



In The Matter Of:

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

Case No.: 91169-07-FM

Petition for Declaratory Statement to the
Florida Department of Financial Services,

Rick Gorham,

Intervener.

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 August 1, 2007. Rick Gorham, (hereinafter "Intervener") is a principal of Northeast Florida Contracting, Inc. (hereinafter "Intervener"), which holds a building permit for Pusser's Caribbean Grille, located at 816 A1A North, Ponte Vedra Beach, Florida, the subject of the Petition. 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 St. Johns County, Florida.

6. The subject of the Petition is automatic sprinkler requirements in buildings originally permitted for shell construction on August 14, 2005.

7. The building is three stories tall at its highest, and was required to be protected by a fire sprinkler system in accordance with Section 553.895, *Florida Statutes*.

8. When the building was constructed, portions were left unfinished to accommodate the specifications of future tenants.

9. The plans submitted with the Petition depict a restaurant and bar to occupy portions of the first and second floors of the building (Petition, Exhibits 6, 7, 10, 11, 12, and 13). The upstairs portion includes a terrace area that is located on one corner of the building. This area is formed by the roof of the first floor area below, and two sides of the second floor areas, with the other two sides open to the air. The plans submitted show a full bar area and numerous tables intended for dining. The area will have a partial height wall/railing on two walls, open to the exterior on the upper half. The plan describes a “canopy” consisting of an aluminum frame covered with a “flame resistant” fabric. The canopy is described as consisting of overlapping layers with small vertical gaps to prevent rain and sun impact while allowing ventilation from between the layers (Petition, Exhibits 7 and 8).

10. While reviewing the plans for the building permit for the tenant space build-out, the fire safety inspector indicated that exterior canopies, awnings, etc., exceeding four feet in width must be sprinkled, and requested documentation that the canopy frame would be capable of carrying the weight of the fire sprinkler piping.

11. The applicant for the permit responded that the canopy would be constructed of non-combustible construction and therefore, pursuant to National Fire Protection (hereinafter “NFPA”) 13, Paragraphs 8.14.7.2, and 8.14.7.1., sprinklers “were permitted to be omitted.”

12. The fire safety inspector responded that the language of NFPA 13, Paragraphs 8.14.7.2 and 8.14.7.1 did not apply as an exception in this case because the area did not constitute a pedestrian way.

13. Later, in a meeting between the Intervener’s representatives, the fire safety inspector and the Petitioner, the Intervener’s architect again stated that the fabric would be “flame resistant” or “fire rated” or “fire retardant”. (Petition, Exhibits 10, 11, 12 and 13). The Petitioner

cautioned that those terms were not synonymous with “non-combustible” or “limited combustible,” as used in the rules, and requested technical documentation in the form of product specification sheets, product labeling, laboratory reports, or listing company reports, to determine the fabric’s proper classification. (To date, the requested documentation has not been provided.)

14. The Intervener’s architect then inquired whether sprinklers would be required if the fabric canopy was replaced with sheet metal or a similar product. The Petitioner interpreted the Code as requiring sprinklers because the area used for storage and handling of combustible materials was not restricted to pedestrian use.

15. The Petitioner explained that the normal products involved in a bar and dining service (possibly including combustible alcoholic beverages, associated containers and packaging, linens, napkins and similar paper products, plastic serving or cleaning supplies and containers, product containers, plastic dispensing apparatus for soft drinks and mixes, mixers, ice machines, furniture items, and assorted decorations and signage) would constitute storage and handling of combustibles that do not qualify as short term or transient in nature.

16. Thereafter, the applicant for permit appealed the Petitioner’s ruling. Prior to the hearing, the Petitioner received and provided a copy of Declaratory Statement 89161-07-FM to the Intervener.

17. Following the presentation to the Appeals Board, a motion was made to affirm the decision of the Petitioner. The motion failed. Next, the Assistant County Attorney indicated that a motion to overturn the Petitioner’s decision would be appropriate; however, no such motion was made, and the hearing adjourned without any further formal action on this agenda item.

18. Thereafter, an order overturning the Petitioner's decision was signed and issued. The order made no findings of fact concerning this issue.

19. Receipt of the Petition herein was published in Volume 33, Number 33 of the *Florida Administrative Weekly*, on August 17, 2007.

20. Rick Gorham, Principal of Northeast Florida Contracting, Inc. (hereinafter "Intervener"), requested and was provided a copy of the Petition herein on August 24, 2007, and filed a written submission on August 30, 2007.

21. Intervener holds a building permit for Pusser's Caribbean Grille, located at 816 A1A North, Ponte Vedra Beach, Florida, which is the subject of the Petition.

22. Intervener contends that the covering is not an exterior roof as that term is used in NFPA 13, Paragraph 8.14.7.1, because it is referred to as an "awning" in the Florida Building Code. Further, Intervener argues that the area under a canopy, used for seated dining and operation of a full bar does not constitute an area where combustibles are stored and handled, and thus does not require the installation of fire sprinklers in accordance with NFPA 13, Paragraph 8.14.7.4., because all materials of the bar and associated tables and hardware are of non-combustible and/or non-fire rated (flame-retardant) materials. He further contends that no food or beverages will be stored in the area outside of "pedestrian use periods, and none of the items require a combustible classification or labeling by any regulatory agency within the State of Florida. Intervener also asserts that the awning material is non-combustible or of limited combustibility and the Petitioner is permitted to omit the requirement for sprinklers. Intervener argues that no one official may arbitrarily and subjectively determine the requirements of any structure, process, use, or any other requirement of the construction process in any instance, and that the decision of the Adjustments and Appeals Board should be affirmed.

QUESTIONS

23. The Petition poses the following questions:

A. Does the described protective covering of the terrace area constitute an exterior roof, or canopy as those terms are used in NFPA 13, Paragraph 8.14.7.1?

B. Does an area under a canopy, used for seated dining and for operation of a full bar, together with the associated storage and handling of alcohol and food products, and the materials typically contained within those areas, as described herein, constitute an area where “combustibles are stored and handled” thus requiring the installation of fire sprinklers in accordance with NFPA 13, Paragraph 8.14.7.4.?

C. Does a canopy that consists of an aluminum support frame, covered with a “flame retardant”, “fire resistant”, or “fire rated” fabric (see St. Johns County Fire Marshal, Exhibit 10,11,12, and 13) that has not been shown to meet the definition of “non-combustible” as provided in NFPA 101, Paragraph 3.3.135.3, or limited combustibility as provided in NFPA 1, Subsection 3.3.124 and/or NFPA 101, Subsection 3.3.131 through submittal of product labeling, listing, or of acceptable testing laboratory report results, meet the intent of the code in NFPA 13, Paragraph 8.14.7.2 as a canopy of non-combustible or limited combustible construction, such that sprinklers may be permitted to be omitted?

D. If the answer to Question B is “no”, and the answer to Question C is “yes”, may the local fire official, based on the language in NFPA 13, Paragraph 8.14.7.2 still require fire sprinklers under the canopy, which canopy is greater than four feet in width, at his option, as determined on an ad hoc basis?

E. May a local adjustment and appeals board overturn the decision of a local authority having jurisdiction based only on a failed motion to affirm the local fire official, but without

passing a motion to overturn the local AJH that meets the requirements of NFPA 1, Subsection 1.10.6?

DISCUSSION

24. The Department of Financial Services, Division of State Fire Marshal, 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.

25. NFPA 13, (2002 edition) entitled, “Standards for the Installation of Sprinkler Systems” is adopted by reference in Rule 69A-60.005, *Florida Administrative Code*.

26. NFPA 13 provides the minimum requirements for the design and installation of automatic fire sprinkler systems and exposure protection sprinkler systems covered within the standard. Its purpose is to provide a reasonable degree of protection for life and property from fire through standardization of design, installation, and testing requirements for sprinkler systems, including private fire service mains, based on sound engineering principles, test data, and field experience.¹

27. NFPA 13, Chapter 4, sets forth the general requirements that apply to all of NFPA 13. Section 4.1 provides that a “building, where protected by an automatic sprinkler system installation, shall be provided with sprinklers in all areas except where specific sections of this standard permit the omission of sprinklers.” Our analysis begins with the premise that every area of the building in question must be sprinklered unless a specific provision allows the area not to be sprinkled.

¹ NFPA 13, Sections 1.1 and 1.2.

28. NFPA 13, Chapter 8, deals exclusively with installation details such as positioning, and location of system components, such as sprinklers and valves. Subsection 8.1.1., encompasses the requirements for spacing, location and position of sprinklers, and is based on the following principles: (1) sprinklers shall be installed throughout the premises, and (4) sprinklers shall be permitted to be omitted from areas specifically allowed by this standard.

29. Section 8.14, entitled “Special Situations,” sets forth situations where the omission of sprinklers is permitted. These include certain concealed spaces, vertical shafts, vertical openings, elevator hoistways and machine rooms, spaces under ground floors, exterior docks, and platforms, and exterior roofs or canopies.

30. NFPA 13, Subsection 8.14.7., addresses “Exterior Roofs or Canopies. Paragraph 8.14.7.1, provides that “[u]nless the requirements of 8.14.7.2 or 8.14.7.3 are met, sprinklers shall be installed under exterior roofs or canopies exceeding 4 ft (1.2 m) in width.”

31. Intervener argues that the covering in question is not a canopy but rather an awning, and NFPA doesn’t specifically address “awnings,” rather it addresses “exterior roofs and “canopies”. The Department agrees that the “special situation” addressed in Subsection 8.14.7. does not apply to the subject of the Petition. Paragraph 8.14.7.1 provides that “unless the requirements of 8.14.7.2 are met, sprinklers shall be installed under exterior roofs or canopies exceeding 4 ft (1.2 M) in width. According to *Automatic Sprinkler Systems Handbook*, this Subsection refers to exterior roofs or canopies covering pedestrian walkways or usage. Examples of areas where this special situation would apply are roof canopies typically found on strip shopping malls, in which the area under the canopy is limited to pedestrians, drive through windows or porte cocheres at hotels and motels.² The examples make logical sense of the

² *Automatic Sprinkler Systems Handbook*, Ninth Edition, Christian Dubay, P.E., National Fire Protection Association, Quincy, Mass, 2002, p.295.

permitted omission because in a pedestrian walkway (or driveway), ingress and egress are not limited as they would be in Intervener's proposed bar and restaurant. Random House's *Webster's Unabridged Dictionary* (Second edition, 1999, New York), defines the term "pedestrian" at page 1428, to mean "one who travels on foot; therefore "pedestrian use" would mean used for walking or traveling. Whether or not the overhead canopy is constructed of noncombustible or limited combustible materials, the fact that the area will be used as a restaurant and bar, not a pedestrian way, is not controverted. Therefore, the permitted omission provided by NFPA 13, Paragraph 8.14.7.2, would not apply to the use in question.

32. Because NFPA 13, Subsection 8.14.7, is not applicable to Intervener's use, a discussion of NFPA 13, Paragraphs 8.14.7.2, and 8.14.7.4., is neither necessary nor relevant. Likewise, the provisions of NFPA 1, Subsections 1.10.6 and 3.3.124, and NFPA 101, Subsection 3.3.131, and 3.3.135.3, are also irrelevant to the instant analysis.

33. The building at issue is protected by an automatic sprinkler system; all areas of the building must be sprinkled, unless a specific section of NFPA 13 permits the omission of sprinklers. No cited section of NFPA 13 permits the omission of sprinklers; therefore, the area at issue must be protected by an automatic sprinkler system.

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

1. The parties are substantially affected persons entitled to the issuance of this Declaratory Statement.

2. Questions and Response

Question A. Does the described protective covering ("canopy") of the terrace area constitute an exterior roof, or canopy as those terms are used in NFPA 13, Paragraph 8.14.7.1?

Answer: No, NFPA 13, Paragraph 8.14.7.1 does not apply to area use described in the Petition.

Question B. Does an area under a canopy, used for seated dining and for operation of a full bar, together with the associated storage and handling of alcohol and food products, and the materials typically contained within those areas, as described herein, constitute an area where “combustibles are stored and handled,” thus requiring the installation of fire sprinklers in accordance with NFPA 13, Paragraph 8.14.7.4.?

Answer: The installation of fire sprinklers is required for the described area pursuant to the provisions of NFPA 13, Section 4.1, which provides that a “building, where protected by an automatic sprinkler system installation, shall be provided with sprinklers in all areas except where specific sections of this standard permits the omission of sprinklers.”

Question C. Does a canopy that consists of an aluminum support frame, covered with a “flame retardant”, ”fire resistant”, or “fire rated” fabric (see St. Johns County Fire Marshal, Exhibit 10,11,12, and 13) that has not been shown to meet the definition of “non-combustible” as provided in NFPA 101, Section 3.3.135.3 or limited combustibility as provided in NFPA 1, Section 3.3.124 and/or NFPA 101, Section 3.3.131, through submittal of product labeling, listing, or of acceptable testing laboratory report results, meet the intent of the code in NFPA 13, Section 8.14.7.2 as a canopy of non-combustible or limited combustible construction, such that sprinklers may be permitted to be omitted?

Answer: No. No, in this instance, automatic sprinklers are required by the provisions of NFPA 13, Section 4.1., whether or not the described covering is of combustible, non-combustible or limited combustible construction.

Question D. If the answer to Question B is “no”, and the answer to Question C is “yes”, may the local fire official, based on the language in NFPA 13, Paragraph 8.14.7.2 still require fire sprinklers under the canopy, which canopy is greater than four feet in width, at his option, as determined on an ad hoc basis?

Answer: Not applicable, based upon the preceding analysis.

Question E. May a local adjustment and appeals board overturn the decision of a local authority having jurisdiction based only on a failed motion to affirm the local fire official, but without motion to overturn the local AJH that meets the requirements of NFPA 1, Subsection 1.10.6?

Answer: NFPA 1, Subsection 1.10.6, does not address the question posed and further, the question, as posed, is partially beyond the scope of the Division’s jurisdiction to answer. However, this Declaratory Statement constitutes the final interpretation of the above-cited provisions of the Florida Fire Prevention Code pursuant to the provisions of Section 633.01(6), *Florida Statutes*, subject to judicial review, as provided below.

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, on _____ day of October,
2007.

Eric Miller
Deputy Chief Financial Officer

Copies furnished to:

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