



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

APR 15 2009

Docketed by

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In The Matter Of:

FRANK McELROY, Fire Marshal
St. John's County,

Case No.: 102207-09-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") from Frank McElroy (hereinafter "Petitioner"), received by the Department of Financial Services, Division of State Fire Marshal (hereinafter the "Department"), on approximately January 23, 2009. 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 Petition. 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 questions are being answered as purely hypothetical. 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 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. The Declaratory Statement was requested pursuant to the provisions of Sections 120.565 and 633.01(6), *Florida Statutes*, Chapter 28.105, and Rule 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.

5. The Petitioner is the Fire Marshal charged with enforcing the Florida Fire Prevention Code (hereinafter the "Code") in the unincorporated areas of St. Johns County, Florida.

6. The subject of the Petition is fire alarm system requirements for the Ocean Sunrise Condominium ("Ocean Sunrise"), located at 20 Dondanville Road, St. Augustine, Florida.

7. Ocean Sunrise is beachfront, six-story, 30 unit apartment building constructed in 1980. Exit access from each upper floor unit is via an open balcony style corridor to exit stairways on the north and south ends of the building.

8. Ocean Sunrise is not provided with an alarm system or fire sprinkler system, and does not meet the exception criteria set forth in National Fire Protection Association ("NFPA") 101-31.3.4.

9. The Petitioner issued a notice of violation to Ocean Sunrise to retrofit the building with a fire alarm system, and gave Ocean Sunrise eighteen months in which to accomplish the retrofit. He advised that an additional extension would be provided if the retrofit could not be accomplished in that time frame.

10. Ocean Sunrise appealed the Petitioner's decision to the local administrative appeals board. The board overruled the Petitioner holding that his decision was unreasonable.

11. Receipt of the Petition herein was published in Volume 35, Number 5 of the Florida Administrative Weekly, on February 6, 2009.

12. The Petition was heard and discussed at a duly noticed meeting before the Fire Code Advisory Counsel on March 27, 2009, in St. Augustine, Florida. A representative of the condominium association presented the argument for Ocean Sunrise, and the Petitioner presented his argument. Several members of the public spoke as well.

QUESTIONS

13. The Petition poses the following questions:

A. Is it the intent of the Florida Fire Prevention Code and Chapter 633, *Florida Statutes*, including NFPA 101-31.3.4, and Section 633.025(6), *Florida Statutes*, that Ocean Sunrise Condominium shall retroactively install a fire alarm system?

B. Was the decision of the local fire official to require such a fire alarm installation at Ocean Sunrise reasonable as contemplated by Section 633.025(6), *Florida Statutes*?

DISCUSSION

14. The Department has authority pursuant to Section 120.565, *Florida Statutes*, to issue Declaratory Statements, and is required by the provisions of Section 633.01(6), *Florida Statutes*, to issue Declaratory Statements relating to the Florida Fire Prevention Code (hereinafter the "Code"), when requested by a substantially affected person or a local enforcing agency.

15. Section 633.025(6), *Florida Statutes*, entitled "Minimum Firesafety Standards," deems the Florida Fire Prevention Code and the Life Safety Code adopted by the State Fire Marshal, adopted by each municipality, county, and special district with firesafety responsibilities. Each

municipality, county, and special district with firesafety responsibilities is directed to enforce the Florida Fire Prevention Code and the Life Safety Code as the minimum firesafety code required by this section. The most current edition of NFPA 101, “Life Safety Code” must be adopted in the Florida Fire Prevention Code, and enforced at the local level.

16. Local government may establish alternative requirements to those required under the minimum firesafety standards on a case-by-case basis, in order to meet special situations arising from historic, geographic, or unusual conditions, if the alternative requirements result in a level of protection to life, safety, or property equal to or greater than the applicable minimum firesafety standards. Alternative standards, if any, must be adopted in accordance with the procedures set forth in Section 633.025(3), *Florida Statutes*.

17. With regard to existing buildings, the Legislature recognized that it is not always practical to apply any or all of the provisions of the minimum firesafety code and that physical limitations may require disproportionate effort or expense with little increase in lifesafety. Prior to applying the minimum firesafety code to an existing building, the local fire official shall determine that a threat to lifesafety or property exists. If a threat to lifesafety or property exists, the fire official shall apply the applicable firesafety code for existing buildings to the extent practical to assure a reasonable degree of lifesafety and safety of property or the fire official shall fashion a reasonable alternative which affords an equivalent degree of lifesafety and safety of property. The decision of the local fire official may be appealed to the local administrative board described in Section 553.73, *Florida Statutes*.

18. NFPA 101 (2006 edition), the “Life Safety Code” is adopted by reference in Rule 69A-60.004, *Florida Administrative Code*, effective December 31, 2008, as part of the Florida Fire

Prevention Code. Chapter 31 applies to existing apartment buildings. NFPA 101-31.3.4.1.1

states that:

Apartment buildings with more than three stories or with more than 11 dwelling units, other than those meeting 31.3.4.1.2 or 31.3.4.1.3, shall be provided with a fire alarm system. . .

19. The following are the cited exceptions:

31.3.4.1.2 fire alarm system shall not be required where each dwelling unit is separated from other contiguous dwelling units by fire barriers having a fire resistance rating of not less than ½ hour, and where each dwelling unit has either its own independent exit or its own independent stairway or ramp discharging at grade.

31.3.4.1.3 fire alarm system shall not be required in buildings that are protected throughout by an approved, automatic sprinkler system in accordance with 31.3.5.3 with listing quick response or listed residential sprinklers installed throughout all dwelling units, that do not exceed four stories in height, and that contain not more than 16 dwelling units.

20. Ocean Sunrise does not meet either of the exceptions in NFPA 101-31, and local government has not adopted an alternative in accordance with Section 633.025, *Florida Statutes*.

21. The fire official can, consistent with Section 633.025(4), *Florida Statutes*, approve a reasonable alternative which affords an equivalent degree of lifesafety and safety of property.

22. The record demonstrates that the fire official deemed the lack of both a fire sprinkler system and a fire alarm system at Ocean Sunrise to be a threat to lifesafety and property. The discussion at the Fire Code Prevention Advisory Council meeting in St. Augustine revealed that these facts, together with the configuration of the building and the difficult access to the building on the beach, pose a threat to the lives and property of the residents, and also to the firefighters called on to respond to a fire. Ocean Sunrise did not propose an alternative to the alarm system requirement. Instead, Ocean Sunrise's position was that the threat was inconsequential when compared to the price of the system.

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

1. The Petitioner is a substantially affected person entitled to the issuance of this Declaratory Statement.

2. Questions and Response:

Question A: Is it the intent of the Florida Fire Prevention Code and Chapter 633, *Florida Statutes*, including NFPA 101-31.3.4, and Section 633.025(6), *Florida Statutes*, that Ocean Sunrise Condominium shall retroactively install a fire alarm system?

Answer A: Yes, a manual fire alarm system is required by the Florida Fire Prevention Code for installation in existing buildings comprised of more than three stories in height or of more than 11 dwelling units.

Question B: Was the decision of the local fire official to require such a fire alarm installation at Ocean Sunrise reasonable as contemplated by Section 633.025(6), *Florida Statutes*?

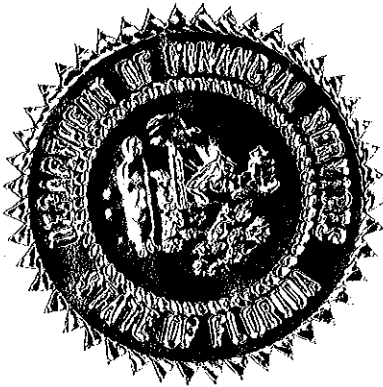
Answer B: The decision to require the installation of a fire alarm system as required by the prescriptive provisions of the Florida Fire Prevention Code was addressed in the response to Question A. The issue of reasonableness only arises in conjunction with fashioning a reasonable alternative which affords an equivalent degree of lifesafety and safety of property. Ocean Sunrise did not propose an alternative to compliance; rather, they only proposed noncompliance with the Florida Fire Prevention Code. Since an alternative to compliance is not at issue, reasonableness cannot be assessed.

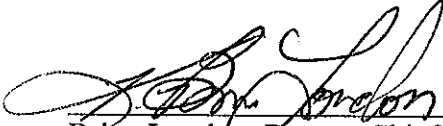
NOTICE OF RIGHTS

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 DFS Agency Clerk, Florida Department of Financial Services, 200 E. Gaines Street, Tallahassee, Florida, 32399-0390, 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, on 15 day of April, 2009.




Brian London, Deputy Chief Financial Officer

Copies furnished to:

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