

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

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| FILED | |
| Department of Business and Professional Regulation Deputy Agency Clerk | |
| CLERK | Brandon Nichols |
| Date | 1/30/2012 |
| File # | 2012-00552 |

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2011049595

JULIE RAWSON., Unit Owner,
OSPREY AT DESTIN WEST BEACH AND BAY RESORT
CONDOMINIUM ASSOCIATION, INC.

DS 2011-081

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes (2010).

PRELIMINARY STATEMENT

On October 11, 2011, the division received a petition for Declaratory Statement from Julie Rawson, seeking an opinion on whether the Osprey at Destin West Beach and Bay Resort Condominium Association, Inc. may adopt a bylaw restricting an owner's candidacy for election based on her election to another condominium board.

The division sent Julie Rawson a letter on October 14, 2011, informing her that a declaratory statement is a limited administrative proceeding and the division may not issue a statement where a statute, rule, or order is not cited to in the petition itself. The division may not determine the validity of a bylaw once recorded in the public records in this type of proceeding. Also, the division informed the petitioner that a complete set of governing records, and a copy of the proposed bylaw, is needed before review can proceed. The proposed bylaw and governing documents, along with a citation to

sections 718.112(2)(d)(2) and 718.112(2)(d)(4)(a), were provided on November 14, 2011.

Also on October 14, 2011, 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 (21) days of the date of the letter. The association responded on October 25, 2011.

Notice of receipt of the petition was published in Florida Administrative Weekly on October 28, 2011.

Rawson filed additional information on November 14 and responded to further questions on December 14, 2011, at which time the petition was considered complete. The association filed its full response on January 4, 2012.

No hearing was requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Julie Rawson and the association. 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. Julie Rawson is a unit owner in the Osprey at Destin West Beach and Bay Resort Condominium Association, Inc. (Osprey).¹ She also owns units in several other adjacent condominium associations.²

2. Osprey is the condominium "association" responsible for the operation, maintenance, and management of Osprey Condominium, one of the residential

¹ Pet for Decl Stmt. at 1 (Oct 11, 2011)

² *Id.*

condominiums under the auspices of Destin West Beach and Bay Resort-Bayside Property Owners Association, Inc.³

3. Osprey's board of directors is attempting to prohibit unit owners in Osprey who also own units and are members of Heron, Pelican, and Sandpiper (residential condominiums falling under the control of the master association), from sitting on its board of directors.⁴

4. Specifically, the proposed bylaw at issue seeks to amend the Osprey bylaws, adding the following requirements for members of the board of directors: (1) the candidate must be a natural person, (2) of at least eighteen (18) years of age, and (3) must not be a member of the Board of Directors of the Destin West Beach and Bay Resort Condominium Association of Sandpiper, Heron, or Pelican condominiums.⁵

5. The petitioner owns condominium parcels in Osprey, Heron, and Pelican and is presently up for election to the Osprey Board while currently serving on the Board of Directors for Heron.⁶

6. If elected, Petitioner would serve on both boards in contravention of the proposed bylaw amendment.

7. The association argues that "[w]ithout the ability by an association to restrict service on its Board by an owner who is already serving on another of the

³ *Id.* In 2007, the Division determined that the "master association," Destin West Beach and Bay Resort-Bayside Property Owners Association, Inc, fell outside of the division's jurisdiction because it controls nonresidential condominiums as well as residential condominiums. For purposes of this declaratory statement, the master association is not at issue. Rather, the underlying condominium association, Osprey in this case, is the association of interest in this proceeding. See Memorandum from Janis Sue Richardson, on Jurisdiction Over Destin West Beach and Bay Resort-Bayside Property Owners Association, Inc, Case No. 2007034540 (Aug 29, 2007) (on file with DBPR)

⁴ *Id.* at 1

⁵ See Proposed Amendment to Art. IV of Osprey Bylaws (on file with DBPR).

⁶ Pet for Decl Stmt at 1

associated boards, we believe it is possible that control of the Master Association may in future be monopolized by a few individuals having primarily a business interest in the property and not the maintenance and care of the property desired by a majority of the owners in these associations.” The association relies upon a legal opinion that finds its corporate authority under chapter 617, Florida Statutes, gives it sufficient grounds to adopt the bylaw;

CONCLUSIONS OF LAW

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

9. Julie Rawson, as a unit owner in Osprey, has standing to petition for a declaratory statement.⁷

10. Osprey, as a condominium association, has standing to intervene and respond.⁸

11. 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.

12. 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

⁷ § 120.565, Fla Stat (2011)

⁸ *Id.*

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.

13. Section 718.112(2)(d)(2), Florida Statutes, provides in relevant part: “Any unit owner desiring to be a candidate for board membership must comply with subparagraph 4.a. and must be *eligible* to serve on the board of directors at the time of the deadline for submitting a notice of intent to run in order to have his or her name listed as a proper candidate on the ballot or to serve on the board.”⁹ The statute then lists factors that render one ineligible to serve on the board; they are: (1) a person who has been suspended or removed by the division under chapter 718; (2) a person who is delinquent in the payment of any fee, fine, or special or regular assessment; and (3) a person who has been convicted of any felony in this state of the United States and whose civil rights have not been restored for a period of five or more years prior to the contested election.¹⁰

14. In section 718.112(2)(d)(2), Florida Statutes, there is no provision which allows the board of directors or a vote of the association to provide other limitations. As a matter of statutory construction, “where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.”¹¹ Here, as mentioned above, there is no language allowing the board to otherwise provide additional limitations. By comparison,

⁹ § 718.112(2)(d)(2), Fla Stat (2011) (emphasis added)

¹⁰ *Id.*

¹¹ *Thayer v. State*, 335 So 2d 815, 817 (Fla 1976)

section 718.112(2)(d)(2) provides that “Unless the bylaws provide otherwise, a vacancy on the board caused by an expiration of a director’s term shall be filled by electing a new board member, and the election must be by secret ballot.”¹² Here, the Legislature has provided that the association bylaws *may* provide different procedures for filling a vacancy if the association chooses to do so.

15. Because the proposed bylaw here would add the additional requirement that a candidate for election must not be a member of the board of directors of the Destin West Beach and Bay Resort Condominium Associations of Sandpiper, Heron, or Pelican condominiums, it runs expressly counter to the provisions in the Condominium Act which provide that *any* unit owner can run for election to a condominium board—subject only to the statutory limitations to eligibility listed in the act. Furthermore, though section 617.0802(1), Florida Statutes, pertaining to the board of directors for non-profit Florida corporations, arguably allows for the imposition of additional requirements to board eligibility, that provision is subservient to the requirements in section 718.112(2)(d)(2) for two reasons. First, section 718.111(2), Florida Statutes, provides that section 617 applies only to the extent that it does not conflict with chapter 718. Second, section 718.112(2)(d)(2) applies to condominium associations more specifically than section 617.0802(1)—so, the specific condominium statute governs over the more general corporate law.¹³

For the reasons stated above it is hereby:

¹² *Id.*

¹³ § 718.111(2), Fla Stat (giving priority to ch 718 over ch 617 powers), *Adams v Culver*, 111 So 2d 665, at 667 (Fla 1959) (stating rule of statutory construction)

ORDERED that Osprey at Destin West Beach and Bay Resort Condominium Association, Inc. lacks the authority to adopt a bylaw restricting a unit owner's eligibility to run for election to the board of directors. Specifically, the proposed bylaw amendment that a candidate for election must not be a member of the board of directors of the Destin West Beach and Bay Resort Condominium Associations of Sandpiper, Heron, or Pelican condominiums, is expressly disallowed under section 718.112(2)(d)(2), Florida Statutes.

DONE and **ORDERED** this 10th day of January 2012, at Tallahassee, Leon County, Florida.





MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, FL 32399-1030

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 Julie Rawson, 1326 Miracle Strip Parkway, SE, Ft. Walton Beach, FL 32548, and Jim W. Peters, President, Osprey at Destin West Beach and Bay Resort Condominium Association, Inc., 1324 Miracle Strip Parkway, L-08, Ft. Walton Beach, FL 32548, on this 30th day of January, 2012.


for: Brandon M. Nichols
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney

Tommy Puckett
1322 Miracle Strip Parkway, Unit P-306
Ft. Walton Beach, FL 32548