

Department of Business and Professional Regulation
AGENCY CLERK

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By: Brandon M. Nichol

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

DS 2006-018

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2006019359

WILLIAM J. GERACE, Unit Owner,
Ocean Dunes of Hutchinson Island Condominium Association, Inc.

DECLARATORY STATEMENT

William J. Gerace (Gerace) filed a Petition for Declaratory Statement requesting an opinion as to whether a unit owner may designate a power of attorney to attend association meetings under sections 718.1035 and 718.112(2)(c) and (d), Florida Statutes.

PRELIMINARY STATEMENT

On April 17, 2006, the Division received a petition for declaratory statement from Gerace. Notice of receipt of the petition was published in Florida Administrative Weekly on April 28, 2006 and on May 5, 2006. On May 9, 2006, the Division received a response from Ocean Dunes of Hutchinson Island Condominium Association, Inc. (Ocean Dunes). A hearing was not requested or held.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by the Gerace and Ocean Dunes. 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. Gerace is a unit owner of Ocean Dunes, a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.
2. Gerace's unit is also owned by two other persons. All three have assigned Gerace's brother (Thomas Gerace) power of attorney.
3. Ocean Dunes does not allow Thomas Gerace, as the holder of the power of attorney, to attend association meetings, including board meetings and unit owner meetings.
4. Ocean Dunes's response indicates that Thomas Gerace was a board member and board president of Ocean Dunes previously. Apparently, resentment towards Thomas Gerace exists among unit owners. The current board and many unit owners do not want Thomas Gerace involved in Ocean Dunes' affairs.
5. The Ocean Dunes condominium documents do not contain any provision governing how a holder of a unit owner's power of attorney participates in association meetings.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Gerace has standing to seek this declaratory statement.

3. Ocean Dunes is a proper party to intervene.

4. Section 718.1035, Florida Statutes provides the following:

The use of a power of attorney that affects any aspect of the operation of a condominium shall be subject to and in compliance with the provisions of this chapter and all condominium documents, association rules and other rules adopted pursuant to this chapter, and all other covenants, conditions, and restrictions in force at the time of the execution of the power of attorney.

5. Section 718.112(2), Florida Statutes, provides the following (in part):

(c) *Board of administration meetings.* --Meetings of the board of administration at which a quorum of the members is present shall be open to all unit owners. Any unit owner may tape record or videotape meetings of the board of administration. The right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting. The association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements. 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.

(d) *Unit owner meetings.*

1. There shall be an annual meeting of the unit owners.

3. The members of the board shall be elected by written ballot or voting machine. Proxies shall in no event be used in electing the board, either in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter.

. No unit owner shall permit any other person to vote his or her ballot, and any such ballots improperly cast shall be deemed invalid, provided any unit owner who violates this provision may be fined by the association in accordance with s. 718.303.

6. Unit owners shall have the right to participate in meetings of unit owners with reference to all designated agenda items. However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

6. Section 718.1035, Florida Statutes, quoted above provides that the use of a power of attorney is subject to the condominium documents as well as chapter 718, Florida Statutes.

7. No provision of Ocean Dunes's condominium documents prescribes how a holder of a unit owner's power of attorney participates in association meetings.

8. The Condominium Act limits the use of a power of attorney in the election of directors, but otherwise leaves it up to the association to adopt reasonable rules for an owner's use of a power of attorney in other cases. § 718.112(d)(3), Fla. Stat. ("no unit owner shall permit any other person to vote his or her ballot"). Thomas Gerace is attempting to attend association meetings and speak as a holder of the unit owners' power of attorney.

9. "Where no statute, administrative rule, or condominium document imposes a restriction on the use of a general power of attorney by a unit owner, there should be no bar to the use of a general power of attorney, especially, where the legislature has expressly authorized associations to adopt rules governing the activity." In re: Petition for Declaratory Statement, Fountainhead Ass'n, Inc., Docket No. 2001-011, Final Order No. 2001-04753 (Nov. 27, 2001).

10. Further, "[i]t is not sound policy to read the requirement that only unit owners may attend, speak at and participate in board of administration meetings into 718.112(2)(c), Florida Statutes. . . . Corporations, by their nature must provide an agent to represent it at these meetings." Id. Additionally, "[i]f the statute is read as preventing unit owners, who have no other means of speaking to the board on issues concerning their units, as an absolute prohibition on speech, this interpretation would contravene the express authority given to the association to adopt rules governing unit owner comments because the board

may not promulgate a rule that directly contravenes a statute.” Id. (quoting § 718.104(4)(m), Fla. Stat.).

11. Therefore, because attendance of association meetings by one holding a general power of attorney is not restricted by Ocean Dunes’ current condominium documents or by chapter 718, Florida Statutes, the association cannot prohibit Thomas Gerace’s attendance as a holder of the unit owners’ general power of attorney. This does not prevent the association board from exercising its corporate power to seek a restraining order if one is justified, or to otherwise control the conduct of the meeting. Those issues are beyond the scope of this statement.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that a unit owner may designate a power of attorney to attend association meetings under sections 718.1035, 718.111(12)(a)7., and 718.112(2)(c) and (d), Florida Statutes.

DONE and ORDERED this 1st day of June, 2006, at
Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, 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 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 William J. Gerace, Ocean Dunes Condominium, 1664 North East Hilltop Street, Jensen Beach, Florida 34957, and to William L. Hunter, Association President, 10980 S. Ocean Drive, Jensen Beach, Florida 34957, this 8th day of June, 2006.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel