

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	11/5/2012
File #	2012-07104

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2012037791

DIANE BROCK OSER, Unit Owner,
GALT MILE APARTMENTS, INC.

DS 2012-073

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under sections 120.565 and 719.501, Florida Statutes (2012).

PRELIMINARY STATEMENT

The Division received a petition for Declaratory Statement September 4, 2012 and an amendment to the petition September 19, 2012 from Diane Brock Oser, seeking an opinion on whether a bylaw of Galt Mile Apartments, Inc. cooperative that requires a director to sit off the board for one year before running again for election to the board is consistent with section 719.106(1)(d), Florida Statutes.

The original petition cited to the Condominium Act, chapter 718, Florida Statutes. The Division pointed out the error and allowed Ms. Oser to file an amended petition. Ms. Oser filed a timely amendment to the petition clarifying her question and citing to the Cooperative Act, chapter 719, Florida Statutes.

The Division sent a letter to the registered agent of the association, informing the association that the Division received a Petition for Declaratory Statement from the petitioner. The Division notified the association that it may intervene or otherwise

respond to the petition, if so desired, within twenty-one days of the date of the letter.

The association did not respond.

Notice of receipt of the petition was published in the October 1, 2012 issue of the *Florida Administrative Register*.

A hearing was not requested.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Diane Brock Oser. The Division takes no position as to the accuracy of the facts, and merely accepts them as submitted for purposes of this final order.

1. Diane Brock Oser is a unit owner and member of the Galt Mile Apartments, a cooperative association (Galt Mile).¹

2. Galt Mile is the cooperative “association” responsible for managing and operating Galt Mile Apartments in Fort Lauderdale, Broward County, Florida.²

3. The association’s bylaws render retiring directors ineligible for another term for a period of one year.³ The bylaw provides: “Directors shall hold office until their successors have been elected and the organizational meeting of the newly elected Board of Directors has been held. A minimum of one (1) year off the Board is required before a retiring Board Member may be considered for re-election after serving his own full term.”

4. This provision has not been enforced for at least the last four years.⁴

¹ Pet Decl Stmt at 1

² *Id.* at 2, § 719.103(2), Fla Stat (2012)

³ Pet Decl Stmt at 2-3, Galt Mile Bylaws Art 5, § 10

⁴ Pet Decl. Stmt at 2

5. Elections are set to be held in March of 2013 and one or more of the retiring board members have announced their intention to run again.⁵

CONCLUSIONS OF LAW

6. The Division has jurisdiction to enter this order pursuant to sections 719.501 and 120.565, Florida Statutes.

7. Diane Brock Oser, as a unit owner in Galt Mile, has standing to petition for a declaratory statement.⁶

8. Galt Mile, as a cooperative association, has standing to intervene and respond⁷

9. 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.

10. 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.

⁵ *Id.*

⁶ § 719 103(26), Fla Stat (2012)

⁷ § 719 103(2), Fla Stat (2012)

11. Section 719.106(1)(d), Florida Statutes, provides in relevant part that “[a]ny unit owner desiring to be a candidate for board membership must comply with subparagraph 1”⁸ regarding notice of candidacy. Section 719.106(1) provides in relevant part that “[a]ny unit owner or other eligible person desiring to be a candidate for the board of administration must give written notice to the association at least 40 days before a scheduled election.”⁹ Notably absent from section 719.106, Florida Statutes, is any provision limiting unit owner eligibility or setting term limits. Under the plain language of the statute, “any unit owner” is automatically eligible for a board position.

12. Furthermore, section 719 106, Florida Statutes, contains no provision that allows the association to determine unit-owner eligibility or set term limits. The unit-owner eligibility provisions, unlike the provisions governing director compensation,¹⁰ voting and election procedure, and director vacancies,¹¹ are not subject to the phrase “unless otherwise provided in the bylaws.” “[W]here [the Legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion.”¹² Since the phrase “unless otherwise provided in the bylaws” does not qualify the unit owner eligibility provision, this omission indicates legislative intent to preclude an association from placing restrictions on a unit owner’s eligibility to run for the board.

⁸ § 719 106(1)(d), Fla Stat (2012)

⁹ § 719 106(1)(d)(1), Fla Stat (2012)

¹⁰ § 719 106(1)(a)(1), Fla Stat (2012)

¹¹ § 719 106(1)(d)(6), Fla Stat (2012)

¹² *Russello v United States*, 464 U S 16, 23 (1983)

13. Additionally, section 719.106(2)(d), Florida Statutes, expressly disallows bylaw provisions that are inconsistent with the Cooperative Act, chapter 719.¹³ The bylaw that requires retiring directors to wait one year before they may serve on the board again runs counter to the provision in the Cooperative Act providing that *any* unit owner can run for election to a cooperative board.

14. In an earlier declaratory statement on a similar issue in the Condominium Act, the Division determined that the legislature intended all unit owners to be eligible for board membership regardless of a bylaw rendering a current board member ineligible to run for another term.¹⁴ In reaching this conclusion, the Division reviewed prior statements and legislative history, which is detailed in that statement. In light of the Legislative action and interpretation, the Division has taken the position that the phrase “any unit owner” is not subject to any further restrictions than those provided by statute.¹⁵

15. Even though these earlier statements concerned chapter 718, chapter 719 contains nearly identical language concerning unit owner board eligibility. Both acts provide that “[a]ny unit owner desiring to be a candidate for board membership must” timely submit notice of his or her candidacy to the association.¹⁶ This legislative decision

¹³ § 719 106((2)(d), Fla Stat (2012)

¹⁴ See *In re Pet for Decl. Stmt. Cloister Beach Towers Ass’n*, DBPR-2007-01533, Docket No 2007003592, Agency Clerk 2007-003 (Feb 21, 2007) (finding a bylaw stating that directors who have completed their three year term must wait one year before becoming eligible to serve on the board again was inconsistent with section 718 112(2)(d), Florida Statutes)

¹⁵ *Id*, See also *In re Pet for Decl. Stmt Gulf and Bay Condo Ass’n*, DBPR-2007-04704, Docket No 2007028049, Agency Clerk 2007-019 (June 26, 2007) (finding a bylaw limiting a unit owner to two terms as a director was inconsistent with section 718 112(2)(d), Florida Statutes), *In re Pet. for Decl. Stmt Osprey at Destin W. Beach and Bay Resort Condo. Ass’n*, DBPR-2012-00552, Docket No 2011049595, Agency Clerk 2011-081 (Jan 18, 2012) (finding a bylaw that prevented unit owners who were members of the board of directors at other associations from being able to serve on the board, was inconsistent with section 718 112(2)(d), Florida Statutes)

¹⁶ Compare § 719 106(1)(d) with § 718 112(2)(d)(2), Fla Stat

to use mirrored language in chapters 718 and 719, Florida Statutes, shows that the legislative intent for both chapters regarding unit-owner eligibility is the same.¹⁷


16. The Cooperative Act provides that every unit owner is eligible to run for election. The Galt Mile bylaw limiting a director's eligibility to run for re-election is inconsistent with the Cooperative Act. All unit owners in Galt Mile are eligible to run for election to the board of directors.

For the reasons stated above it is hereby:

ORDERED that the Galt Mile Apartments, Inc. cooperative bylaw that requires retiring unit owner directors to wait a year before they are eligible to serve on the board again is inconsistent with section 719.106(1)(d), Florida Statutes.

DONE and ORDERED this 1 day of November 2012, at Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
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¹⁷ See *Shotz v. City of Plantation, Fla*, 344 F 3d 1161, 1168 (11th Cir 2003) (“[The Legislature] knows how to use specific language to identify which particular entities it seeks to regulate”), *Doctors Hosp., Inc. of Plantation v. Bowen*, 811 F 2d 1448, 1452 (11th Cir 1987) (“A presumption is made that the same words used in different parts of an act have the same meaning”) Even though this issue deals with two separate acts, the Condominium and Cooperative Acts, the principles of statutory construction noted in *Shotz* and *Bowen* apply Chapter 76-222, Laws of Florida, created the Condominium Act and the Cooperative Act, which had in principle, up until then, been governed together by chapter 711, Florida Statutes

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 Diane Brock Oser, 3233 NE 34th Street, Apt. 509, Fort Lauderdale, FL 33308 and Galt Mile Apartments, Inc., c/o Katzman Garfinkel & Berger, 5297 W. Copans Road, Margate, FL 33063, on this 5th day of November 2012.


Agency Clerk's Office

Copies furnished to:

Janis Sue Richardson
Chief Attorney