



In The Matter Of:

MARK CAVINEE,

Case No.: 91292-07-FM

And

SCHENKELSHULTZ, JOSEPH S. TOTH,
AIA,

Case No.: 91373-07-FM

Petitions for Declaratory Statement regarding
Neptune Elementary School in St. Cloud,
Florida, to the Florida Department of
Financial Services.

DECLARATORY STATEMENT

THIS CAUSE came on for consideration upon the filing of a Petition for Declaratory Statement (hereinafter “Petition”) by Mark Cavinee (hereinafter “Cavinee”). The Petition was received by the Department of Financial Services, Division of State Fire Marshal (hereinafter the “Department”), on August 7, 2007. Joseph S. Toth, AIA, filed a Petition for Declaratory Statement on behalf of Schenkelshultz (hereinafter “Toth”) on August 17, 2007. Both Petitions address the same location and the same question and are consolidated for the purpose of entering a single Declaratory Statement. 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 party to this matter.
2. This Declaratory Statement is premised upon the assertions of fact set forth in the Petitions. 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 Petitioners' questions are being answered as purely hypothetical. If any of the facts asserted by the Petitioners are untrue or materially incomplete, the conclusions of this Declaratory Statement could be significantly different.

3. If the Petitions contain 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. Cavinee is the authority having jurisdiction over Neptune Elementary School, 1220 Betsy Ross Lane, St. Cloud, Florida, charged with enforcement of Rule 69A-60, *Florida Administrative Code*, the "Florida Fire Prevention Code" (hereinafter the "Code").

5. Toth is the architectural firm that designed Neptune Elementary School.

6. The Declaratory Statement was requested pursuant to the provisions of Sections 120.565 and 633.01(6), *Florida Statutes*, and Rules 28.105 and 69A-60.007, *Florida Administrative Code*, which authorize a substantially affected person to seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory or rule provision as it applies to the Petitioner's particular set of circumstances, and require the Department to issue a Declaratory Statement when requested by the authority having jurisdiction.

7. The subject of both Petitions is whether Neptune's cafeteria /multipurpose room, holding more than 300 occupants, must be separated from the remainder of the building which is an educational occupancy. The Petitioners agreed that the Petitions would be answered in one consolidated Declaratory Statement, and the due date would be that for the last filed Petition.

8. Notice of receipt of the Cavinee Petition was published in Volume 33, Number 34 of the *Florida Administrative Weekly*, on August 24, 2007. Notice of receipt of the Toth Petition was published in Volume 33, Number 36 of the *Florida Administrative Weekly*, on September 7, 2007.

9. According to Cavinee, in determining the separation required between the cafeteria/multipurpose room (assembly occupancy) of this elementary school and the remainder of the building (educational occupancy), National Fire Protection Association (hereinafter “NFPA”) 101-14.1.2.1 was applied, which is intended to specifically address this type of multiple occupancy. Section 14.1.2.1 provides that “multiple shall be in accordance with Section 6.1.14,” which segregates multiple occupancies into two types, mixed and separated. As the remainder of the building (educational occupancy) does not meet the more stringent requirements of the assembly occupancy, the determination was made by Cavinee was to consider this a separated occupancy as defined in NFPA 101-6.1.14.2.3. The requirements for the “separated occupancy,” as described in Section 6.1.14.4.3, state that the fire resistance rating specified for this type of multiple occupancy shall be permitted to be reduced from three-hour fire resistance rated, but in no case shall it be reduced to less than one hour, and then only when the building is protected by an approved automatic sprinkler system in accordance with Section 9.7. This particular school is protected by an approved automatic sprinkler system.

10. Cavinee also states that the Florida Building Code Section 423.8.1.1, which provides that “the support spaces such as media centers, administrative offices, and cafeterias and kitchens located within educational facilities are not separated occupancies” is in conflict with the Code.

11. The Toth Petition, filed on behalf of the architects of the Neptune Elementary School, states that they believe they are in compliance with both the Florida Building Code and

the Florida Fire Prevention Code. Toth contends that the design has been built in numerous other counties in Florida without conflict. Toth also asserts that the building is substantially built and cannot receive a final certificate of occupancy until the issue is resolved. Toth indicates that if Cavinee's position is deemed to be correct, Toth will be required to install fire dampers and fire rated doors in existing walls.

12. In support of his argument, Toth states that NPA 101, 14.1.2.2 implies that a cafeteria/multipurpose room is not a separate occupancy since it is not an auditorium or gymnasium as listed in NFPA 14.1.2.2.2., and the term "cafeteria" is not mentioned in the text of NFPA 14.1.2.2.1.

13. Quoting the NFPA 101 handbook, Toth states that NFPA 6.1 provides: "educational occupancies primarily include large numbers of young people found in school buildings," and "assembly occupancies generally contain large numbers of people who are unfamiliar with the space and are therefore subject to indecision regarding the best means of egress in an emergency." NFPA A.6.3.1 states "an educational occupancy is distinguished from an assembly occupancy in that the same occupants are regularly present."

14. Toth argues that the elementary school cafeteria/multipurpose room is therefore not a separate assembly space since its occupants are regular users and are familiar with the space and existing procedures. Unlike a high school gymnasium or auditorium, which may be open for public use and have occupants that are unfamiliar with the space and egress procedures, the elementary school cafeteria/multipurpose room is utilized by the staff, students, and on occasion, the students' families, all of whom are familiar with the space. In addition, Toth argues that the students have fire drills on a monthly basis.

15. The cafeteria/multipurpose space, states Toth, will be used during regular school hours by the same occupants as the school and therefore should not require separation. If an event is held in the cafeteria/multipurpose room after hours, the remainder of the educational spaces is not occupied; therefore, Toth argues, separation between the cafeteria/multipurpose room and unoccupied educational spaces should not be necessary, as the spaces will either be used simultaneously by the same occupants, or they will not be used simultaneously.

16. Toth states that the occupant load and egress capacity from the cafeteria/multipurpose room is based on assembly occupant load factors and all three of the egress paths from the cafeteria/multipurpose room are protected with a one hour rated corridor to the exterior per code. Toth argues that although the 2004 Florida Fire Prevention Code references the 2003 NFPA 101, it should be noted that the 2006 NFPA 101 handbook has a clarification in Section 6.1.14.1.2 regarding multiple use facilities because the 2003 edition was being misinterpreted. Per this clarification, Toth argues that the building in question does not meet the requirements of a multiple occupancy building. In addition, Toth contends that Section 423.8.1.1 of the Florida Building Code lists cafeteria as a support space of educational occupancies and does not require that they be separated.

17. A duly noticed public hearing was conducted before the Florida Fire Code Advisory Council on September 18, 2007, to consider and make outcome recommendations on the two Petitions. The Council members include a Florida building official, an architect, and representatives of the Florida Fire Chiefs' Association, Society of Fire Protection Engineers, the University System, and the general public. The recommendation of the Council is consistent with this Declaratory Statement.

QUESTION

18. Does the Florida Fire Prevention Code require an elementary school cafeteria/multipurpose room, holding more than 300 occupants, be separated from the remainder of the building which is an educational occupancy?

DISCUSSION

19. The Department is required by the provisions of Section 633.01(6), *Florida Statutes*, to issue Declaratory Statements relating to the Code, when requested by a substantially affected person or a local enforcing agency.

20. Chapter 69A-58, *Florida Administrative Code*, governs fire safety in educational facilities. The purpose and scope of the chapter is to provide a reasonable degree of safety from fire in new construction and existing buildings located in educational facilities.¹ Rule 69A-58.0031 addresses new construction; it provides that:

New construction and new buildings are subject to and controlled by NFPA 1, the edition as adopted in Rule 69A-3.012, F.A.C., in Chapter 20, relating to “educational occupancies” and NFPA 101, the edition as adopted in Rule 69A-3.012 F.A.C., Chapter 14, “New educational occupancies,” except where specifically otherwise provided in this rule chapter.

21. Rule 69A-3.012, *Florida Administrative Code*, adopts the 2000 edition of NFPA 101. All references hereafter are to the 2000 edition unless otherwise noted. Subsection 14.1.2 addresses multiple occupancies and states that, “[m]ultiple occupancies shall be in accordance with 6.1.14.” The term “multiple occupancy” is defined at Subparagraph 6.1.14.2.1., as a “building or structure in which two or more classes of occupancy exist.”

22. Subsection 6.1.14, addresses multiple occupancies, and provides at subparagraph 6.1.14.1.1 that, “[m]ultiple occupancies shall comply with the requirements of 6.1.14.1 (general) and one of the following: (1) [m]ixed occupancies – 6.1.14.3, (2) [s]eparated occupancies -

6.1.14.4.” The building in question is “multiple occupancy.” It is undeniable that at least two occupancies exist in the building. Toft admits that auditoriums and gymnasiums are “assembly occupancies.” Since the school is also an “educational occupancy,” the building in question, having at least two occupancies, is a multiple occupancy.² Therefore, it must be treated as either a “separated” or a “mixed” occupancy

23. The term “mixed occupancy” is defined at Subparagraph 6.1.14.2.2 as a “multiple occupancy where the occupancies are intermingled.” The term “separated occupancy” is defined at Subparagraph 6.1.14.2.3, as a “multiple occupancy where the occupancies are separated by fire resistance-rated assembly.” If the particular cafeteria/multipurpose room plan meets the definition of a “separated occupancy,” the plan must meet the provisions of Paragraph 6.1.14.4. If the particular cafeteria/multipurpose room plan meets the definition of a mixed occupancy, the plan must meet the requirements of Paragraph 6.1.14.3.

24. Toth argues that the cafeteria/multipurpose room is not an assembly occupancy. In the alternative, Toth argues that the cafeteria/multipurpose room is an assembly occupancy limited to serving students and employees of Neptune Elementary School, and therefore, the same egress capacity should be permitted to serve both occupancies.

25. In support of his argument that the cafeteria/multipurpose room is not an assembly occupancy, Toth argues that Paragraph 14.1.2.2 implies that a cafeteria/multipurpose room is not a separate occupancy since it is not an auditorium or gymnasium as listed in Subsection 14.1.2.2.2., and the term “cafeteria” is not mentioned. Paragraph 6.1.2.1 defines the term “assembly occupancy” as an “occupancy used for a gathering of 50 or more persons for deliberation, worship, entertainment, eating, drinking, amusement, awaiting transportation, or

¹ Rule 69A-58.002(1), *Florida Administrative Code*.

similar uses.” Harmonizing Paragraphs 14.1.2.2, 6.1.2.1, and Subparagraph 14.1.2.2.1 in a way that gives meaning to all three parts, compels the conclusion that all multiple occupancies must be in accordance with Subsection 6.1.14, and that auditorium and gymnasium assembly occupancies must comply with the egress requirements of Chapter 12. For the same reasons, Toth’s argument that because auditorium and gymnasium assembly occupancy egress requirements were specifically addressed in paragraph 14.1.2.2.1, and cafeteria/multipurpose room egress requirements were not, that cafeteria/multipurpose rooms are not included in the definition of assembly occupancy, is rejected.

26. Next, Toth states that their position that the cafeteria/multipurpose room is not an assembly occupancy is supported by the definitions of “educational” and “assembly” occupancies found in the Annex at A.6.1.3.1., which distinguishes an educational occupancy from an assembly occupancy. The fact that the two occupancies are distinguishable is a given; however, that does not mean that both occupancies cannot be present in an educational facility. If that were true, multiple occupancies would not exist.

27. A clarification to Subparagraph 6.1.14.1.2 in the NFPA 101, *Life Safety Code Handbook*, 2006 edition, is also cited in the Toth Petition in support of their position that the facility in question does not constitute an assembly occupancy. A review of the cited provision, and the explanation contained in the *Handbook* compels the conclusion that both are consistent with the conclusions in this Declaratory Statement.³

² The *NFPA Handbook*, 2006 edition, does not directly reference “school cafeteria,” “educational cafeteria” or even “cafeteria,” nor does the *NFPA Handbook*, 2003 edition.

³ Paragraph 6.1.14.1.2 of NFPA 101, 2006 edition, provides, “[w]here exit access from occupancy traverses occupancy, the multiple occupancy shall be treated as a mixed occupancy.” The explanation to the paragraph provides that the “shared corridor system does not permit the multiple occupancy to be protected as separated occupancies. Instead, the multiple occupancy must be protected as a mixed occupancy.” (p.100)

28. Finally, Toth argues that even if the cafeteria/multipurpose room is an assembly occupancy, it is suitable only for the school population and therefore the same egress capacity can be permitted to serve both sections. In support, Toth cites Subparagraph 14.1.2.2.2, which provides that “[i]n the case of an assembly occupancy of a type suitable for use only by the school occupant load and therefore not subject to simultaneous occupancy, the same egress capacity shall be permitted to serve both sections.” The response to this argument depends on the policy of the school and the School Board. If the policy is to limit the use of the cafeteria/multipurpose room to the school occupant load, Toth’s argument has merit. If the policy is to extend the use of the cafeteria/multipurpose room beyond the student occupant load, Toth’s argument does not have merit. The absence of limitation on cafeteria/multipurpose room size or occupant load leaves open much room for interpretation. For example, a cafeteria/multipurpose room in an educational facility may have the capacity of several hundred persons and be suitable for simultaneous occupancy just as the auditorium and gymnasium are.

29. Section 6.1.1.1 states that “occupancy classification shall be subject to the ruling of the authority having jurisdiction where there is a question of proper classification in any individual case.” In this case, Cavinee, the authority having jurisdiction, has determined that the cafeteria/multipurpose room constitutes an assembly occupancy. The Department agrees. Whether the cafeteria/multipurpose room space must meet the requirements of a “mixed” or a “separated” occupancy depends on the design of the cafeteria/multipurpose room, and the policy of the school board.

30. When a conflict exists between the Florida Building Code and the Florida Fire Prevention Code, which is alleged in both Petitions, the provisions of Section 553.73(1)(d), *Florida Statutes*, provide that the conflict shall be resolved “in favor of the requirement that

offers the greatest degree of lifesafety or alternatives that would provide the equivalent degree of lifesafety and an equivalent method of construction.”

31. In conclusion, the cafeteria/multipurpose room space meets the definition of assembly occupancy. The educational facility contains two or more occupancies, and therefore meets the definition of multiple occupancy. Multiple occupancies must meet the requirements of either a “mixed” or a “separated” occupancy. The determination of whether multiple occupancies are mixed or separated is dependent on the architectural plans and the policy of the school and/or school board.

NOW, THEREFORE, in accordance with the foregoing, and the statutes and rules cited therein, it is hereby declared that:

1. The Petitioners are substantially affected and entitled to the issuance of this Declaratory Statement.

2. Question: Does the Florida Fire Prevention Code require an elementary school cafeteria/multipurpose room, holding more than 300 occupants, be separated from the remainder of the building which is an educational occupancy?

Answer: The design plan dictates whether the school is a “mixed” or a “separated” occupancy. It must be one or the other. If the design plan demonstrates an intermingled occupancy, then the requirements of mixed occupancies in Paragraph 6.1.14.3 must be met. If the design plan demonstrates a separated occupancy, then the requirements of Paragraph 6.1.14.4 pertain. If the school board policy prohibits the use of the cafeteria/multipurpose room by anyone other than the registered students and employees of the Neptune Elementary School, the provisions of Paragraph 14.1.2.2.2 allow the same egress capacity to serve both sections.

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 in the City of Tallahassee, Leon County, Florida, this ____ day of _____, 2007.

Eric Miller
Deputy Chief Financial Officer

Copies furnished to:

Mark Cavinee
817 Bill Beck Boulevard
Kissimmee, Florida 344741

Joseph S. Toth, AIA
Suite 300
200 East Robinson Street
Orlando, Florida 32812

Lesley Mendelson, Assistant General Counsel
Department of Financial Services
Division of State Fire Marshal
200 East Gaines Street
Tallahassee, Florida 32399-0340