

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2009011708

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.

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**DS 2009-015**

**DECLARATORY STATEMENT**

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to section 120.565, Florida Statutes (2008).

**PRELIMINARY STATEMENT**

On March 4, 2009, the Division received a Petition for Declaratory Statement from Brickell Bay Club Condominium Association, Inc. (Association), by and through its attorney, David H. Rogel, requesting an opinion as to whether it must vote to reaffirm a bylaw amendment establishing two-year staggered terms passed by a majority of unit owners other than the developer in 1989 under section 718.112(2)(d)1, Florida Statutes (2008).

Notice of receipt of the petition was published in Florida Administrative Weekly on March 20, 2009. The association requested the entry of the statement without a hearing. Pet. for Decl. Stmt. at 4.

## FINDINGS OF FACT

The following findings of fact are based on information submitted by 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. Brickell Bay Club Condominium was created in the early 1970s. Art. 2, Restated and Revised Declaration of Condo. of Brickell Bay Club, a Condominium (Declaration) (1987).

2. Association is the Florida not-for-profit corporation responsible for the operation of Brickell Bay Club. Id. at art. 1(n); Arts. I-III, Arts. of Incorp. of Brickell Bay Club Ass'n (Art. of Incorp.) (1973).

3. Association's annual meeting, where the board of directors is elected, is held on the third Thursday of April of each year. Art. III, sec. 3, Amend. By-Laws of Brickell Bay Club Ass'n (1987) (Am. By-laws).

4. Originally, the bylaws provided for 3 to 9 directors elected for one-year terms. Art. IV, sec. 1, Amend. Bylaws. The bylaws were amended in 1989 to provide for staggered two-year terms for a board of "not less than nine (9) persons." Amend. Art. IV, sec. 1, of the Amend. Bylaws (Mar. 22, 1990); Pet. for Decl. Stmt. at 1. Under the amended bylaws, all nine directors are elected to two-year terms. Id. Five directors are elected in odd numbered years and four directors are elected in even numbered years. Id. Association has operated under the two-year staggered term bylaw since 1989.

5. At the upcoming annual meeting, five directors are slated to be elected to two-year terms. Pet. for Decl. Stmt. at 2.

6. Association distinguishes its situation from two previous declaratory statements issued on the application of the staggered term provision in In re: Petition for Declaratory Statement, de la Bahia Condominium Association, Inc., DBPR 200808158, Docket No. 2008046156 (Sept. 25, 2008) (declaring that de la Bahia must vote to reaffirm its staggered term bylaw under section 718.112(2)(d), Fla. Stat. 2008) and The Olympus Condominium Association, Inc., DBPR 200900555, Docket No. 2008056492 (Jan. 23, 2009) (declaring that Olympus must vote to reaffirm staggered term bylaw and that directors elected to 2-year terms in 2008 could serve out the remainder of their term). The Division reached these conclusions in part on the grounds that an association must reaffirm its staggered term bylaw to ensure that a bylaw adopted by a developer or passed by less than a majority vote did not continue without a majority of the current owners approving it. Association distinguishes its situation by stating that a majority of non-developer owners approved its bylaw in 1989. Pet. Decl. Stmt. at 1, 4.

### CONCLUSIONS OF LAW

1. 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.

2. 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.

3. Association has standing to petition for a declaratory statement. §§ 718.103(2), 120.565, Fla. Stat.

4. Section 718.112(2)(d)1, Florida Statutes, as amended in 2008 provides:

(2) REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

\* \* \* \*

(d) *Unit owner meetings.*—

1. There shall be an annual meeting of the unit owners . . . . The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms.

Ch. 2008-28, § 7, Laws of Fla. (2008) (Fla. HB 995).

5. As the Division noted in its prior statements, the legislature intended “that the board members’ terms must expire at the annual meeting, whether or not it is mentioned in the bylaws.” Fla. H.R. Comm. on Saf. and Sec. Council, HB 995 (2008) Staff Analysis 8 (rev. April 14, 2008) (available at <http://www.flsenate.gov/data/session/2008/House/bills/analysis/pdf/h0995c.SSC.pdf>).

The legislature created one exception to the one-year term for an association that

adopted or reaffirmed an existing bylaw allowing for two-year staggered terms.<sup>1</sup> Reaffirmation is needed to ensure that a prior bylaw inserted by a developer without a unit owner vote or a bylaw approved by less than a majority of the total voting interests is affirmed in compliance with section 718.112(2)(d)1, Florida Statutes. Additionally, reaffirmation is required to create an exception to the statutory mandate that all directors' terms be one-year terms.

6. A “[s]taggered board of directors” is “[a] board of directors whose members’ terms of service overlap so that only part of the board’s makeup is voted on in any single election. Typically, members serve terms of two or more years, with some members’ terms expiring at each annual election.” BLACK’S LAW DICTIONARY 142 (8th ed. 2005).<sup>2</sup> The current by-laws governing board of director elections for Association meet the definition of “staggered terms.” See art. IV, sec. 1, Amend. By-laws.

7. However, Association’s bylaws are no longer consistent with section 718.112(2)(d)1, Florida Statutes (2008) because the board members’ terms are not one-year terms that expire at the annual meeting and because the provisions allowing two-year staggered terms have not been reaffirmed by a majority of the total voting interests of Association.

8. Generally, laws are prospective in application from the effective date. 48A Fla. Jur. 2d Statutes § 99 (2000); During v. Reynolds, Smith & Hills, 471 So. 2d 603, 607

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<sup>1</sup> See also Fla H R Comm. Saf and Sec. Council, tape recording of proceedings (April 18, 2008) (on file with The Florida House of Representatives, Office of the Clerk) (Representative Robaina stating: “Speaker what this allows is for the staggered terms in the event they are provided for in the condominium’s bylaws and there is a majority vote of the unit owners ”)

<sup>2</sup> “When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning” BB Landmark, Inc v Haber, 619 So. 2d 448, 449 (Fla 3d DCA 1993). When the meaning is clear, resort to a dictionary suffices Id (applying the dictionary definition of materially and adverse to determine whether a developer change triggered rescission rights under § 718.503, Fla Stat.)

(Fla. 1st DCA 1985). “[T]he citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect.” During, 471 So. 2d at 607 (quoting Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978)). Even where the effective date is several months after the enactment, the law is prospective in application. See City of St. Augustine v. Authentic Old Jail, Inc., 388 So. 2d 1044 (Fla. 5th DCA 1980) (holding that seven month delay between enactment and effective date of city ordinance did not preclude enforcement to actions occurring after the effective date).

9. Subsection 718.112(2)(d)1, Florida Statutes, took effect on October 1, 2008. Ch. 2008-28, § 25, Laws of Fla. The amendment applies to Association. The amendments are prospective in application. Before the 2008 amendment, the Condominium Act set the terms of directors at one year but left it to each association, without words of limitation, to adopt a bylaw setting different terms. See s. 718.112(2)(d), Fla. Stat.(2007), (if there is no provision in the bylaws for terms of the members of the board, the terms of all members of the board shall expire upon the election of their successors at the annual meeting.). Thus, the Florida Legislature explicitly provided for annual terms, but granted associations the ability to establish different terms of office, regardless of their length and without any statutorily imposed voting requirement. In 2008, the legislature amended these provisions adding limiting language that if the bylaws permitted staggered terms of no more than two-years and upon approval of a majority of voting interests, board members could serve two-year staggered terms. Ch. 2008-28, §7, Laws of Fla. (2008) (Fla HB 995). Therefore, as of October 1, 2008, all

condominium association director seats were limited to one-year terms, unless the bylaws allowed two-year staggered terms and a majority of the condominium voting interests approved such terms. If the legislature had wished to create an exception for those associations whose bylaws already provided for two-year staggered terms, it could have easily done so when drafting these new provisions. For example, the legislature could have said that with respect to associations with two-year staggered terms already in their bylaws, no re-vote (majority or otherwise) or reaffirmation of a prior vote is necessary. They didn't, and the Division cannot now add such an exception to the law where none exists. See 48A Fla. Jur. 2d Statutes §§ 119, 164 (2000). Therefore, in order for the Association to elect new directors to serve two-year staggered terms, it must reaffirm its bylaw by a majority vote.

10. The election held in April 2009 must adhere to the new provisions in section 718.112(2)(d)1. Director seats up for election at the annual meeting in February 2009 must be for one-year terms unless Association reaffirms the by-law approving two-year staggered terms. Directors presently serving a two-year staggered term who are not up for election in April 2009 may serve out their terms as the law is prospective in application and the legislature did not express an intention to make the amendment retroactive to elections held prior to its effective date or to truncate terms of validly elected directors.

For the reasons stated above it is hereby:

**ORDERED** that Brickell Bay Club Condominium Association, Inc. must vote to reaffirm a bylaw amendment establishing two-year staggered terms passed by a majority of unit owners under section 718.112(2)(d)1, Florida Statutes (2008).

DONE and ORDERED this 24<sup>th</sup> day of March, 2009,  
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 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 David H. Rogel, Esquire, Becker & Poliakoff, P.A., 121 Alhambra Plaza, 10th Floor, Coral Gables, FL 33134 on this 3<sup>rd</sup> day of April, 2009.

*for: Brandon M. Nichols*  
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson  
Chief Assistant General Counsel