STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HAROLD RUDISILL AND PATRICIA RUDISILL,

Petitioners,

vs. Case No. 17-4868RU

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on October 26, 2017, via video teleconference at sites in Tallahassee and Tampa, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent: Megan S. Silver, Esquire
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STATEMENT OF THE ISSUES

Does the Department of Business and Professional Regulation, Division of Condominiums, Timeshares and Mobile Homes' ("the Division"), approval of timeshare developers' requests to provide purchasers with a public offering statement via a website link amount to an unadopted rule within the meaning of section 120.52(8)(a), Florida Statutes (2017).[1/] Also, does the Division's approval of timeshare developers' requests to provide purchasers with public offering statements via a website link amount to an invalid exercise of delegated legislative authority within the meaning of section 120.52(8)(c).

PRELIMINARY STATEMENT

On August 25, 2017, Harold and Patricia Rudisill ("the Rudisills") filed a petition alleging that the Division's decision to allow timeshare developers to provide a public offering statement (a "public offering statement" or a "POS") via a website link to timeshare purchasers amounts to an unadopted rule. The Rudisills also alleged that the Division's decision enlarged, modified, or contravened the specific law to be implemented. As stated in the petition:

> The crux of both claims brought herein is that the Timeshare Act requires [] developers to "deliver" and "furnish" purchasers the POS, yet [the Division] has approved the practice of allowing developers

> to inform purchasers where they can find the POS on the internet in lieu of delivering or furnishing the POS; advising purchasers where they can find the POS on the internet is not the same as furnishing and delivering the POS as required by Florida Law.

After convening a telephonic status conference on August 30, 2017, the undersigned issued a notice scheduling the final hearing to occur on September 18, 2017.

In response to an "Unopposed Motion to Continue Final Hearing" filed on September 6, 2017, the undersigned issued an Order on September 7, 2017, canceling the final hearing.

On September 18, 2017, the undersigned issued an Order rescheduling the final hearing to occur on October 26, 2017, by video teleconference at sites in Tallahassee and Tampa, Florida.

As noted in the Pre-hearing Stipulation, the Division made relevancy objections to Petitioners' Exhibits 13, 15, 18 through 22, and 25. After the final hearing, the undersigned concluded that those objections were well-taken and thus excludes the aforementioned exhibits from consideration. However, the undersigned accepted Petitioners' Exhibits 1 through 12, 14, 16, 17, 23, 24, and 26 through 29 into evidence.

There were no objections to the Division's exhibits, and all of them were accepted into evidence.

The final hearing was held as scheduled on October 26, 2017, and the Transcript was filed on November 13, 2017.

The parties filed timely Proposed Final Orders on November 27, 2017, that were carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

The following findings of fact are based on exhibits accepted into evidence, admitted facts set forth in the pre-hearing stipulation, and matters subject to official recognition.

Relevant Statutes and Rules Pertaining to Timeshares

1. Chapter 721 of the Florida Statutes is known as the "Florida Vacation Plan and Timesharing Act" ("the Act"). § 721.01, Fla. Stat.

2. The Florida Legislature intends for the Act to "[p]rovide full and fair disclosure to the purchasers and prospective purchasers of timeshare plans." § 721.02(3), Fla. Stat.

3. The Division is the state agency responsible for enforcing the Act.

4. Section 721.10(1), Florida Statutes, provides that a purchaser[2/] can cancel a contract to purchase a timeshare interest "until midnight of the 10th calendar day following whichever of the following days occur later: (a) The execution date; or (b) The day on which the purchaser received the last of

all documents required to be provided to him or her . . . ." (emphasis added).

5. Section 721.10(1) further provides that "[t]his right of cancellation may not be waived by any purchaser or by any other person on behalf of the purchaser. Furthermore, no closing may occur until the cancellation period of the timeshare purchaser has expired."

6. A "public offering statement" is the term describing a single-site timeshare plan or a multisite timeshare plan, including any exhibits attached thereto as required by sections 721.07, 721.55, and 721.551.

7. Section 721.07(6)(a) requires that a timeshare developer "shall furnish each purchaser" with "[a] copy of the purchaser public offering statement text in the form approved by the division for delivery to the purchasers." (emphasis added). Florida Administrative Code Rule 61B-39.004(1) provides that "a developer of a single-site timeshare plan shall deliver to every purchaser of the single-site timeshare plan a single-site purchaser POS." (emphasis added).

8. Rule 61B-39.004(1) mandates that a public offering statement shall contain:

> (a) A copy of the single-site registered public offering statement text as prescribed in Section 721.07(5), Florida Statutes, and Rule 61B-39.003, F.A.C.;

> (b) A copy of the exhibits prescribed in Sections 721.07(5)(ff)1., 2., 4., 5., 8., and 16., Florida Statutes, as applicable. Pursuant to Section 721.07(6)(b) and Section 721.07(5)(ff)19., Florida Statutes, if the single-site is one created as a tenancy-in-common, the purchaser shall receive the document or documents creating the tenancy-in-common, including at a minimum a Declaration of Covenants, Conditions and Restrictions; and
>
> (c) Any other exhibit that the developer has filed with the division pursuant to Section 721.07(5), Florida Statutes, and Rule 61B-39.003, F.A.C., which the developer is not required but elects to include in the purchaser POS pursuant to Section 721.07(6)(d), Florida Statutes.

9. In short, a public offering statement contains all of the documents that a timeshare developer is required to give to a purchaser. Its purpose is to apprise a purchaser of everything that he or she needs to know about a timeshare. As a result, a public offering statement can be as much as 100 pages long.

10. Section 721.07(3)(a)1. requires that:

> Any change to an approved public offering statement filing shall be filed with the division for approval as an amendment prior to becoming effective. The division shall have 20 days after receipt of a proposed amendment to approve or cite deficiencies in the proposed amendment. If the division fails to act within 20 days, the amendment will be deemed approved.

11. The Division allows timeshare developers to provide purchasers with a POS through "alternative media." As set forth in rule 61B-39.008(1),

> Developers may provide purchasers with the option of receiving all or any portion of a single-site or multi-site purchaser POS through alternative media in lieu of receiving the written materials in the format prescribed in Rule 61B-39.004 or 61B-39.006, F.A.C., as applicable. The purchaser's choice of the delivery method shall be set forth in writing on a separate form which shall also disclose the system requirements necessary to view the alternative media, which form shall be signed by the purchaser. The form shall state that the purchaser should not select alternative media unless the alternative media can be viewed prior to the 10 day cancellation period. The alternative media disclosure statement shall be listed on the form receipt for timeshare documents in the manner prescribed in DBPR Form TS 6000-7, Receipt for Timeshare Documents, or DBPR Form TS 6000-7, Receipt for Multisite Timeshare Documents, as both of which are referenced in Rule 61B-39.003, F.A.C.

12. Rule 61B-39.001(1) defines "alternative media" as "any visually or audibly perceptible and legible display format which may require the use of a device or a machine to be viewed, including CD-ROM, microfilm, electronically transferred data, computer disk, computer or electronic memory, cassette tape, compact disk or video tape."

13. Rule 61B-39.008(3) provides that:

> Prior to delivery of the purchaser POS through alternative media, the developer

> must submit to the division a copy of the purchaser POS through the alternative media proposed to be used by the developer together with an executed certificate, using the form prescribed in DBPR Form TS 6000-8, the Certificate of Identical Documents, referenced in Rule 61B-39.003, F.A.C., certifying that the portion of the purchaser POS delivered through the proposed alternative media is an accurate representation of and, where practical, identical to the corresponding portion of the written purchaser POS.

Facts Specific to the Instant Case

14. Orange Lake Country Club, Inc. ("Orange Lake Country Club"), is the "developer" within the meaning of section 721.05(1) for the timeshare plans known as Orange Lake Country Club Villas, a Condominium ("Orange Lake"); Orange Lake Country Club Villas III ("Orange Lake III"); and Orange Lake Country Club Villas IV, a Condominium ("Orange Lake IV"). The aforementioned timeshare plans shall be collectively referred to as the "Orange Lake Timeshare Plans."

15. The Orange Lake Timeshare Plans are "single-site timeshare plans" as defined by rule 61B-39.001(13).

16. Via letters dated April 24, 2015, Orange Lake and Orange Lake III filed amendments to their alternative media disclosure statements with the Division.

17. In addition to providing for purchasers to receive documents such as the POS in writing or via CD-ROM, the amended alternative media disclosure statements gave purchasers the

option of receiving documents through the internet at http://orangelake.com/legaldocuments/index.php.

18. The amended alternative media disclosure statements contained a notice that a PDF reader and one of three web browsers (Internet Explorer 9 or above, Google Chrome, or Firefox) were required.

19. The amended alternative media disclosure statements instructed purchasers how to access documents through the link:

> - Open the link, http://orangelake.com/legaldocuments/index.php. in your web browser.
>
> - Enter the user name: hoEXliday and password: welcome!
>
> - Follow the following steps:
>
> Step 1: Please select the link to your resort.
> Step 2: Please select the Condominium, if applicable.
> Step 3: Please select the State where you purchased.
> Step 4: Please select the Public Offering Statement.

20. Via letters dated April 28, 2015, the Division approved the amended alternative media disclosure statements "for filing and use in the timeshare plan."

21. Before retiring, Mr. Rudisill worked as a regional service manager for York International. He oversaw 50 service technicians and sales engineers.

22. Mr. Rudisill used a computer at work and had an e-mail address associated with his position at York International.

23. Mr. Rudisill acquired his first home computer 35 to 40 years ago and has owned a home computer ever since. He currently has an e-mail address and internet access via three different web browsers.

24. Ms. Rudisill has no reported employment history. She uses a home computer and has an e-mail address.

25. The Rudisills maintain a permanent residence in Georgia but travel to Florida for vacations.

26. Between 2002 and 2015, the Rudisills purchased approximately 11 timeshare interests for use as vacation residences.

27. Neither Mr. Rudisill nor Ms. Rudisill read any of the public offering statements associated with the aforementioned timeshare purchases.

28. Ms. Rudisill considers she and her husband to be well-versed with the process of purchasing timeshares.

29. On June 14, 2015, the Rudisills executed purchase agreements to acquire week 32 for unit 5280 at Orange Lake and week 29 for unit 87911 at Orange Lake III.

30. These purchases were made so that they would have vacation residences.

31. Both acquisitions utilized the alternative media disclosure statements that had been approved by the Division on April 28, 2015.

32. As noted above, the Rudisills had the option to receive documents in written format, via a CD-ROM, or through a website link.

33. The Rudisills placed their initials next to a box indicating they agreed to accept documents electronically via a link to http://orangelake.com/legaldocuments/.

34. On June 14, 2015, the Rudisills executed documents pertaining to the Orange Lake and Orange Lake III timeshares stating that "[t]he undersigned acknowledges that the items listed below have been received and the timeshare plans and specifications have been made available for inspection." The aforementioned items included "Public Offering Statement Text."

35. However, neither Mr. Rudisill nor Ms. Rudisill ever attempted to access the link provided to them by the Orange Lake Country Club.

36. Neither Mr. Rudisill nor Ms. Rudisill ever asked for the documents to be provided in a different format.

37. The Rudisills initiated the instant litigation in order to cancel the purchase agreements. They cannot afford the timeshares and are unable to travel.

38. There is no allegation that Orange Lake Country Club coerced the Rudisills into purchasing the timeshares at issue or took advantage of them in any way.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.56 and 120.57(1), Fla. Stat.

40. The Rudisills have raised two issues. The first concerns whether the Division's approval of timeshare developers' requests to provide purchasers with a public offering statement via a website link amounts to an unadopted rule. The second issue concerns whether the Division's approval of timeshare developers' requests to provide purchasers with public offering statements via a website link amounts to an invalid exercise of delegated legislative authority.

41. Because the undersigned expressed uncertainty during the final hearing as to whether the Rudisills have standing to raise the aforementioned arguments, the undersigned will address the standing issue prior to considering the merits of the Rudisills' arguments. See generally Ferreiro v. Phila. Indem. Ins. Co., 928 So. 2d 374, 376 (Fla. 3d DCA 2006)(noting that "[t]he issue of standing is a threshold inquiry which must be made at the outset of the case before addressing whether the case is properly maintainable as a class action.").

The Rudisills Have Not Demonstrated an Injury in Fact

42. In order to have standing to challenge the validity of an administrative rule, a person must be "substantially affected" by the rule in question. § 120.56(1)(a), Fla. Stat.

43. As the First District Court of Appeal has observed,

> [t]o establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

Off. of Ins. Reg. v. Secure Enters., LLC., 124 So. 3d 332, 336 (Fla. 1st DCA 2013; see also Fla. Med. Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983).

44. With regard to the second prong of the substantially affected test, chapter 721 and the rules implementing the provisions therein are clearly intended to protect purchasers of timeshares. Thus, the Rudisills satisfy the zone of interest test. See generally Televisual Commc'ns v. Dep't of Labor & Emp. Sec./Div. of Workers' Comp., 667 So. 2d 372, 374 (Fla. 1st DCA 1995)(concluding that "[t]he hearing officer correctly noted that TVC was not a health care provider affected by section 440.13(3), Florida Statutes (Supp. 1994), but failed to recognize that TVC was indeed affected by the proposed rule which has the collateral effect of regulating TVC's industry.").

45. However, the Rudisills fail to demonstrate that they have suffered a real or immediate injury in fact.

46. The Rudisills argue that they have been prevented from exercising their right under section 721.10(1) to cancel the contracts at issue because they never received all of the documents that Orange Lake Country Club was required to provide to them.

47. However, there is no allegation that the Rudisills were prevented from viewing the public offering statements or that their ability to do so was impaired in any way.

48. Therefore, to whatever extent that the Rudisills have been injured, that injury was not due to Orange Lake Country Club making the public offering statements available to them via a website link, or to the Division's approval of that "alternative media" means of delivery. In fact, Orange Lake Country Club was merely complying with the Rudisills' selection to have the public offering statement provided to them in that manner as opposed to in written format or via a CD-ROM. See generally Off. of Ins. Reg. v. Secure Enters., LLC, 124 So. 3d at 339 (holding that "[a]ppellee has no protected economic right that has been impaired by the rules and forms at issue.").

49. In the alternative, even if the Rudisills could demonstrate that they have standing, they failed to demonstrate that the Division has utilized an unadopted rule or that rule

61B-39.001(1) amounts to an invalid exercise of delegated legislative authority.

The Division Has Not Utilized an Unadopted Rule

50. The Rudisills argue that the Division utilizes an unadopted rule by allowing timeshare developers to provide public offering statements via a website link.

51. The resolution of this issue turns on whether a website link is included within the rule 61B-39.001 definition of "alternative media."

52. The aforementioned rule defines "alternative media" as "any visually or audibly perceptible and legible display format which may require the use of a device or a machine to be viewed, including CD-ROM, microfilm, electronically transferred data, computer disk, computer or electronic memory, cassette tape, compact disk or video tape."

53. The plain language of rule 61B-39.001 strongly suggests that it was written in a broad manner so that it would encompass a wide variety of formats and not need to be amended as technology advanced. A website link unquestionably falls under the portion of rule 61B-39.001 describing "any visually or audibly perceptible and legible display format which may require the use of a device or a machine to be viewed . . . ." A website link is a visually perceptible display format that can

be viewed through the use of a computer, smart phone, or any other device capable of connecting to the internet.

54. In other words, interpreting rule 61B-39.001 to include a website link does not place upon the rule an interpretation that is not readily apparent from its plain language. While the Rudisills obviously take issue with the fact that rule 61B-39.001 does not expressly refer to the internet or website links, such a hypertechnical level of precision is not required in rulemaking. See generally St. Francis Hosp., Inc. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989)(stating that "[a]n agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rulemaking.") (emphasis added).

The Division Has Not Committed an Unlawful Exercise of Delegated Legislative Authority

55. Rule 61B-39.001 identifies section 721.07 as one of the laws it implements.

56. Section 721.07(6)(a) requires that a timeshare developer "shall furnish each purchaser" with "[a] copy of the purchaser public offering statement text in the form approved by the division for delivery to the purchasers." (emphasis added).

57. According to the Rudisills, providing a public offering statement via a website link is not the same as furnishing or delivering the public offering statement. Therefore, the Rudisills argue that interpreting rule 61B-39.001's definition of "alternative media" to include website links causes the rule to be invalid. See § 120.52(8)(c), Fla. Stat. (defining an "invalid exercise of delegated legislative authority" to include a rule that "enlarges, modifies, or contravenes the specific provisions of law implemented.").

58. Without a doubt, the Rudisills and the Division could refer to many different dictionaries and cite numerous definitions of "furnish" and "delivery" to support their respective arguments as to whether interpreting rule 61B-39.001 to include website links contravenes the section 721.07(6)(a) references to "furnish" and "delivery."

59. In general, courts defer to an agency's interpretation of a statute administered by that agency unless the agency's interpretation is clearly erroneous or unreasonable. West Flagler Assocs. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, 139 So. 3d 419, 421 (Fla. 1st DCA 2014).

Courts will not defer to such an interpretation if no special agency expertise was applied.

60. Regardless of whether the Division's interpretation of section 721.07(6)(a) is owed any deference, the undersigned concludes without hesitation that the Division's interpretation of the section 721.07(6)(a) references to "furnish" and "delivery" does not enlarge, modify, or contravene the statute.

61. The Rudisills essentially argue that a timeshare developer must physically "furnish" and "deliver" a public offering statement in order to be in compliance with section 721.07(6)(a).

62. Given that the internet has become a ubiquitous feature of modern life, adopting the hypertechnical interpretation favored by the Rudisills would serve no logical end. See generally Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. Investment Corp., 747 So. 2d 374, 385 (Fla. 1999)(noting that "the majority opinion below and respondents advocate a hypertechnical interpretation of section 120.565 which serves no logical end.").

63. Moreover, the Rudisills have made no allegation that Orange Lake Country Club did anything improper when it sold the timeshares at issue, and the Rudisills stated that they initiated the instant litigation in order to cancel the purchase agreements. The undersigned declines to adopt a hypertechnical

interpretation of section 721.07(6)(a) in order to assist the Rudisills with disavowing valid contracts. See generally Brunelle v. Norvell, 433 So. 2d 19 (Fla. 4th DCA 1983)(stating "[w]e decline to assist appellant in avoiding extradition by giving a hypertechnical interpretation to the statute.").

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the rule challenge initiated by Harold and Patricia Rudisill be dismissed.

DONE AND ORDERED this 21st day of December, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2017.

ENDNOTES

[1/] Unless stated otherwise, all statutory references will be to the 2017 version of the Florida Statutes.

[2/] Section 721.05(30), Florida Statutes, defines a "purchaser" as "any person, other than a developer, who by means of a

voluntary transfer acquires a legal or equitable interest in a timeshare plan other than as security for an obligation."

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.