

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	5/31/2013
File #	2013-03082

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2013015521

SHLOMO POLLACH, GENADI ZATUCHNI and CHANTAL TAIC,
as Manager and on behalf of Z-318, Inc., and Z-327, Inc., Unit Owners,
De Soleil South Beach Condominium Association, Inc., d/b/a
Z Ocean Hotel.

DS 2013-027

DECLARATORY STATEMENT

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

PRELIMINARY STATEMENT

The Division received a Petition for Declaratory Statement April 4, 2013 from petitioners, unit owners in the condominium and members of the De Soleil South Beach Residential Condominium Association, Inc. (hereinafter "the association"), seeking an opinion whether the condominium, known as De Soleil South Beach Residential Condominium and held out to the public as Z Ocean Hotel, is a "residential condominium" as defined in section 718.103(23), Florida Statutes.

Division counsel responded April 9, 2013 to inform the unit owners that the Division would serve a copy of the petition on the association, as required by 718.501(1)(g), Florida Statutes, so that the association could intervene and file a response if it chose to do so. On April 9, 2013, the Division notified the registered agent

of the association of the petition and informed the association of its opportunity to respond.

The Division received a response from the association May 1, 2013, requesting that the Division declare that the condominium is a “residential condominium” obligated to comply with the regulations promulgated by the Division.

Notice of receipt of the petition was published in the April 19, 2013 edition of the Florida Administrative Register. A hearing was not requested.

FINDINGS OF FACT

The material facts are set out in the petition and the association’s response. The Division takes no position as to the accuracy of the facts and accepts them as submitted by the unit owners and the association for the purpose of issuing this declaratory statement.

1. De Soleil South Beach Residential Condominium is a condominium formed pursuant to chapter 718, Florida Statutes,¹
2. The condominium is operated by De Soleil South Beach Residential Condominium Association, Inc.²
3. There are 80 units in the condominium.³
4. The zoning applicable to the condominium is MXE: mixed use entertainment district.⁴

¹ Pet for Decl Stmt 1

² *Id.*

³ *Id.* at 2.

⁴ *Id.*

5. All units in the condominium are hotel rooms. All units in the condominium have always been operated as hotel rooms and no one is residing or has ever permanently resided in the condominium.⁵

6. The owners of 79 of the 80 units in the condominium have entered into rental agreements with a management company to rent out their units as hotel rooms. One unit owner in the condominium rents his unit on his own behalf as a hotel room.⁶

7. The condominium is operated under the name Z Ocean Hotel.⁷

8. There are not a sufficient number of parking spaces in the building, under the municipal code, for the units in the condominium to be occupied as residences.⁸ Under the zoning restrictions, all of the units are classified as hotel rooms for transient use.⁹

9. Unit owners cannot obtain a homestead exemption from their real property taxes from Miami-Dade County and must pay the transient rental tax on all units.¹⁰

10. Section 3.30 of the declaration of condominium provides:

“Residential Condominium Unit” means ‘Unit’ as described in the Act and is that portion of the Condominium Property within the Condominium which is subject to exclusive ownership and which is to be utilized only for residential or transient lodging purposes.¹¹

11. Section 15.1 of the declaration of condominium provides:

“The Residential Condominium Units shall be used for residential purposes subject to applicable zoning requirements, including transient lodging facilities. Residential Condominium Units may be rented on a daily or

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*, Pet.[’s] Reply to Resp’t[’s] Resp Pet. Decl Stmt 2, Exhibit A

⁹ *Id.* Ex. B.

¹⁰ *Id.*

¹¹ Resp’t[’s] Resp Pet Decl Stmt 2

longer basis, occupied by the Residential Condominium Unit Owner or anyone else designated by the Residential Condominium Unit Owner, or through any rental program that the Residential Condominium Unit Owner chooses to participate in, if applicable. . . .”¹²

12. The association recently conducted an election of directors. The election followed the requirements set forth in chapter 61B-23, Florida Administrative Code. The unit owners believe that the condominium is a non-residential condominium and therefore is not bound to follow the requirements of 61B-23.¹³

13. Petitioners submitted a Petition for Declaratory Statement to the Division for the purpose of determining whether the condominium hotel is a “residential condominium” under section 718.103(23), Florida Statutes.

CONCLUSIONS OF LAW

14. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes. The Division, however, does not have jurisdiction to enforce the provisions of the Condominium Act against non-residential condominiums operating as hotels, which are public transient lodging establishments.¹⁴ Therefore, the Division declines to answer the question of whether the election rule, chapter 61B-23, Florida Administrative Code, applies to the association’s election.

15. 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.

¹² *Id.*

¹³ Pet. for Decl. Stmt. 2.

¹⁴ § 718 501(1), Fla. Stat. (providing that the division enforces the act against “residential” condominium units) Transient public lodging establishments operating as hotels are defined in sections 509 013(4)(a)(1), 509 242(1)(a), Fla Stat

(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.

16. 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.

17. Petitioners have standing to petition for a declaratory statement as unit owners.¹⁵

18. The association has standing to intervene.¹⁶

19. All condominiums in Florida are created under the Condominium Act, chapter 718, Florida Statutes. Condominiums are creatures of statute.¹⁷ The act, the declaration of condominium, the association's articles of incorporation and the association's bylaws together determine the legal rights of the unit owners and the association.¹⁸ The declaration is a covenant running with the land, enforceable as an equitable servitude, which sets out the extent and limits of the owners' enjoyment and use of the condominium.¹⁹ Provisions in a declaration enjoy a very strong presumption of validity.²⁰

¹⁵ §§ 718.103(28), 120 565, Fla Stat (2012).

¹⁶ *Id.* § 718 103(2), Fla Admin. Code r 28-105.0027.

¹⁷ *Woodside Vill. Condo. Ass'n, Inc. v. Jahren*, 806 So 2d 452, 455 (Fla 2002)

¹⁸ *Id.* at 456

¹⁹ *Id.*, § 718 104(7), Fla. Stat.

²⁰ *Woodside*, 806 So 2d at 457

20. The legislature created the Division to enforce and ensure compliance with the Condominium Act for private residential condominiums only.²¹ The purchase of units used for hotel transient rental to the public is not a private residential use. The legislature intended to protect the home ownership of unit owners whose units are used as private residences. Courts have recognized the unique nature of private residential condominium living and the restrictions imposed by the declaration and the statutes. An often quoted paragraph explains this view:

[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.²²

21. Section 718.103(23), Florida Statutes, provides:

“Residential condominium” means a condominium consisting of two or more units, any of which are intended for use as a *private* temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial [A] residential unit includes a unit intended as a *private* temporary or permanent residence as well as a unit not intended for commercial or industrial use²³

22. Because it is offered to the public as a transient lodging establishment under the name Z Ocean Hotel, Du Soleil South Beach Residential Condominium is not a “private temporary or permanent residence” within the meaning of section 718.103(23), Florida Statutes.

²¹ § 718.501(1), Fla Stat

²² *Woodside*, 806 So 2d at 456 (quoting *Hidden Harbour Est., Inc. v. Norman*, 309 So 2d 180 (Fla. 4th DCA 1975))

²³ § 718 103(23), Fla Stat. (2012) (emphasis added)

23. In order to be considered even a temporary “residence,” the unit must be treated like a home.²⁴ Under the zoning code, temporary or permanent occupancy requires residence of six months and a day to be recognized as an apartment unit rather than a hotel transient unit.²⁵ No one has ever resided in any of the units. In fact, 79 of 80 unit owners have entered into agreements to have their units rented out as transient public lodging hotel units.

24. Further, the operation of a unit or condominium as a hotel is generally considered a commercial use.²⁶ For residential units intended for transient public lodging in condominiums created under the Condominium Act, the units are non-residential in nature because the units are not intended or used as private residences. A condominium hotel, is not a “residential condominium” as defined in section 718.103(23), Florida Statutes.²⁷

25. Notwithstanding section 3.30 of the declaration, which provides that the units may be utilized “for residential or transient lodging purposes,” the units are in fact being used only for transient public lodging purposes under the business name Z Ocean Hotel. The declaration’s recognition of “residential” use recognizes that the transient sleeping units are used for overnight accommodations rather than use as other types of commercial enterprises, such as a restaurant, retail store, or other business use. It does not itself establish that the units were in fact “intended for use as a private temporary or permanent residence” under section 718.103(23), Florida Statutes.

²⁴ See *Schwarz v City of Treasure Island*, 544 F 3d 1201, 1214 (11th Cir 2008) (“[T]he house, apartment, condominium, or co-op that you live in is a ‘residence,’ but the hotel you stay in while vacationing at Disney World is not”).

²⁵ Pet.[’s] Reply to Resp’t[’s] Resp Pet Decl Stmt. 2, Exhibit B.

²⁶ *Malcolm v. Smith*, 112 So 2d 395, 396 (Fla 2d DCA 1959) (noting that motels, like hotels, are commercial, not residential, in nature)

²⁷ § 718.103(23), Fla Stat (2012)

26. Moreover, because there are not a sufficient number of parking spaces, under the municipal code, for the condominium to be occupied as private residences, and because section 15.1 of the declaration requires that the condominium's use is "subject to applicable zoning requirements," the condominium may not be used for private permanent or temporary residential purposes. In order for the declaration provisions to be consistent with the incorporation of the local zoning code, the condominium must be considered transient public lodging.


27. The fact that owners cannot obtain a homestead exemption on the unit's real property tax from Miami-Dade County and must pay the transient rental tax²⁸ on the hotel units, further establishes that the condominium is not a "temporary or permanent residence" under section 718.103(23), Florida Statutes.

For the reasons stated above it is hereby:

ORDERED that De Soleil South Beach Residential Condominium is not a "residential condominium" under 718.103(23), Florida Statutes.

DONE and **ORDERED** this 28th day of May 2013, 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
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²⁸ § 212 03, Fla Stat (renting or leasing hotel rooms or residential spaces for less than 6 months occupancy requires payment of a transient rental tax)

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 Mark Grant, Esq., Greenspoon Marder P.A., 200 East Broward Boulevard, Suite 1500, Fort Lauderdale, FL, 33301, and Gregory R. Eisinger, Esq., Eisinger, Brown, Lewis & Frankel, P.A., 4000 Hollywood Boulevard, Suite 265-S, Hollywood, Florida 33021 on this 31st day of may 2013.



Agency Clerk's Office

Copies furnished to:

Janis Sue Richardson
Chief Attorney