

**STATE OF FLORIDA
BUILDING COMMISSION**

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Department of Business and Professional Regulation	
Deputy Agency Clerk	
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File #	

IN RE:

LANDMARK DEVELOPMENT CORP.

CASE NO.

DS 2014-142

**PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BUILDING COMMISSION**

Landmark Development Corp. (“Landmark” or “Petitioner”) petitions the Florida Building Commission (the “Commission”) for a declaratory statement (the “Petition”) regarding the application of the vertical accessibility requirement of the 2012 Florida Accessibility Code for Building Construction (“FAC”) to its affordable housing buildings and developments, and states as follows:

JURISDICTION

1. The Florida Building Commission (the “Commission”) has jurisdiction to issue declaratory statements pursuant to section 120.565, Florida Statutes, relating to an agency’s interpretation and enforcement of the specific provisions of the Florida

Building Code (FBC), which the agency is authorized to enforce. *See* § 553.775(3)(f), Fla. Stat.¹

The Petitioner

2. Petitioner's address is 3050 Biscayne Boulevard, Suite 300, Miami, Florida 33137. Petitioner's telephone number is (305) 538-9552 but should be contacted by telephone through undersigned counsel.

3. Petitioner is a Florida Corporation and is a developer of affordable housing in several counties in Florida.

4. Petitioner intends to continue developing affordable housing developments that may consist of garden style apartments, mid-rise apartments, high-rise apartments and townhouse-style apartments.

5. Petitioner has in the past, and intends in the future, to finance its affordable housing developments with financing provided by, or facilitated by agencies of the State of Florida and various county government agencies.

SUMMARY OF FACTS

4. In 1993, the Florida Legislature adopted the first version of the Florida Accessibility Code for Building Construction that incorporated the Americans with

¹ All references to Florida Statutes shall be to the 2014 edition unless otherwise indicated.

disabilities Act's ("ADA") Standards for Accessible Design (1991).² §1, Ch. 93-183, Laws of Florida.

5. In 2011, the Legislature enacted Section 22, Ch. 2011-222, Laws of Florida, which replaced the ADAAG with the 2010 ADA Standards as the foundation standard of the FAC.

6. Prior to the adoption of the 2010 ADA Standards as the foundation standard for the 2012 FAC, the FAC provided, based on the mandate of Section 553.509, Florida Statutes, that "[v]ertical accessibility shall be provided to all levels above and below the occupiable grade level, regardless of whether the code requires an elevator to be installed in such building, structure or facility, except for [certain prescribed exemptions]". *See, e.g.*, § 11-4.1.3(5), Florida Building Code ("FBC"), 2007 edition.

7. The 2012 edition of the FAC ("FAC-2012") provides:

201.1 Vertical accessibility. Sections 553.501-553.513, F.S. and the ADA Standards for Accessible Design do not relieve the owner of any *building*, structure or *facility* governed by these sections from the duty to provide vertical accessibility to all levels above and below the occupiable grade level regardless of whether the Standards require an elevator to be installed in such *building*, structure or *facility* except for:

(7) *Facilities, sites* and spaces exempted by Section 203.

² The 1991 Standards for Accessible Design were also referred to as the ADA Accessibility Guidelines or ADAAG.

8. Section 203.8 of the 2012-FAC states: “[i]n residential *facilities, common use* areas that do not serve *residential dwelling units* required to provide mobility features complying with 809.2 through 809.4 shall not be required to comply with these requirements or to be on an *accessible* route.

9. Section 233.2 of the 2012-FAC, titled Residential Dwelling Units Provided by Entities Subject to HUD Section 504 Regulations, provides:

Where *facilities with residential dwelling units* are provided by entities subject to regulations issued by the Department of Housing and Urban Development (HUD) under Section 504 of the Rehabilitation Act of 1973, as amended, such entities shall provide *residential dwelling units* with mobility features complying with 809.2 through 809.4 in a number required by the applicable HUD regulations. *Residential dwelling units* required to provide mobility features complying with 809.2 through 809.4 shall be on an *accessible* route as required by 206. In addition, such entities shall provide *residential dwelling units* with communication features complying with 809.5 in a number required by the applicable HUD regulations.

(Emphasis added).

10. Section 233.3 of the 2012-FAC provides, in pertinent part:

In *facilities with residential dwelling units*, at least 5 percent, but no fewer than one unit, of the total number of *residential dwelling units* shall provide mobility features complying with 809.2 through 809.4 and shall be on an *accessible* route as required by 206.

§ 233.3.1.1, 2012-FAC (Emphasis added).

11. It has been the experience and belief of Petitioner and other developers of multifamily housing in Florida that building officials in a number of jurisdictions in Florida have been misreading various provisions of the 2012-FAC in regard to their

application to multifamily housing. This has already led to a petition to the Commission for, and the granting of, a declaratory statement pertaining to the application of the 2012-FAC to multifamily housing developments covered by the Fair Housing Act.

12. The aforementioned declaratory statement, Case Number DS 2013-011, however, covered only multifamily developments that are subject to the Fair Housing Act, and not those which are subject to either Section 504 of the Rehabilitation Act (the “Rehabilitation Act”) (applicable to recipients of federal financial assistance), or Title II or III of the ADA.

COUNSEL FOR THE PETITIONER

13. Petitioner is represented by: Robert S. Fine, Esq., AIA. Florida Bar Number 0155586. Greenberg Traurig, P.A., 333 S.E. 2nd Avenue, Suite 4400, Miami, Florida 33131. Telephone: 305.579.0826. Facsimile: 305.961.5826. Email: FineR@gtlaw.com.

THE STATUTES, RULE AND CODE PROVISIONS, AND THEIR EFFECT ON PETITIONER

14. Florida Building Code Provisions

a. The Florida Building Code

i. FBC, 2010 Accessibility Volume, commonly referred to as the 2012 Florida Accessibility Code for Building Construction.

15. Florida Statutes

i. Section 553.509(1), Florida Statutes (2014)

16. The Effect of these Code Provisions on Petitioner

Section 206.2.3 of the 2012-FAC states:

“Multi-Story Buildings and Facilities. At least one accessible route shall connect each story and mezzanine in multi-story buildings and facilities. Notwithstanding the requirements and exceptions of this section, section 201.1.1 shall apply.”

That is followed by an “Exceptions: section where seven enumerated exceptions are reserved. This is followed by an advisory:

Advisory 206.2.3 Multi-Story Buildings and Facilities Exceptions.

Exceptions 1–7 are preempted by Florida vertical accessibility requirements of s.553.509, F.S., as incorporated in section 201.1.1. Florida requirements may be waived down to the ADA Standards requirements. *Note: The following Advisories on the Exceptions to 206.2.3 are provided for consideration when waiving Florida Vertical Accessibility requirements down to ADA Standards for Accessible Design.*

This advisory leads some readers (e.g., building officials) to the mistaken impression that the exception to providing vertical accessibility is preempted by Section 553.509, Florida Statutes when in fact, 553.509(1) provides a specific exception for multifamily housing when the housing falls within the exception provided at Section 203.8 of the 2012-FAC.

Petitioner is the developer of multifamily housing developments in Florida commonly referred to as “affordable housing.” These developments are typically

financed with some combination of tax credits, federally subsidized loans commonly referred to as HUD loans, federal grants, and HOME loans and other financing provided, or facilitated by state agencies (e.g., Florida Housing Finance Corporation) and/or county or city housing programs. By virtue of partaking in these financing vehicles, the affordable housing projects may become subject to the Rehabilitation Act, or Title II of the ADA. Unlike market rate housing, affordable housing developments have strict limits on the amount of rent that may be charged. This limits the amounts of money that may be spent on the construction of affordable housing developments in order for affordable housing developments to be financially feasible. This also creates practical limits on unit sizes. If Petitioner is required to spend its limited dollars on building components not required by the building code (because of a misinterpretation of the code), or is required to construction additional circulation space to facilitate common area elevators, then the already limited unit sizes would necessarily be reduced adversely affecting the tenants but also Petitioner by adversely affecting the “rentability” of the units in affordable housing developments. Therefore, Petitioner is an adversely affected party when a building official misinterprets the accessibility code and requires features such as elevators in garden style apartment buildings when such is not required by the accessibility code. It should be noted the developments covered by the Rehabilitation Act or Titles II of III the ADA are subject to significantly enhanced accessibility requirements as compared to developments subject only to the accessibility

requirements of the Fair Housing Act such that the lack of elevators in the building types not required to have them by the Fair Housing Act, Rehabilitation Act or the ADA are not considered to be discriminatory or in some manner inapposite to public policy.

NATURE OF DECLARATORY STATEMENT SOUGHT

17. Landmark seeks a declaratory statement answering the question: “are multifamily residential buildings/developments covered by the Rehabilitation Act and/or the ADA required by the 2012-FAC to provide elevators when the building/developments would otherwise not be required to provide them by the Rehabilitation Act and/or ADA, as applicable to the particular project?”

PETITIONERS’ PROPOSED ANSWERS TO QUESTIONS POSED IN THE PETITION

18. No. Section 553.509, Florida Statutes, exempts “[f]acilities, sites, and spaces exempted by s. 203 of the Standards,” from “the duty to provide vertical accessibility to all levels above and below the occupiable grade level, regardless of whether the standards [*sic*] require an elevator to be installed in such building, structure, or facility...” § 553.509(1)(g), F.S. This exemption is restated in Section 201.1.1 of the 2012-FAC. Section 203.8 of the Standards provides that dwelling units that are not required to provide the enhanced accessibility features required by the Rehabilitation Act or the ADA (i.e., Sections 809.2 through 809.4) are not required to be on an accessible route including a route that provides vertical accessibility. Therefore, in a

multifamily residential building/development where all of the units that are required to have the enhanced accessibility features of Sections 809.2 through 809.4 (by HUD or DOJ regulations) are provided on the ground floor, the remaining floors above and below the ground floor are not required to be on an accessible route that provides vertical accessibility.

Conclusion

In a multifamily residential building/development where all of the units that are required to have the enhanced accessibility features of Sections 809.2 through 809.4 (by HUD or DOJ regulations) are provided on the ground floor, the remaining floors above and below the ground floor are not required to be on an accessible route that provides vertical accessibility. This result is authorized by the exception set forth in Section 553.509(1)(g) of the Florida Statutes.

Respectfully submitted,

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By: /s/ Robert S. Fine
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*Counsel for Petitioner, LANDMARK
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by

REGISTERED EMAIL upon:

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This 31st day of October , 2014.

By: /s/ Robert S. Fine
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