

FILED

Department of Business and Professional Regulation
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Date **3/19/2013**
File #

**STATE OF FLORIDA
BUILDING COMMISSION**

IN RE: _____)
)
 ALLIANCE RESIDENTIAL BUILDERS OF)
 SOUTH FLORIDA, LLC, and ALTIS AT)
 COCONUT CREEK, LLC.)
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CASE NO. **DS 2013-011**

**SECOND AMENDED PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BUILDING COMMISSION¹**

Petitioners, Alliance Residential Builders of South Florida, LLC., and Altis at Coconut Creek, LLC (collectively, "Petitioners"), file this amended petition for declaratory statement (the "Petition") amending the amended petition previously filed on February 25, 2013. Petitioners respectfully petition the Florida Building Commission for a Declaratory Statement determining that the Florida Accessibility Code (including its regulations related to swimming pools) does not apply to the apartment complexes they construct that do not receive government funding or financial assistance and which are considered "covered multifamily dwellings" pursuant to the Florida and Federal Fair Housing Acts. In support hereof, Petitioners state as follows:

A. INTRODUCTION

Between 1997 and March 15, 2012, the Florida Accessibility Code for Building Construction ("FACBC") adopted the Department of Justice's Americans with Disabilities Act ("ADA") Standards for Accessible Design (1991 edition) and then added a few Florida-specific enhancements. In accordance with the statutes that authorized it, the FACBC generally did not impose requirements for apartment buildings and associated facilities (considered to be "covered multifamily dwellings" e.g., residential apartment buildings, under the Florida and Federal Fair

¹ With incorporated Memorandum of Law in support of Petitioners' proposed responses.

Housing Acts.)² Instead, the accessibility requirements for “covered multifamily dwellings” enforceable by building officials are set forth in Sections 760.22 and 760.23, Florida Statutes (the Florida Fair Housing Act).³

The 2012 Florida Accessibility Code (the “Accessibility Code”) took effect on March 15, 2012. The Accessibility Code adopted the 2010 ADA Standards with some Florida-specific enhancements. The adoption of the new Federal standards meant that the accessibility code now also covered entities that receive government financial assistance or sponsorship as set forth in the ADA Standards. *See* § 553.507(1), F.S. Outside of this additional coverage for government-assisted projects, however, the accessibility code’s authorizing statutes (§§ 553.501- 553.513, F.S.) do not subject certain types of facilities such as multifamily dwellings covered under the Florida (and federal) Fair Housing Act(s) if they did not receive governmental financial assistance or sponsorship (except for the requirement set forth in Section 553.504(2), Florida Statutes, when it applies).

Because the 2010 ADA Standards (as adopted in Florida) apply to multifamily residential developments that *do* receive governmental financial assistance, there are standards of accessibility for multifamily residential facilities contained in the 2010 ADA Standards (Sections 233 and 809) and by extension, the Accessibility Code. A number of building officials in the state are erroneously construing these provisions to be applied to “covered multifamily dwellings” (under the Fair Housing Act(s)) even when there is no government funding or

² One exception to this general rule is the requirement provided in section 553.504(2) of the Florida Statutes which requires 29-inch clear door opening to a bathroom located on the habitable grade level in the dwelling units of certain types of residential facilities.

³ *See* Memorandum dated June 11, 1999, from Evelyn Golden, Assistant General Counsel, Florida Commission on Human Relations, to Suzanne Schmith, Staff Attorney, Florida Building Commission.

assistance involved. This is resulting in several building officials requiring swimming pool lifts and other accessibility-related elements to multifamily dwelling projects that should not be subject to those provisions of the Accessibility Code. Petitioners, developers and builders of multifamily housing developments in Florida are, and will be, subjected to these varying and erroneous interpretations of the Accessibility Code in the projects that they are, and plan to be constructing.

A related issue affecting Petitioners is Section 424.1 of the Florida Building Code's classification of certain swimming pools in apartment complexes ("covered multifamily dwellings") as "public swimming pools." The term "public swimming pool" has resulted in an interpretation that such pools in Petitioners' current and future apartment development projects are public accommodations or commercial facilities notwithstanding their being part of exclusively residential developments that are intended solely for the use of residents and their guests. In such cases, pool lifts are also being required.

Because these varying interpretations additional requirements by building officials are being erroneously applied to Petitioners' current projects, and in all likelihood to their future projects without clarification from the Commission, Petitioners respectfully submit their Petition for Declaratory Statement.

B. THE PETITIONERS

1. Alliance Residential Builders of South Florida, LLC. ("Alliance"), One North Federal Highway, Suite 201; Boca Raton, FL 33432. Telephone: 561.756.8980 ext. 204. Alliance is a developer and/or builder of residential apartment developments that are defined as "covered multifamily dwellings" under the (federal and) Florida Fair Housing Act

(“FLFHA”) in Florida. Alliance currently has a project in development in South Florida and is considering additional developments.

2. Altis at Coconut Creek, LLC. (“Altis”), 1515 South Federal Highway, Suite 300, Boca Raton, Florida 33432. Telephone: 561.997.8661. Facsimile: 561.361.7898. Altis is a developer and/or builder of residential apartment developments that are defined as “covered multifamily dwellings” under the (federal and) Florida Fair Housing Act (“FLFHA”) in Florida. Altis currently has a project in development in South Florida and is considering additional developments.

C. COUNSEL FOR THE PETITIONERS

Petitioners are represented by: Robert S. Fine, Esq., AIA. Florida Bar Number 0155586. Greenberg Traurig, P.A., 333 Avenue of the Americas, Suite 4400, Miami, Florida 33131. Telephone: 305.579.0826. Facsimile: 305.961.5826. Email: FineR@gtlaw.com

D. THE STATUTORY, RULES AND CODE PROVISIONS AND THEIR EFFECT ON PETITIONERS

(1) The Florida Building Code

(a) The Florida Building Code provisions that are the subject of this Petition are:

- (i) **FBC, 2010 Building volume (“FBC- Building”),⁴ Section 424.1; and**
- (ii) **FBC- 2010 Accessibility Volume⁵ (the “Accessibility Code”) Sections 101.1.3, 201.1, 203.8, 233, and 242.**

⁴ All references to the Florida Building Code are to the 2010 edition unless otherwise indicated.

(2) Statutory and code provisions

(a) The statutory provisions that are the subject of this Petition are:

(i) Section 514.011(2), Florida Statutes (2012)⁶

(ii) Sections 553.502-553.504, 553.507(1 and 2),

Florida Statutes

(iii) Section 553.775(5), Florida Statutes

(iv) Sections 760.02, 760.22 and 760.23, Florida

Statutes

(b) The Rules (and incorporated code provisions) that are the subject of this Petition are:

(i) Rule 61 G20-4.002, Florida Administrative Code (“F.A.C.”)(The Florida Accessibility Code)⁷

(ii) Rule 61 G20-1.001, F.A.C. (The Florida Building Code).

⁵ The FBC- 2010 Accessibility Volume contains the 2012 Florida Accessibility Code for Building Construction.

⁶ All references are to the 2012 Florida Statutes unless otherwise indicated.

⁷ All references are to the 2012 Florida Administrative Code unless otherwise indicated.

(3) The effect of these code provisions on Petitioners

As developers and builders of residential apartments in Florida,⁸ Petitioners are subject to the requirements of the Florida Fair Housing Act (“FLFHA”)(as relevant to the Petition, Sections 760.22(2 and 4) and 760.23(10), Florida Statutes), and the Accessibility Code (when applicable)(as well as the analogous federal statutes and Standards). Building officials are charged with the enforcement of the FLFHA, § 760.23(10), F.S. (*see* Footnote 3), and the Accessibility Code. §§ 553.80(1), 553.513, F.S.

It is Petitioners’ information and belief, and experience, that building officials in various jurisdictions throughout Florida are interpreting, applying and enforcing the statutes, rules and code provisions that are the subject of this Petition in an inconsistent, and erroneous manner. Such inconsistency detracts from the Legislature’s purpose in creating the FBC (“The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code, to be called the Florida Building Code...” § 553.72, F.S.), creates delays in the design and permitting of Petitioners’ projects, and additional costs due to said delays, failed inspections, project changes during construction, and being required to provide features in development projects that are not required by applicable law (statutes, rules or codes). Because the market for multifamily housing determines the price (e.g., rent, sales price for units) that Petitioners receive for the product they produce that is regulated by the statutes, rules and codes that are the subject of this Petition, the cost of any delays, inefficiencies, change orders or construction or installation of elements that are not required are borne by Petitioners who are thus adversely impacted by the concerns raised in this Petition.

⁸ “Apartment(s)” means residential dwelling units, whether individually owned (condominium ownership) or collectively owned and rented to non-transient tenants.

E. NATURE OF DECLARATORY STATEMENT SOUGHT

1. Are the areas of the apartment buildings and developments⁹ in projects that will be permitted and constructed by Petitioners in Florida, that are intended solely for the use of residents and their guests (including dwelling units and common use areas), that are not subject to Section 504 of the Rehabilitation Act (programs receiving federal financial assistance) and are not subject to Title II of the Americans with Disabilities Act (State and Local Government Services), subject to the Accessibility Code except for the requirement set forth in Section 553.504(2), Florida Statutes, as provided for in Sections 101.1.3 and 201.1 of the Accessibility Code?^{10 11}

2. Are swimming pools that are part of common use areas of the apartment buildings and developments¹² in the projects that Petitioners will be permitting and constructing, that are intended solely for the use of the residents and their guests (and not otherwise available to the general public) and which are not the recipients of governmental financial assistance or sponsorship, subject to the Accessibility Code because Section 424.1 classifies them as “public swimming pools” or any other reason?

⁹ Defined in the FLFHA as “covered multifamily dwellings.”

¹⁰ This Petition does not ask the Commission to make a determination whether the developments that Petitioners construct are subject to the Section 504 of the Rehabilitation Act or Title II of the Americans with Disabilities Act (“ADA”). That these developments are not subject to Section 504 and/or Title II is part of the underlying factual predicate of this Petition.

¹¹ Leasing offices located in the apartment complexes being developed by Petitioners, and associated parking spaces and toilet facilities serving the leasing offices as well as the accessible route connecting these elements are excluded from this Petition as such facilities are subject to Title III of the ADA and by extension, the Accessibility Code.

¹² See Footnote 9, above.

F. PETITIONERS' PROPOSED ANSWERS TO QUESTIONS POSED IN THE PETITION

1. The plain language of Sections 101.1.3 and 201.1 of the Accessibility Code limit the application of the Accessibility Code as applied to residential buildings being developed by Petitioners to the requirements of Section 553.504(2), Florida Statutes, and the Florida Statutes authorizing the Accessibility Code do not provide for coverage of these multifamily dwellings by the Accessibility Code except for the requirements of Section 553.504(2), Florida Statutes, unless these multifamily residential developments receive government financial assistance or sponsorship (as set forth in the 2010 ADA Standards). Further, residential apartment buildings and developments that do not receive government financial assistance or sponsorship do not fall within the definitions of "places of public accommodation" or "commercial facilities" in the ADA regulations and therefore, pursuant to Sections 553.503, and 553.507(1 and 2), of the Florida Statutes, are not subject to the Accessibility Code with the exception of Section 553.504(2), when it is applicable. Therefore, areas of Petitioners' apartment development projects that are not the recipient of governmental financial assistance or sponsorship (with the exception of the areas described in Footnote 11) that are intended solely for the use of residents and their guests (including dwelling units and common use areas) are not subject to requirements of the Accessibility Code with the exception of the requirement set forth in Section 553.504(2) of the Florida Statutes.

Notwithstanding this response, Petitioners' apartment buildings and facilities *may* be subject to the accessibility requirements of the Florida Fair Housing Act. *See* §§ 760.22(2 and 4) and 760.23(10), F.S.

2. Swimming pools that are defined as "public swimming pools" or "public pools" in Section 424.1 of the FBC- Building, that are elements of residential apartment developments

(including “common use areas”) are subject to the requirements Section 424.1 of the FBC-Building. However, being classified as “public swimming pools” or “public pools” in Section 424.1 does not subject these pools to the Accessibility Code if the pool is intended solely for the use of apartment complex’s residents and their guests and the project is not the recipient of governmental financial assistance or sponsorship. Notwithstanding this response, swimming pools at the multifamily residential buildings and facilities being or to be developed by Petitioners *may* be subject to the accessibility requirements of the Florida Fair Housing Act. *See* §§ 760.22(2 and 4) and 760.23(10), F.S.

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS’ PROPOSED
ANSWERS TO QUESTIONS POSED IN THE PETITION**

I. JURISDICTION

A. The Florida Building Commission (the “Commission”) has jurisdiction to issue declaratory statements pursuant to s. 120.565 relating to the enforcement or administration by local governments of the Florida Building Code. § 553.775(3)(a), Fla. Stat.; Ch. 28-105, F.A.C. “The Commission may render declaratory statements in accordance with s. 120.565 relating to the provisions of the Florida Accessibility Code for Building Construction *not attributable to the Americans with Disabilities Act Accessibility Guidelines.*” § 553.775(5), F.S. (emphasis added).

II. ARGUMENT

A. The Accessibility Code

The Accessibility Code is authorized by, and was created under Chapter 553, Part II, of the Florida Statutes. §§ 553.502-553.503, F.S. It sets forth the accessibility requirements that are to be enforced by building officials by adopting certain federal regulatory provisions:

Subject to modifications under this part, the federal Americans with Disabilities Act Standards for Accessible Design, and related regulations provided in 28 C.F.R. parts 35 and 36 and 49 C.F.R. part 37, are hereby adopted and incorporated by reference as the law of this state and shall be incorporated into the Florida Accessibility Code for Building Construction and adopted by the Florida Building Commission in accordance with chapter 120.

§ 553.503, F.S. A number of Florida-specific requirements are then added. *See, e.g.*, § 553.504, F.S. The Americans with Disabilities Act Standards for Accessible Design (“2010 ADA Standards”), referred to in Section 553.502, Florida Statutes, is comprised of several *discrete* parts including certain sections of the ADA’s Title II regulations (28 C.F.R. part 35.151), certain sections of the ADA’s Title III regulations (28 C.F.R. Part 36, Subpart D); and the 2004 Americans with Disabilities Act Accessibility Guidelines.¹³ *See* 2010 ADA Standards @ pages 3, 16 (PDF version; http://www.ada.gov/2010ADASTandards_index.htm).

Section 553.75, Florida Statutes, expressly allows for declaratory statements regarding the Accessibility Code but only to provisions “not attributable to the Americans with Disabilities Act Accessibility Guidelines.” § 553.775(5), F.S. By the plain reading of its terms, however, Section 553.775(5) does not place limitations on interpretations of the Accessibility Code that are not attributable to the Guidelines. *Id.* This is fortunate since if that were not the case, errors in the Accessibility Code such as those that come from erroneously restating definitions from the ADA regulations (and not the Guidelines), could not be resolved by use of declaratory statements.¹⁴

¹³ The Americans with Disabilities Act Accessibility Guidelines (as opposed to the 2010 ADA Standards) may be found at <http://www.access-board.gov/ada-aba/adaag.cfm>.

¹⁴ Compare, for example, the definition of “commercial facilities” in Section 106.5 of the Accessibility Code with the definition of “commercial facilities” in the Title III regulations at 28 C.F.R. § 36.104.

The provisions of the Accessibility Code that set determines its jurisdiction and coverage are found in Chapter 1 (Section 101.1.3) and Chapter 2 (Section 201.1). Chapter 1 of the Accessibility Code is titled Application and Administration. Chapter 1 provides:

This code establishes standards for accessibility to *places of public accommodation* and *commercial facilities* by individuals with disabilities. This code shall also apply: to state and local government *facilities* pursuant to Section 553.503, F.S.; to *private clubs* pursuant to Section 553.505, F.S.; and to residential *buildings* pursuant to Section 553.504(2), F.S., and the ADA Standards for Accessible Design. It is to be applied during the design construction [*sic*] and *alteration* of such *buildings* and *facilities* as required by this code.

§ 101.1.3, Accessibility Code (emphasis added).

Multifamily residential developments do not fall within any applicable definition of the term “place of public accommodation.” *See* § 106.5, Accessibility Code; *see also*, 28 C.F.R. § 36.104¹⁵; and § 760.02(11), F.S.

Further, multifamily residential developments do not fall within the definition of “commercial facilities” as found in the Title III regulations, 28 C.F.R. § 36.104. The Title III regulations provide, in pertinent part, “[c]ommercial facilities means facilities-- ... (3) [t]hat are not-- (i) [f]acilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631). *Id.* “Covered multifamily dwellings,” as defined in the Fair Housing Act regulations, “means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.” 24 C.F.R. 100.201. To be covered under the Fair Housing Act’s accessibility requirements, a “covered multifamily dwelling” must be designed and constructed for first occupancy after March 13, 1991. 24 C.F.R. 100.205(a). An

¹⁵ This citation is to the Title III regulation. It is not part of the Americans with Disabilities Act Accessibility Guidelines. *See* § 106.5, Guidelines (<http://www.access-board.gov/ada-aba/adaag.cfm#a106>).

example of “expressly exempted from coverage under the Fair Housing Act” is a building that would meet the definition of “covered multifamily dwelling” but was constructed for first occupancy prior to March 13, 1991. *Id.*

The Accessibility Code defines “commercial facilities” as [f]acilities-- ... (3) [t]hat are not-- (a) [f]acilities that are *not* covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended (42 U.S.C. 3601 - 3631). § 106.5, Accessibility Code (emphasis added). This definition is inconsistent with the corresponding definition in the ADA regulations. Because this definition has no statutory authority and is inconsistent with the mandate of Section 553.503, Florida Statutes, this definition in the Accessibility Code must be read to be consistent with the definition in 28 C.F.R. § 36.104. *See, e.g.,* §§ 553.73(1)(b), 553.506, F.S.

Since the buildings and facilities that are the subject of this Petition are not “places of public accommodation,” “commercial facilities,” “state and local government facilities” or private clubs, the only application of the Accessibility Code to “covered multifamily dwellings” whose units and common area facilities are intended solely for the use of the residents and their guests is the requirement set forth in Section 553.504(2), Florida Statutes:¹⁶

All new single-family houses, duplexes, triplexes, condominiums, and townhouses shall provide at least one bathroom, located with maximum possible privacy, where bathrooms are provided on habitable grade levels, with a door that has a 29-inch clear opening. However, if only a toilet room is provided at grade level, such toilet room must have a clear opening of at least 29 inches.

Chapter 2 of the Accessibility Code sets forth “Scoping Requirements.” Section 201.1 restates the coverage described Section 101.1.3. It does goes farther, however, and states that

¹⁶ In fact, “covered multifamily dwellings” that are intended for rent (not condominiums), and are not duplexes, triplexes or townhouses, are not covered by Section 553.504(2), Florida Statutes, by its own terms.

“[t]his code applies to... buildings and facilities as determined by the ADA Standards for Accessible Design.” “Covered multifamily dwellings” as defined in the Fair Housing Act, where their dwelling units and common use areas are intended solely for the use of residents and their guests, and which have not received federal, state or local governmental financial assistance or sponsorship, are not subject to the Standards. They are not subject to the Standards *not* because of any exclusion in the Guidelines¹⁷ (and so this Petition does not require interpretation of the Accessibility Code based on anything in the Guidelines), but because they are not places of public accommodation, commercial facilities or recipients of governmental financial assistance as set forth in various federal and state statutes and regulations.¹⁸

B. The FBC- Building Volume, Swimming Pools and the Accessibility Code.

Section 424.1 of the FBC- Building classifies a swimming pool that is operated by, or serves camps, churches, cities, counties, day care centers, group home facilities for eight or more clients, health spas, institutions, parks, state agencies, schools, subdivisions, as a “public swimming pool” or “public pool.” The definition of “public swimming pool” or “public pool” in Section 424.1 also includes a swimming pool that is operated by, or serves cooperative living-type projects of five or more living units, such as apartments, and townhouses. § 424.1.1, FBC-Building. This definition comes from Section 514.011, Florida Statutes (pool safety requirements), it did not originate in the ADA regulations, the ADA Standards (either 1991 or

¹⁷ Note that the Guidelines does not even contain definitions for “place of public accommodation” or commercial facilities.” § 106.5, Guidelines.

¹⁸ The only provision in the Guidelines that discusses the types of entities or facilities that are covered by the Guidelines states as follows: “General. This document contains scoping and technical requirements for accessibility to sites, facilities, buildings, and elements by individuals with disabilities. The requirements are to be applied during the design, construction, additions to, and alteration of sites, facilities, buildings, and elements to the extent required by regulations issued by Federal agencies under the Americans with Disabilities Act of 1990 (ADA).” § 101.1, Guidelines.

2010), or the Florida Civil Rights Act. Although swimming pools for large multifamily residential developments may themselves be large, necessitating that they meet the same criteria for pool safety as say, a hotel pool, they do not fall within the definitions of “places of public accommodation” or “commercial facilities” in either state law, *see* § 760.02(11) or the Title III regulations, *see* 28 C.F.R. § 36.104, so long as they are intended solely for the use of residents and their guests. As with the first question posed in the Petition, the swimming pools in question here are those that are not part of a development that has received governmental (federal, state or local) financial assistance or sponsorship.

Section 203 of the Accessibility Code (General Exceptions) provides as follows:

In 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.

§ 203.8, Accessibility Code. The Commission’s response to the first question in this Petition should confirm that multifamily residential developments that do not receive governmental financial assistance or sponsorship are not subject to the Accessibility Code (except, to the extent applicable, Section 553.504(2), Florida Statutes). Therefore, they would not be required to provide mobility features complying with Sections 809.2 through 809.4 of the Accessibility Code. Accordingly, notwithstanding the application of the adjective “public” in the definition swimming pools that are part of the common use area of multifamily residential developments of a certain size (i.e., number of dwelling units), if such swimming pool is intended solely for the use of the residents and their guests, and the project is not receiving governmental financial assistance or sponsorship, then the swimming pools, even if they are defined to as “public swimming pools” or “public pools” (in the FBC-Building), should not be subject to the Accessibility Code, including its accessible pool entry (e.g., lifts, sloped entries) requirement.

CONCLUSION

The Commission has jurisdiction to render Petitioners' request for declaratory statement because the questions posed can be resolved using provisions not attributable to the Americans with Disabilities Act Accessibility Guidelines.

Based on the arguments and authorities set forth in this Petition, the Commission should grant Petitioners' request and render a declaratory statement holding:

1. Multifamily residential developments (dwelling units, site and common area facilities) that do not receive governmental financial assistance or sponsorship, and whose facilities are intended solely for the use of residents and their guests, are not subject to the Accessibility Code with the exceptions of (1) the requirements of Section 553.504(2), Florida Statutes, when applicable and (2) leasing offices (and the restrooms, parking and accessible routes serving them); and
2. Swimming pools that are part of the common use area of multifamily residential developments that do not receive governmental financial assistance or sponsorship, and whose facilities are intended solely for the use of residents and their guests, are not subject to the Accessibility Code, including provisions for pool lifts or sloped entries, even if they are considered to fall within the definition of "public swimming pools" or "public pools" in Section 424.1.1 of the FBC- Building.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing by Registered E-mail and FedEx upon:

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This 19nd day of March 2013.

By: _____



Robert S. Fine

Counsel for Petitioners