

# KULICK LAW FIRM

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July 7, 2015

Mr. Michael Schaefer  
Treasurer, DCCPOA  
694 Aulena Court  
Diamondhead, MS 39525

**RE: Diamondhead Country Club and Property Owners Association**

Dear Mr. Schaefer:

You have requested that I prepare a written opinion on the following 3 issues:

1. The propriety of voting by absentee ballot;
2. Whether or not voting by e-mail would be allowed;
3. What voting rights the Purcell Corporation has.

I will base my opinion on the By-Laws and Mississippi Law. I cannot be sure which by-laws are current and I am using the version that you directed me to follow. The by-laws I am utilizing are dated November 11, 1997. I have included excerpts from a version presumably adopted June of 2005 and February 2009. The Board would have to determine what version is actually in effect.

Let's discuss the first and third issue first since they are related and controlled by Section 3.7 of the By-Laws for the DPOA.

The section reads as follows:

**Section 3.7 Voting.** Each member in good standing of the Corporation shall be entitled to cast one vote for the election of Officers and Directors; provided, however, that not more than one vote shall be cast for any one parcel of property, regardless of the number of co-owners thereof. **On any matter other than the election of Officers and Directors which may come before a membership meeting, members in good standing shall be entitled to cast one vote for each parcel of property owned by them and upon which assessments are being charged.** The vote for any parcel of real property owned or being purchased jointly by husband and wife may be cast by either

spouse. The vote for any real property being held by or being purchased by more than one person under some form of joint or several ownership other than between husband and wife may be cast by any one of such persons upon presentation of written authority. Except as herein or in the Certificate of Incorporation otherwise provided, all Corporate action shall be determined by vote cast by a majority of the membership present in person and/or by proxy at a meeting at which a quorum is present.

### [JUNE 2005]

Section 3.7 Voting. Each member in good standing of the Corporation shall be entitled to cast one vote for the election of Officers and Directors; provided, however, that not more than one vote shall be cast for any one parcel of property, regardless of the number of co-owners thereof. **On any matter other than the election of Officers and Directors which may come before a membership meeting, members in good standing shall be entitled to cast one vote for each parcel of property owned by them and upon which assessments are being charged (other than exempt developer lots).** The vote for any parcel of real property owned or being purchased jointly by husband and wife may be cast by either spouse. The vote for any real property being held by or being purchased by more than one person under some form of joint or several ownerships other than between husband and wife may be cast by any one of such persons upon presentation of written authority. Except as herein or in the Certificate of Incorporation otherwise provided, all Corporate action shall be determined by vote cast by a majority of the membership present in person and/or by proxy at a meeting at which a quorum is present.

### ABSENTEE BALLOTS

By-Laws Section 3.7 provides that members in good standing may vote “on any matter... which may come before a membership meeting”. Absentee ballots would have to be prepared and voted in advance of the meeting. They would pertain only to matters known in advance—but not as to “any [other] matter” which might come up at the meeting. As such, absentee ballots would not be in compliance with the intent of the by-laws which is to allow every member in good standing to vote for any—and presumably all—matters which arise at the meeting. Absentee ballots are not proxies. Proxies allow the designated holder at the meeting to vote on all matters.

While on the face of things, absentee ballots seem like a good idea, they only work if the issues are set. Based on the current by-laws, I would argue that absentee ballots are in violation and should not be allowed.

### PURCELL VOTING:

Section 3.7 also provides that *members in good standing* may cast one vote for officers. The same good standing member may cast as many votes as they have parcels of property on other matters.

According to the Mississippi Non Profit Corporation Act, as set forth in Miss. Code Ann. § 79-11-127 containing definitions:

(x) "Member" means (without regard to what a person is called in the articles or bylaws) **any person or persons** who on more than one (1) occasion, pursuant to a provision of a corporation's articles or bylaws, have the right to vote for the election of a director or directors.

A person is not a member by virtue of any of the following:

- (i) Any rights such person has as a delegate;
- (ii) Any rights such person has to designate a director or directors; or
- (iii) Any rights such person has as a director.

(y) "Membership" refers to the rights and obligations a member or members have pursuant to a corporation's articles, bylaws and Section 79-11-101 et seq.

(z) "Nonprofit corporation" means a corporation, no part of the assets, income or profit of which is distributed to or enures to the benefit of its members, directors or officers, except as otherwise provided under this chapter. In a corporation all of whose members are nonprofit corporations, distribution to members does not deprive it of the status of a nonprofit corporation.

(aa) "Notice" is defined in Section 79-11-129.

(bb) **"Person" includes any individual or entity.**

Insofar as Purcell is a Corporation—an "entity", and the definition as used in the Mississippi Code would allow an entity to be a member of a corporation, Purcell would pass the membership test by definition alone.

The next step is to look at the basic rights of members. The Non Profit Act in § 79-11-177, entitled "Rights and obligations of members" states:

"All members shall have the same rights and obligations with respect to voting, dissolution, redemption and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members shall have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws."

So Purcell cannot receive special treatment as a member—unless the by-laws specify that they have a different class of membership with different rights or obligations. I have reviewed the by-laws and have not found where Purcell was set out as a special class of membership and as such, it must behave as any other member.

So, with that being said, we now have to look to the by-laws to see if they are behaving as other members. It is my understanding that Purcell corporation owns over 400 lots in Diamondhead. It is my understanding that every lot is assessed with dues as part of being a member of the HOA? Is Purcell assessed dues like every other member on each of its lots? Does Purcell pay dues like every other member? Is each lot owned by other individuals assessed dues? I would need to

know the answer to these questions to definitively say whether or not Purcell is a member in good standing. However, the by-laws are clear that:

**Section 2.5 Member Not in Good Standing.** Except as provided by Section 3.7 hereof a member who is not in good standing shall be suspended from (i) the right to vote on such matters which may come before a membership meeting and (ii) all other privileges associated with the membership in the Corporation including the privilege to the common facilities of the Corporation, including the golf courses, country club, yacht club, marina, swimming pools and other recreational facilities.

If Purcell pays dues assessed as with any other member, I would say that Mississippi Law and the By-Laws allow them to vote one vote for officers and as many votes as they own parcels of property on other matters that come up at the membership meetings. If not, Mississippi Law is also clear that if the by-laws don't provide for Purcell to have special treatment, then their votes on any matter should be void.

The version of the By-Laws presumably adopted in 2005 references "exempt developer lots". I cannot find anywhere in any of the versions of the By-Laws that "exempt developer lots" is defined. Again, without clarification as to what lots are "developer lots", I am not sure if that includes Purcell, or any other party who has purchased a lot for development. Also, the By-Laws don't define what "exempt" means. Does that mean developer lots that are exempt have special status to not pay dues? As you can see, this statement added in 2005 creates more ambiguity rather than clarity.

Also, it would be important to determine if Purcell was "in good standing" before the 2005 amendment occurred if they participated in the decision to amend the by-laws. Again, I don't have that information. Research into the minutes would have to be conducted for that determination to be made.

## E-MAIL VOTING

Section 3.10 prescribes that members may vote via e-mail if prior to the action being taken, the member has authorized the e-mail ballot in writing to the Secretary of the Board of Directors. A special vote may be taken—provided all members are given notice of the action via other means. Obviously, these actions would be specific items or resolutions and not for general meeting matters wherein members would not be able to have knowledge of any and all matters coming before the meeting—just as with absentee ballots.

***Section 3.10. Action Without a Meeting. The members of the Corporation may act without a meeting if the Corporation delivers a written ballot to every member entitled to vote on the action. Ballots may be delivered to members in person, by email pursuant to other provisions of this section, or by mail delivered to the post office address with the Corporation. The action will be approved when the number of votes cast, either in person or by proxy, is at least equal to the quorum required for a meeting under section 3.6, and***

*the number of votes cast in favor of approval is at least what would be required to approve the action at a meeting under Section 3.7. Along with the written ballot, the Corporation will specify the time and manner by which the ballot must be returned to the Corporation in order to be counted and also will inform the member of the number of responses needed to meet the quorum requirement and the percentage of approvals necessary to approve each action.*

*For purpose of this section, written ballots may be delivered by email to any member who authorizes the Corporation to deliver ballots by email. Authority to deliver ballots by email must be made in writing to the Secretary of the Board of Directors. A member who has granted authority to deliver ballots by email may revoke that authority by delivering written notice of revocation to the Secretary of the Board of Directors. Any notice sent to the email address designated by the member is deemed delivered to the member 24 hours after the time sent unless it is returned as undeliverable within that time. In the event of two consecutive emails are returned undeliverable, the member's authorization to deliver ballots by email shall be deemed revoked and delivery must be made by other means.*

For your further edification, I have attached a copy of the by-laws I used as reference for these opinions. I have reviewed only the by-laws to which I have attached. If there are others or if the Covenants which are referenced and incorporated are more comprehensive than those contained therein, then my opinion is subject to change.

If I can be of further service, please do not hesitate to call.

Sincerely,

William M. Kulick  
**KULICK LAW FIRM**

Enclosures