718.111(12)(a)(12) as focusing on post-election preservation of the records as evidenced by the provision that these records must be maintained for a period of one year “from the date of” the election.¹⁶ The court held that voting proxies, ballots, and sign-in sheets do not become official records subject to inspection by any association member until *after* the election for which they were given.¹⁷

18. However, the court also stated that management may not keep the existence of the proxies secret or that the proxies in their sealed condition should not be available for inspection.¹⁸ The court stated that “whatever information management has should be available to the membership.”¹⁹ In Islander Beach Club, the owner in a proxy fight desired to see who had sent in proxies so that he could better campaign for the election.²⁰ Similarly, Mr. Christensen seeks to view the ballots so that he can get a better idea of how many people cast votes so as to insure that the members will have enough votes to validate the upcoming

¹⁴ Islander Beach Club Condominium Ass'n of Volusia County, Inc v Johnston, 623 So 2d 628 (Fla 5th DCA 1993)

¹⁵ Id

¹⁶ Id

¹⁷ Id

¹⁸ Id at 629

¹⁹ Id

²⁰ Id

rescheduled election. Legacy Dunes management only has access to the unopened ballots. Therefore, the number of unopened ballots and other information about the ballots should be deemed accessible information after the election for which they were received as long as the outer envelopes remain unopened.

19. Therefore, until an election at which the ballots are opened and counted or “cast,” they are not “official records” of Legacy Dunes subject to inspection. However, if Mr. Christensen seeks access to the unopened ballots merely to count how many qualified ballots had been returned for the cancelled election and to see which units submitted ballots in order to conduct a get-out-the-vote campaign, as long as he can do so without opening the ballots, the unopened ballots should be made accessible *after* the election for which the ballots were received is over or the ballots are nullified and replaced by reissued ballots for a rescheduled election as in this case. This does not mean, however, that a unit owner may inspect ballots or returned envelopes for a scheduled election before the date of the election or before the votes are cast. To allow a unit owner to do so would create potential for allegations of vote tampering. This opinion is limited to the specific facts of this case. Only where the election for which the voting materials are received is cancelled and the voting materials will not be used in a later rescheduled election, such as limited proxies that are valid for 90 days from a scheduled election, is unit owner access permitted. On these facts, these ballots will not be counted for any purpose, but must be retained for one year, so unit owners have access to the unopened ballot envelopes.

For the reasons stated above it is hereby:

ORDERED that unopened ballot envelopes that were not cast and are no longer valid for any election are official records, which are available for unit owner inspection in their sealed condition under section 718.111(12)(c), Florida Statutes.

DONE and **ORDERED** this 4th day of August 2010, at Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
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 ANY PARTY ADVERSELY AFFECTED 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 R. Lenox, Esq., Greenspoon Marder, P.A., Capital Plaza 1, Suite 500, 201 East Pine St., Orlando, FL 32801-2718, and Marth Christensen, 7512 44th Ave SW, Seattle, WA 98136, on this 12th day of August 2010.


Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney