

STATE OF FLORIDA
DEPARTMENT OF INSURANCE
STATE FIRE MARSHAL

In re the Matter of

COMMERCIAL FIRE &
COMMUNICATIONS, INC.

Case No.: 34756-00-SP

Petition for Declaratory Statement to
The Florida Department of Insurance

_____ /

DECLARATORY STATEMENT

THIS CAUSE came on for consideration upon the Petition for Declaratory Statement received on _____ by the Department of Insurance, hereinafter referred to as the Department, from Commercial Fire and Communications, Inc., hereinafter referred to as Petitioner. Upon consideration thereof, and being duly advised, the Treasurer and Insurance Commissioner, as State Fire Marshal, finds as follows:

1. The Treasurer and Insurance Commissioner, 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. 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. The 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.

4. Petitioner asserts that:

- A. Petitioner serviced a fire alarm system in a two-story building housing condominium units in 1996, the servicing consisting of,
 - (i) replacing the existing control panel with a new low-voltage, battery-backed panel,
 - (ii) replacing the horns with horn/strobes,
 - (iii) replacing the pull stations, and
 - (iv) separating the fire alarm wiring from the 120V emergency lighting wiring.

Installation of additional notification appliances was not included in the work required to be performed.

- B. The building's original fire alarm system had been installed prior to the service performed in 1996.
- C. In 1996, the authority having jurisdiction (AHJ) approved the servicing in all respects, including the decibel level of the horn/strobes.
- D. The same code was in effect in 1996 as is in effect today.
- E. In 1999, it was determined that the fire alarm system would not produce the 70db *inside* the building's living units, as required by code.
- F. The AHJ now maintains that Petitioner must bring the system up to code and produce the 70db inside the living units.

5. The Petitioner requests the Department to render a Declaratory Statement on the following issues:¹

A. Whether Section 633.70, Florida Statutes, permits the AHJ to now require the fire alarm system to be modified so as to produce the 70db after it approved the work done in 1996 in all respects.

B. If so, whether Section 633.70, Florida Statutes, permits the AHJ to require Petitioner, which performed the work in 1996, to modify the system to provide for the 70db inside the living units.

6. Section 4A-48.002, Florida Administrative Code, was cited as relevant. It states in full:

These rules apply to both new and existing fire alarm systems as of the effective date of the rule. Those systems which were based on product and engineering practices recognized as being acceptable at the date of installation but are not in compliance with currently adopted standards may continue in use, *provided approval by the authority having jurisdiction.* (Emphasis supplied).

7. While that may be considered a “grandfather” provision of sorts, it only maintains its grandfather characteristics as long as the existing situation is approved by the AHJ. The moment the AHJ removes its approval from the existing situation, the grandfather aspect no long exists. In this case, the AHJ removed its approval of the existing situation when it sought to require Petitioner to make the horn/strobes conform to existing code; therefore, when the AHJ removed its approval, the refuge of Section 4A-48.002, F.A.C., disappeared.

8. Petitioner also mentions Section 633.70, Florida Statutes (1999). That provision states:

633.70 Jurisdiction of State Fire Marshal over alarm system contractors and certified unlimited electrical contractors.--

¹ Petitioner phrases a question in the following form: “Does the acceptance of permitted work by the local AHJ constitute ‘engineering practices recognized as being acceptable?’” However, the answer to that question is irrelevant, because the “continuation in use,” authorized by the rule, only applies to systems which have been approved by the AHJ. If such approval is withdrawn, as it clearly was in this case, the system is no longer permitted to continue in use regardless of whether the engineering principles were recognized as accurate or not.

(1) When the State Fire Marshal, in the course of its activities pursuant to s. 633.01(2), determines that an alarm system contractor or a certified unlimited electrical contractor working with an alarm system has violated any provision of this chapter or the rules of the State Fire Marshal, the State Fire Marshal shall have jurisdiction, notwithstanding any other provision of this chapter, to order corrective action by the alarm system contractor or the certified unlimited electrical contractor to bring the alarm system into compliance with applicable standards set forth in this chapter and the rules of the State Fire Marshal.

10. The question here concerns whether Section 633.70, Florida Statutes, empowers the AHJ to require, 3 years after it gave its approval to a fire alarm system, an adjustment to that system.

11. The response to that question is yes, unless under common law principles of estoppel the AHJ is *estopped* from requiring Petitioner to take this action because of its previous approval.

12. The AHJ in performing its duties in enforcing the various codes is acting both as a local governmental unit and in place of, or on behalf of, the state, as permitted by Sections 633.121 and 633.15, Florida Statutes.²

13. The law relating to estoppel against the state applies equally to the AHJ when enforcing the laws and rules of the state under Chapter 633, Florida Statutes.

14. There are three requirements which must be proved in order to be successful in asserting that the state may be estopped from asserting a position.³ They are:

A. a representation by an agent of the state as to a material fact;

² In granting jurisdiction to the local authorities to enforce the laws of the State Fire Marshal and the rules adopted thereunder, Section 633.121, F.S., states: "Such personnel acting under the authority of this section shall be deemed to be agents of their respective jurisdictions, not agents of the State Fire Marshal."

³ *Harris v. State Department of Administration, Division of State Employees' Insurance*, 577 So.2d 1363 (Fla. 1st DCA 1991); *Florida Department of Natural Resources v. Railway Marketing Corporation*, 11 FLW 526 (Fla. 1st DCA, February 27, 1986); *Fraga v. Department of Health and Rehabilitative Services*, 464 So.2d 144 (Fla. 3rd DCA 1985).

- B. reasonable reliance on the representation; and
- C. a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

15. In this case, A, and probably B, are present, but not C.

16. As to A., there was a representation by an agent of the state through the local AHJ as to a material fact; i.e., that the system was in compliance in all respects. As to B, we may assume that there was a reasonable reliance on the representation in that Petitioner did not take any further action once it received the AHJ's approval. As to C., however, there was *no change in position* of Petitioner, detrimental to Petitioner, which was based on the AHJ's approval.

17. The 70db requirement was in effect in 1996; therefore, the AHJ could have required compliance with it then, before approving the servicing and, had that occurred, Petitioner would had to have complied with it then, in 1996, and the matter would have been at an end.⁴

18. Petitioner undertook to replace the horns with horn/strobes. Had Petitioner not undertaken this responsibility, the result reached in this declaratory statement may have been different; however, by undertaking to replace the horns with horn/strobes, Petitioner was required to make certain that the horn/strobes met then current code, which was in 1996 the same as in 1999, and required 70db inside the units.

20. The fact that the AHJ, 3 years later, requires code compliance is immaterial, since it is only requiring what it could have required in 1996 and since,

⁴ The question of whether Petitioner can pass the charge for the new, compliant, horns on to the condo association is not part of this declaratory statement and is not governed by Chapter 633, Florida Statutes; rather it is governed by the laws relating to contracts. That is, the contract between Petitioner and the condominium association must be examined to determine the intent of the parties as to what Petitioner was to do for the association, what the association was to pay, and whether compliance with code was a consideration in the contract.

further, there has been no change of position by Petitioner, detrimental to Petitioner, which would cause additional damages to Petitioner because of the action of the AHJ and which may operate to estop the AHJ from enforcing the code requirement.

21. Since the change should have been made in 1996 to make the system conform to code, but was not in fact required until 1999, there has been no change in position detrimental to Petitioner which would work an estoppel on the AHJ.

Therefore, it is the position of the State of Florida, Department of Insurance, State Fire Marshal, that:

A. The AHJ may require that the system be upgraded to code so that it provides the 70db sound *inside* the units, by operation of Section 633.70, Florida Statutes (1999). Section 4A-48.002, Florida Administrative Code, is not applicable because the AHJ removed its approval of the existing system.

B. Section 633.70, Florida Statutes, permits the AHJ to require Petitioner, which did the work in 1996 and undertook to replace the horns with horn/strobes, to perform the upgrading, since that could and should have been done in 1996.

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 Section 120.565, Florida Statutes, and Rule 9.110, Fla.R.App.P., 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 _____, 2000.

Bill Nelson, Insurance Commissioner
State Fire Marshal

Copies furnished to:

Dennis J. Watson, Esquire
Attorney for Petitioner
2560 Gulf to Bay Blvd., Suite 300
Clearwater, Florida 33765

Lisa Santucci, Esquire
Attorney for the Department
200 East Gaines Street
Tallahassee, Florida 32399-0300