



TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE FIRE MARSHAL
STATE OF FLORIDA

In re the Matter of

Clearwater Gas System, City of
Clearwater,

Petitioner.

Case No.: 81315-04-FM

Petition for Declaratory Statement
to the Florida Department of
Financial Services

_____ /

DECLARATORY STATEMENT

THIS CAUSE came on for consideration upon the Petition for Declaratory Statement received on April 15, 2005, by the Department of Financial Services, hereinafter referred to as the Department, from Clearwater Gas System, City of Clearwater, hereinafter referred to as Petitioner. Upon consideration thereof, and being duly advised, the Chief Financial Officer as State Fire Marshal, finds as follows:

1. The Chief Financial Officer as State Fire Marshal, has jurisdiction over the subject matter and the parties to this matter.

2. This Declaratory Statement is premised upon the assertions of fact set forth in the Petition for Declaratory Statement. Any modification to those assertions of fact could alter the conclusions set forth in this Declaratory Statement. None of the assertions of fact are admitted by the Department as being true and Petitioner's question is being answered purely as a hypothetical one. If any of the facts asserted by

the Petitioner are untrue or materially incomplete the conclusions of this Declaratory Statement could be significantly different.

3. If the Petition for Declaratory Statement contains various legal assertions, conclusions, and arguments, those assertions, conclusions, and arguments are not adopted by the Department and are not used as legal premises or authority for the conclusions of this Declaratory Statement. Legal assertions, conclusions, and arguments are considered only to illustrate the manner in which Petitioner may be an affected person entitled to have the Department issue this Declaratory Statement.

BACKGROUND and FACTS ASSERTED

4. Petitioner asserts that:

A. In Petitioner's application to install natural gas light appliances on an outside deck, which meets the definition of Outdoor Area under NFPA 1, the authority having jurisdiction has interpreted the Outdoor Area as also being subject to the NFPA 101 in that he interprets the definition of "assembly occupancy" under 101 to include the Outdoor Area.

B. However, "occupancy" is defined in NFPA 101, in relevant part, as "*a building or portion thereof*".

C. Petitioner is of the opinion that by definition, the Outdoor Area is not a building or portion thereof, and is therefore not subject to the restrictions on the installation of Open Flame Devices "in an assembly occupancy" under 101.

D. Further, Petitioner contends that even if the open deck is determined to be in an "assembly occupancy" by your office, resulting in an application of the NFPA 101 restrictions on the subject installation of gas lights, the authority having jurisdiction has

unreasonably denied Petitioner's application because Petitioner has met the applicable installation requirements under Life Safety 101, 9.1.1 - National Fuel Gas Code Table 9.16.2.2, to which NFPA 101 refers for installation parameters.

E. Petitioner submits that generally, Code references deferring to the approval of the authority having jurisdiction were not intended to provide for unbridled discretion by that authority, but rather such approval by the authority must consider and apply the guidelines of applicable law, in this case, Table 9.16.2.2.

F. Clearwater Gas System applied to the City of Indian Rocks Beach for a construction permit to install nine open-flame natural gas torch lighting fixtures on the outside deck of Jimmy Guana's Restaurant, which is located in Indian Rocks Beach, within the Pinellas Suncoast Fire and Rescue jurisdiction.

G. The Building Official of Indian Rocks Beach deferred to the local Fire Marshal for Commercial Plan Review and approval utilizing the Florida Fire Prevention Code.

H. The Fire Marshal of Pinellas Suncoast Fire and Rescue denied Petitioner's application, citing Section 12.7.2 of NFPA 101, specifically, "No open flame device shall be used in any assembly occupancy."

I. Clearwater Gas System appealed to the Pinellas County Construction Licensing Board ("PCCLB"), which is the proper local appeals board.

J. The matter came before the PCCLB in accordance with Section 31-32, Chapter 75-489, as amended, Laws of Florida.

K. At the initial hearing, the Fire Marshal took the position that the deck is a part of a building and therefore, installation of gas lights on the deck would be hazardous to an assembly of persons in the adjoining restaurant and motel.

L. During the course of the same hearing, a member of the PCCLB hearing the case stated that the torches would not be installed "inside" the assembly area itself, but outside on a open deck, not blocking ingress/egress, with sufficient clearance from combustibles.

M. In addition, the member cited, contrary to the authority having jurisdiction, that the gas would dissipate naturally in the air and not cause a volatile or life safety situation.

N. So, the member suggested an alternative solution be reached, such as locating the lights on the outside of the deck railing.

O. The Fire Marshal responded by stating that he was the authority having jurisdiction and would not accept any installation of the gaslights on the deck.

P. The appeal was denied.

Q. The Board advised Clearwater Gas that the case may be further appealed to the State Fire Marshal.

R. Instead, Clearwater Gas System modified the installation plans, which were again denied at the local level.

S. Clearwater Gas requested another appeal from the PCCLB. The appeal was granted.

T. The modified design provided that each gaslight would be mounted on a bracket three feet outside the edge of the deck, as had been suggested by the member of the PCCLB at the first hearing, rather than directly on the deck.

U. Despite the modification, the Fire Marshal repeated his reason for denying the application, which was that NFPA 101, Section 12.7.2 stated, “No open flame device shall be used *in any assembly occupancy.*” (Emphasis supplied).

V. After consideration of the testimony, the PCCLB voted to table Appeal 04-3 LS until a declaratory statement could be obtained from the State Fire Marshal’s Office as to the interpretation of NFPA 101, Section 12.7.2, New Assembly Occupancies . . . “as to the definition of ‘in an assembly occupancy’ or if this would be considered as an installation outside of an assembly on or attached to an open deck/walkway” and as to “whether an elevated deck is considered in the total confines of an assembly occupancy or considered as an open deck/walkway.”

W. In line with the instruction of the local appeals board, Clearwater Gas System respectfully submits the following information for consideration in answering the questions presented herein.

QUESTIONS

5. Petitioner’s questions are:

A. Petitioner seeks an interpretation of the Florida Fire Prevention Code, (“Code”) NFPA 101, Chapter 13, Existing Assembly Occupancies, Section 13.7.2, Open Flame Devices and Pyrotechnics. Specifically, Petitioner requests clarification of whether the Section 13.7.2 language “in an assembly occupancy” is intended to apply to

an outside deck adjoining a building, which meets the definition of “Outdoor Area” under NFPA 1, Uniform Fire Code.¹

B. If the answer to question #1 is yes, and an outdoor deck adjoining a building is defined as being “in an assembly occupancy” under 13.7.2, is it reasonable for a local fire marshal, as “authority having jurisdiction,” to deny an application for a permit to install appliances, when the engineering standards and specifications of the installation meet the installation parameters under the National Fuel Gas Code, Table 9.16.2.2, Clearances for Unlisted Outdoor Open-Flame Illuminating Appliances, to which NFPA 101, 9.1.1 refers for installation parameters and when NFPA 101-13.7.2, exception 6 allows such an installation?²

¹ As to Question #5.A., Petitioner states:

As discussed above, the Local Fire Marshal’s denial of the application to install gaslights was based on Chapter 12.7.2 of NFPA 101, which states, “No open flame device shall be used in any assembly occupancy” Note that the Local Fire Marshal cites Chapter 12, New Assembly Occupancies, rather than Chapter 13, Existing Assembly Occupancies, which Petitioner submits is the proper Code section to be applied (if either of the two Code sections applies at all), since the premises was already in existence as of the date the edition of the Code had gone into effect. (See NFPA 1, Uniform Fire Code, Florida Edition, 2004, Chapter 3, Definitions, 3.3.72). Chapter 13 applies to “existing buildings or portions thereof” currently occupied as assembly occupancies. Therefore, for purposes of Petitioner’s circumstances, Petitioner cites Chapter 13, the Code provision it believes to be applicable if either Chapter is applicable at all. (Note that the relevant language in Chapter 12 upon which the Fire Marshal relies for his denial is congruent to the language in Chapter 13, so the substantive analysis is parallel.)

Assembly Occupancy is defined in NFPA 101 as “An occupancy (1) used for the gathering of 50 or more persons for deliberation, worship, entertainment, eating, drinking, amusement, awaiting transportation, or similar uses; (2) used as a special amusement building, regardless of the occupant load.” NFPA 101 defines “occupancy” as “The purpose for which a *building or portion thereof* is used or intended to be used.” (Emphasis added). Therefore, occupancy as defined within “Assembly Occupancy” would logically be a “building or a portion thereof” used for the gathering of 50 or more persons . . . or as a special amusement building.

So the question becomes, “Is an outside deck which adjoins a building considered ‘a building or a portion thereof?’” Based on the definition of “building” in NFPA 101, it is not clear whether a “building” goes beyond the confines of the four walls; however, all of the examples listed in the definition’s subsections are enclosed buildings in the traditional sense. In addition, NFPA 101, Section 3.1 states, “The definitions contained in this chapter shall apply to the terms used in this code. Where terms are not included, common usage of the terms shall apply.” In an attempt to clarify the vague definition of “building,” Petitioner suggests default to the common usage definition or a “roofed and walled structure built for permanent use.” Merriam-Webster’s Collegiate Dictionary (10th ed. 1997.)

The subject deck does not appear to fall under the definition of building in this instance. Rather, Petitioner suggests that the outdoor deck in question meets the two-prong definition of “Outdoor Area” under NFPA 1 in that it is “an area that is either outside the confines of a building,” and is “an area sheltered from the elements by overhead cover, that is protected from weather exposure by an exterior wall that obstructs not more than 25 percent of the building boundary.” The deck upon which Clearwater Gas is requesting a permit to install gaslights, (which will actually extend three feet outside of the deck) is an area outside of the confines of the attached building. In addition, the deck is sheltered from the elements by an overhead cover, with the deck being protected to the west side by two portions of the exterior wall of the adjoining building, which does not obstruct more than 25 percent of the entire building boundary. Logically, the terms “Outdoor Area” and “Assembly Occupancy” are mutually exclusive. A structure that is not enclosed within building walls is, by logic, outside the building walls, and therefore, outside the building. Even if a definition were to be applied to describe the deck under NFPA 101, Petitioner suggests it would be “Open Structure,” defined therein as “A structure that supports equipment or operations *not enclosed within building walls*” (emphasis supplied).

DISCUSSION

6. Subdivision 13.7.2 of NFPA 101, 2000 edition, effective January 1, 2002, states, “No open flame devices or pyrotechnic device shall be used in any assembly occupancy.” (Emphasis supplied).

7. Subdivision 13.7.2 of NFPA 101, Florida 2003 edition, effective January 1, 2005, states:

13.7.2 Open Flame Devices and Pyrotechnics. No open flame devices or pyrotechnic devices shall be used in any assembly occupancy, unless otherwise permitted by the following:

[subdivisions (1) through (5) omitted as irrelevant.]

(6) Gas lights shall be permitted to be used, provided that precautions are taken, subject to the approval of authority having jurisdiction, to prevent ignition of any combustible materials. (Emphasis supplied).

8. The operative word in subdivisions 13.7.2 of both the 2000 and 2003 editions is “*in*.”

9. Given the layout of the proposed open flame gas lights and the context in which the word “in” is used, the gas lights are not located “in” the assembly occupancy, but are, rather, at least three feet *outside of* the assembly occupancy.

10. The above finding was apparently ignored if considered, or not considered by either the authority having jurisdiction or the appeals board.

² As to Question #5.B., Petitioner states:

If the State Fire Marshal finds that the outside deck and the area three feet beyond the railing is within the definition of an assembly occupancy, and as a result, NFPA 101 applies to the standards for installation in this case, Petitioner requests an opinion from the State Fire Marshal as to the reasonableness of the Local Fire Marshal’s denial of Petitioner’s application in light of the Petitioner’s Engineered/Sealed design specifications which meet the applicable Code parameters. Petitioner has met the applicable Code parameters for installation of the gaslights, specifically, Section 9.16.2, Table 9.16.2.2. of the National Fuel Gas Code, to which NFPA 101-9.1.1 refers for installation guidelines.

11. While the word “in” is not defined in any applicable code or standard, in the context of the subject subdivision it is being used as a synonym for “inside.” “Inside” is defined in Random House Webster’s Unabridged Dictionary, 2nd Edition, p. 986, as: “On the inner side, or part of; within. *Inside the circle; inside the envelope.*”

12. To find that the gaslights in this case are “in an assembly area” is to ignore the facts as presented by the petitioner; clearly the gaslights are “outside” the assembly area, the proposal being to locate them three feet from any area that could be considered “in” the assembly area. The fact that the gas light is proposed to be structurally attached to the building is of no consequence just as an antenna attached to the roof of a building is not considered inside the space below.

13. Lacking in the authority having jurisdiction’s position and the appeals board’s initial upholding of that position is the definite, particular code or standard itself the authority having jurisdiction must possess to approve or disapprove the situation or condition.³

³ The authority to approve or disapprove a particular situation or condition must have a rational or reasonable basis (BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, Petitioner, v. JACK R. SNYDER, et ux., Respondents, 627 So. 2d 469 (Fla. 1993), quoting [Snyder v. Board of County Commissioners, 595 So. 2d at 81](#) (footnotes omitted): “Applying these principles to the facts of the case, the court found (1) that the Snyders’ petition for rezoning was consistent with the comprehensive plan; (2) that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the health, safety, morals, or welfare of the general public; and (3) that the denial of the requested zoning classification without reasons supported by facts was, as a matter of law, arbitrary and unreasonable.” (Emphasis supplied); that is, it must have a valid, legitimate, and justifiable relationship to the safety sought to be gained from approving or disapproving the situation or condition. Approval and disapproval authority is not absolute, nor does the local authority having jurisdiction have unbridled discretion in whether to approve or disapprove a situation or condition.

Approval authority must also be subject to appeal through the local appeal process. In this case, the petitioner went through the local appeal process and the decision of the authority having jurisdiction was first upheld, then deferred for the Petitioner to secure this declaratory statement. Even though the decision of the authority having jurisdiction was upheld, the appeals board did not relate the approval or disapproval of the authority having jurisdiction’s decision to a rational or reasonable basis, or to a valid, legitimate, and justifiable relationship to the safety sought to be gained from approving or disapproving the situation or condition.

To exercise approval authority, the authority having jurisdiction and the appeals board must interpret NFPA 1, NFPA 101, and all the other codes and standards adopted in the Florida Fire Prevention Code, in a sound, rational, and reasonable manner, not arbitrarily or capriciously, in the same way as any other administrative agency or individual. An authority having jurisdiction must not only interpret the codes and standards in a sound, rational, and reasonable manner, and not arbitrarily or capriciously, it must also have a definite, particular code section or standard which supports its position.

DECLARATORY STATEMENT

14. Accordingly, it is the position of the State Fire Marshal as the final interpreting authority of the Florida Fire Prevention Code which includes NFPA 101, 2000 edition effective through December 31, 2004, and 2003 edition effective January 1, 2005.

A. Question 5.A.: Petitioner seeks an interpretation of the Florida Fire Prevention Code, (“Code”) NFPA 101, Chapter 13, Existing Assembly Occupancies, Section 13.7.2, Open Flame Devices and Pyrotechnics. Specifically, Petitioner requests clarification of whether the Section 13.7.2 language “in an assembly occupancy” is intended to apply to an outside deck adjoining a building, which meets the definition of “Outdoor Area” under NFPA 1, Uniform Fire Code.

Response to Question 5.A.: The question of whether the outside deck adjoining a building meets the definition of “Outdoor Area” under NFPA 1 is irrelevant because under the facts presented the gaslights are not to be located “in” any occupancy, as further explained in the response to Question 5.B., below.

B. Question 5.B.: If the answer to question #1 is yes, and an outdoor deck adjoining a building is defined as being “in an assembly occupancy” under 13.7.2, is it reasonable for a local fire marshal, as the “authority having jurisdiction,” to deny an application for a permit to install appliances, when the engineering standards and specifications of the installation meet the installation parameters under the National Fuel Gas Code, Table 9.16.2.2, Clearances for Unlisted Outdoor Open-Flame Illuminating Appliances, to which NFPA 101, 9.1.1 refers for installation parameters and when NFPA 101-13.7.2, exception 6 allows such an installation?

Response to Question 5.B.: Regardless of whether the outside deck is considered an “assembly occupancy,” the petitioner’s plans and specifications indicate that the gaslights are to be place outside of the outside deck; therefore, the provisions of subdivisions 13.7.2, the 2000 and Florida 2003 Editions, are not applicable.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Declaratory Statement is entitled to seek review of this Declaratory Statement pursuant to Rule 9.110, Florida Rules of Appellate Procedure, because pursuant to Section 120.565, Florida Statutes, a Declaratory Statement constitutes final agency action and is therefore subject to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida, and a copy of the same with the appropriate district court of appeal, within thirty days of rendition of this Declaratory Statement.

ENTERED at Tallahassee, Leon County, Florida, this ____ day of _____, 200__.

Karen Chandler
Deputy Chief Financial Officer

Copies furnished to:

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