

FILED

JAN 20 2012



Docketed by

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

STATE FIRE MARSHAL

In The Matter Of:

Fort Myers Beach Fire Control District and
Darren White, Assistant Fire Chief

Case No.: 121574-11-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 (hereinafter "Petition") filed by Fort Myers Beach Fire Control District and Darren White, Assistant Fire Chief ("Petitioner"), with the Department of Financial Services, Division of State Fire Marshal ("Department"), on November 3, 2011. Upon consideration thereof, and being duly advised, the Chief Financial Officer finds as follows:

1. The Chief Financial Officer has jurisdiction over the subject matter and the parties to this matter.
2. This Order is premised upon the assertions of fact set forth in the Petition. Any modification to those assertions of fact could alter the conclusions set forth in this Order. None of the assertions of fact are admitted by the Department as being true and the questions are being answered as purely hypothetical. If any of the facts asserted by the parties are untrue or materially incomplete, the conclusions of this Order could be significantly different.
3. If the Petition 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 Order. Legal assertions, conclusions, and arguments are

considered only to illustrate the manner in which parties may or may not be entitled to have the Department issue a Declaratory Statement.

BACKGROUND AND FACTS ASSERTED

4. Petitioner is the authority having jurisdiction (AHJ) responsible for fire code enforcement within the Fort Myers Beach Fire Control District.

5. This Declaratory Statement was requested pursuant to the provisions of Sections 120.565 and 633.01(6), Florida Statutes, Rule Chapter 28.105, Florida Administrative Code, and Rule 69A-60.007, Florida Administrative Code, which authorize a local enforcement agency, i.e., an AHJ, and 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.

6. The Petition alleges the following facts:

(a) A certificate of occupancy inspection was conducted for a gift shop that adjoins the principle means of egress for an existing hotel, the Lani Kai Island Resort located at 1400 Estero Boulevard, Fort Myers Beach, Florida 33931.

(b) During the inspection, the AHJ determined that: the gift shop exceeds 400 square feet; no fire separation or sprinklers exist; and one-hour fire-rated separation is warranted by Chapter 29 of the National Fire Protection Association 101, Life Safety Code, 2006 edition ("NFPA 101").

7. Petitioner has confirmed that litigation is not pending in this matter.

8. Notice of the receipt of the Petition herein was published in Volume 37, Number 47 of the *Florida Administrative Weekly*, on November 23, 2011.

QUESTIONS

9. The Petitioner presents the following questions for consideration: 1) Does a gift shop greater than 100 square feet in an existing hotel need one-hour fire-rated separation or fire sprinklers in

accordance with Section 29.3.2.2.2. of NFPA 101? and 2) When there are two provisions in the Florida Fire Prevention Code, does the more stringent apply?

DISCUSSION

10. The Department is authorized pursuant to Section 120.565, Florida Statutes, to issue Declaratory Statements when requested by a substantially affected person 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. The Department is required to issue a Declaratory Statement when requested by a local enforcing agency, i.e., an AHJ, and the request involves the application of the Florida Fire Prevention Code ("FFPC") to the Petitioner's particular set of circumstances.¹

11. Section 120.565(2), Florida Statutes, provides that a Petition for 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 of circumstances." "The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances." *Chiles v. Div. of Elections*, 711 So.2d 151, 154 (Fla. 1st DCA 1998); *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration*, 955 So.2d 1173, 1176 (Fla. 1st DCA 2007).

11. Section 633.0215, Florida Statutes, directs the State Fire Marshal to adopt the FFPC and update it every three years. Pursuant to Rules 69A-60.002(3) and 69A-60.004, Florida Administrative Code, the 2007 FFPC adopts and incorporates by reference NFPA 101.

12. Chapter 29 of NFPA 101, is entitled "Existing Hotels and Dormitories." Section 29.1.1.1 of that chapter states that its requirements "apply to existing buildings or portions thereof currently occupied as hotel² or dormitory occupancies" Section 29.3.2.2.2. and Table 29.3.2.2.2 specify that a

¹ Section 633.01(6), Florida Statutes.

² Section 3.3.125 of NFPA 101 defines a "hotel" as "a building or groups of buildings under the same management in which there are sleeping accommodations for more than 16 persons and primarily used by transients for lodging with or without meals."

gift or retail shop that exceeds 100 square feet in a hotel must have one-hour fire-rated separation or sprinklers.

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

1. The petitioner is an AHJ entitled to issuance of this Declaratory Statement.
2. Question 1: Yes. Under Chapter 29 of NFPA 101, a gift shop that exceeds 100 square feet in an existing hotel requires one-hour fire-rated separation or sprinklers.³
3. Question 2: The Petition fails to identify any provisions in the FFPC which authorize differing requirements for Petitioner's circumstances. As a result, the Petition does not satisfy Section 120.565(2), Florida Statutes, which requires the Petition to specify the statutory provision, rule, or order that the petitioner believes may apply to Petitioner's circumstances, and the Department may not answer the question.

³ In describing the factual circumstances, the Petition states that the gift shop "adjoins" the hotel. In "Question 1.," the Petition states that the gift shop is "in" the hotel. The Department's opinion provided in this Declaratory Statement is based on the assumption that the gift shop is a "portion" of the building occupied as a hotel.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the order pursuant to Rule 9.110, *Florida Rules of Appellate Procedure*, because pursuant to Section 120.565, *Florida Statutes*, an order denying a petition for 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 Julie Jones, Agency Clerk, at 612 Larson Building, Tallahassee, Florida, 32399-0333, and a copy of the same with the appropriate district court of appeal, within thirty days of rendition of this Declaratory Statement. A copy of the notice may also be served by email addressed to Julie.Jones@myfloridacfo.com or by facsimile transmission at 850-488-0697.

ENTERED in the City of Tallahassee, Leon County, Florida, this 20 day of January, 2012.



A handwritten signature in black ink, appearing to read "R. Kneip".

Robert C. Kneip
Chief of Staff

Copies furnished to:

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