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By: *Sarah Wachman*

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2004020316

RAYMOND J. DAUPHINAIS, Unit Owner,  
Edgewater Arms Fourth, Inc.

**DS 2004-014**

DECLARATORY STATEMENT

Raymond J. Dauphinais (Dauphinais), Petitioner filed a Petition for Declaratory Statement requesting an opinion as to whether the mailing of a notice of candidacy on December 23, 2003 to the association's board office where the board's notice required receipt of notice of candidacy by 5:00 p.m. on December 24, 2003 and the notice was not received in the board's office until December 29, 2003 constituted timely receipt of "written notice to the association [of] not less than 40 days" prior to the election required by section 718.112(2)(d)3, Florida Statutes, and rule 61B-23.0021(5), Florida Administrative Code.

PRELIMINARY STATEMENT

On April 9, 2004, the Division received a petition for declaratory statement from Raymond J. Dauphinais (Dauphinais), unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on May 21, 2004. No hearing was requested or held.

### FINDINGS OF FACT

The following findings of fact are based on information submitted by Dauphinais. 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. Dauphinais is a unit owner of Edgewater Arms Fourth, Inc. (Edgewater Arms), a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. Progressive Management, Inc. sent a notice dated December 4, 2003 of the upcoming February 2, 2004 election of directors for the Edgewater Arms board. The notice stated the following:

Anyone interested in running as a candidate for a seat on the Board of Directors . . . must submit their name in writing to my office on or before 5:00 P.M. ON WEDNESDAY, DECEMBER 24, 2003. After this date, no other names can be accepted.

3. Dauphinais mailed his written notice of intent to be a candidate for the board of directors to the Progressive Management, Inc. office. The notice was dated December 23, 2003 and postmarked December 24, 2003; however, the office did not receive Dauphinais's notice of candidacy until December 29, 2003.

4. Progressive Management, Inc. sent Dauphinais a written notice, which was dated December 29, 2003, indicating that it received his name as a candidate for the Edgewater Arms board. Then, in a letter dated December 31, 2003, Progressive Management, Inc. informed Dauphinais that his notice of candidacy had not, in fact, been received in the office by the stipulated



December 24, 2003 deadline. Thus, the remaining members of the Edgewater Arms board would appoint individuals to fill the vacant seats.

5. According to Dauphinais, his notice complied with the stipulated deadline, because he believes effective receipt by the association occurred upon his mailing of the notice to the association. It is noted that the Division closed a complaint, complaint number 2004010642, which Dauphinais previously filed with the Division regarding the dispute.

#### CONCLUSIONS OF LAW

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

2. Dauphinais has standing to seek this declaratory statement.

3. Section 718.112(2)(d)3, Florida Statutes, provides, in part:

Any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than 40 days before a scheduled election.

(emphasis added).

4. Rule 61B-23.0021(5), Florida Administrative Code, provides:

A unit owner or other eligible person desiring to be a candidate for the board of administration shall give written notice to the association not less than 40 days before a scheduled election. Written notice shall be effective when received by the association. Written notice shall be accomplished in accordance with one or the more of the following methods:

- (a) By certified mail, return receipt requested, directed to the association; or
- (b) By personal delivery to the association; or
- (c) By regular U.S. mail, facsimile, telegram, or other method of delivery to the association.



(emphasis added).

5. According to section 718.112(2)(d)3, Florida Statutes, unit owners “must give written notice to the association not less than 40 days before a scheduled election.” Florida Administrative Code Rule 61B-23.0021(5) echoes this deadline and further provides the means of delivery may be by certified mail, personal delivery, regular mail, facsimile, telegram or other method of delivery. The rule does not modify the deadline stated in the statute; rather, it gives unit owners several options for delivery of the notice. Further, the rule clarifies that written notice is effective upon receipt by the association, instead of upon mailing by the unit owner.

6. Nothing in the statute or rules supports an extension of the deadline beyond 40 days. Coletta v. The Bayshore Yacht & Tennis Club Condo. Ass’n, Inc., Arb. Case No. 99-1256, Final Order (Sept. 14, 1999). Additionally, the statute does not specify that the 40 days are 40 business. Id. Dauphinais was required to ensure that his notice of candidacy was received by the association in a timely manner. Dauphinais chose to post his notice by regular mail the day before a Christmas holiday, so he must bear the responsibility for its late delivery. Accepting Dauphinais’s notice of candidacy would constitute a violation of section 718.112(2)(d)3, Florida Statutes, because the notice was received on December 29, 2003, less than 40 days prior to the February 2, 2004 election.

#### ORDER

Based upon the findings of fact and conclusions of law, it is declared that Dauphinais’ mailing of his notice of candidacy on December 23, 2003 to the



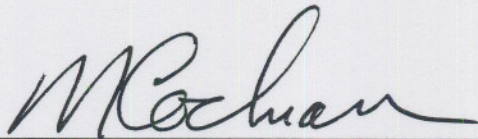
Edgewater Arms board office where the board's notice required receipt of notice of candidacy by 5:00 p.m. on December 24, 2003 and the notice was not received in the board's office until December 29, 2003 did not constitute timely receipt of "written notice to the association [of] not less than 40 days" prior to the election as required by section 718.112(2)(d)3, Florida Statutes, and rule 61B-23.0021(5), Florida Administrative Code.

**DONE** and **ORDERED** this 23<sup>rd</sup> day of June, 2004.

For the reasons stated above it is hereby:

**ORDERED** that the Petition for Declaratory Statement is **DENIED**.

**DONE** this 23<sup>rd</sup> day of June, 2004, at Tallahassee, Leon County, Florida.



MICHAEL 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 Raymond J. Dauphinais, 634 Edgewater Drive #746, Dunedin, Florida, 34698, this 29<sup>th</sup> day of June, 2004.



ROBIN MCDANIEL, Docket Clerk

Copies furnished to:  
Michael Cochran,  
Director

Janis Sue Richardson,  
Chief Assistant General Counsel