

STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

FLORIDA BUILDING COMMISSION

**In re: Petition for Declaratory Statement
Filed by Joe Belcher, AWP Windows
and Doors, LLC, and David Jones, as
President of Aluminum Association
of Florida.**

DS 2012-021

**CUSTOM WINDOW SYSTEMS, INC.'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR A DECLARATION THAT REPLACEMENT
FENESTRATION UNITS IN ALL EXISTING BUILDINGS MUST BE CODE
COMPLIANT. AND SUPPORTING MEMORANDUM OF LAW**

Custom Window Systems, Inc. (“CWS,” “Movant” or “Intervenor”), by and through its undersigned attorneys in this matter and pursuant to Rule 28-106.204, Florida Administrative Code, moves the Florida Building Commission (the “Commission”) to dismiss the Petition for Declaratory Statement (“Petition”) and any amendments thereto, originally filed herein by Joe Belcher, AWP Windows and Doors, LLC, and Aluminum Association of Florida, Inc. (“Petitioners”) on March 5, 2012.¹

In the alternative, if the Commission decides to address the Petition on the merits, which it should not, Custom Window Systems, Inc. requests that the Commission declare that

¹ There was an earlier version of this Petition, dated March 2, 2012, which did NOT include AWP Windows and Doors, LLC, as well as an “amendment” thereto dated March 12, 2012, attempting to allege additional facts, and an “addendum” thereto dated April 23, 2012, attempting to add another party. Movant is unsure which version(s) the Commission is now being asked to address, but believes this Motion to Dismiss is applicable to the original filed Petition, and to the three (3) versions of the Petition subsequently dated and filed.

replacement fenestration units installed in all existing buildings after March 15, 2012, must comply with the Section 402.3.6 of the Florida Building Code, Energy Conservation Code.

BACKGROUND

The Facts:

As early as March 2, 2012,² Petitioners filed a Petition for Declaratory Statement with the Commission. That Petition has been assigned case number DS 2012-021 and was set for the first of two required hearings by the Commission for April 3, 2012. On or about May 11, 2012, Movant herein petitioned for leave to intervene with respect to this Petition, setting forth the facts by which CWS would be substantially affected by this Petition; that leave to intervene is expected to be taken up, and granted, by the Commission at its next meeting on June 12, 2012.

At the first hearing on April 3, 2012, the Commission considered an earlier recommendation of its Energy Technical Advisory Committee (“TAC”), via conference call held on March 26, 2012, that, in accordance with Commission staff recommendations, the four (4) questions posed in the Petition dated March 5, 2012, be answered in the affirmative as to Question 1, Question 2, and Question 3, and in the negative as to Question 4; however, due to lack of time for interested persons to fully participate in that TAC conference call, the Commission referred the Petition back to the TAC for further consideration.³ That TAC reconsideration was held via conference call on May 14, 2010, and again adopted the erroneous recommendations of the Commission staff. Currently, the Petition remains on the first of two

² See footnote 1.

³ At its meeting on April 3, 2012 the Commission chair directed and the Commission agreed that this subsequent Energy TAC meeting would be held “in person” the day before and at the location of the next Commission meeting scheduled for June 12, 2012. However, for reasons that have not been explained, the Energy TAC chose, instead, to meet via telephonic conference call on May 14, 2012.

required hearings before the Commission, and is expected to be again considered on first hearing by the Commission on June 12, 2012.

Petitioners allege that there is a conflict between s. 553.902(3), Florida Statutes (2011), which is the statutory definition of “Renovated building,” as enacted in 1977, and some of the provisions of the 2010 Florida Building Code, Energy Conservation Code (“FBCECC”), which was adopted effective March 15, 2012, based on a 2008 statutory mandate. In particular, Petitioners seek a declaratory statement from the Commission that Section 402.3.6, FBCECC, regarding “Replacement fenestration,” does not apply to Table 101.4.1 of such code regarding buildings that do not meet the statutory definition of “Renovated building.”⁴

There is nothing in the Petition that describes a specific project for which Petitioners particular sets of circumstances would be applied.⁵ Rather, the Petition fails to set forth or describe how these particular set of circumstances apply to Joe Belcher, AWD Windows and Doors, LLC, or the Aluminum Association of Florida. Even the subsequently filed “amended” or “addendum” Petitions fail to describe the particular circumstances of any of the parties.⁶

⁴ Petitioners’ argument rests on the assumption that if any improvements to an existing building do not meet the “30% threshold” of renovation costs to assessed value of the property being improved, the Code does not apply; however, nothing in s. 553.902(3) so states. In addition, s. 553.903, as amended in 1993, adds “building systems and components” to “new or renovated buildings” to which these statutory provisions are also applicable.

⁵ An amended Petition filed subsequent to the Commission’s first hearing attempts to add an additional named party, described as a window seller and installer, and adds an allegation that the Petition relates to window replacements in a house in Citrus County, Florida.

⁶ The “addendum” to the Petition, dated April 23, 2012, alleges that window replacements are to take place on a house in Citrus County, Florida, but fails to identify the legal description, ownership, or street address of such project.

Applicable Law:

Section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, establish the statutory and regulatory authority pursuant to which the Commission may issue declaratory statements.

Section 120.565, Florida Statutes, provides that:

- (1) Any *substantially affected person* may seek a declaratory statement 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*.
- (2) The petition seeking a 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*.

§ 120.565(1), Fla. Stat. (2011) (emphasis added). Rule 28-105.001, Florida Administrative Code, states in pertinent part that:

A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may *apply to the petitioner's particular circumstances*. *A declaratory statement is not the appropriate means for determining the conduct of another person.*

Fla. Admin. Code R. 28-105.001 (emphasis added).

The statutory additional provisions applicable to this Petition include:

- Section 553.902(3), Florida Statutes, adopted in 1977, which provides a definition of “Renovated building.”⁷
- Section 553.903, Florida Statutes, which provides for the “Applicability” of these sections (which is known as the “Thermal Efficiency Code”); the original enactment of

⁷ Table 101.4.1 of the Code, labeled as “Nonexempt Existing Buildings,” uses the term “Renovation” in footnote “d” as being defined in Chapter 2 of the FBCECC; however, this code definition differs from the statutory definition of “Renovated building.” To this extent, Petitioners may be correct that this particular portion of the Code may conflict or be inconsistent with the statutory provision, in which case the statute will control over the rule, regardless of any declaratory statement.

this statute, also in 1977 as section 553.93, was amended in 1993, to include the following underlined language:

553.903 Applicability.—This part shall apply to all new and renovated buildings in the state, except exempted buildings, for which building permits are obtained after March 15, 1979, **and to the installation or replacement of building systems and components with new products for which thermal efficiency standards are set by the Florida Energy Efficiency Code for Building Construction.** The provisions of this part shall constitute a statewide uniform code. [Emphasis Added]

The rule provisions applicable to this Petition is Rule 61G20-1.001(1), as amended effective on November 10, 2011, which adopts the 2010 Florida Building Code by incorporation by reference, effective March 15, 2012, including the following applicable Energy Conservation Code provisions:

- Section 101.4.1, regarding “Existing buildings,” which refers to Table 101.4.1, entitled “Nonexempt Existing Buildings.”
- Section 102.1, regarding “Alternative Materials – Method of Construction Design or Insulating Systems,” which provides as follows:

102.1 General. This code is not intended to prevent the use of any materials, method of construction, design or insulating system not specifically prescribed herein, provided that such construction, design or insulating system has been approved by the code official as meeting the intent of the code....

- Section 402.3.6, regarding “Replacement fenestration” refers to Table 402.1.1, and provides as follows:

402.3.6 Replacement fenestration. Where some or all of an existing fenestration unit is replaced with a new fenestration product, including sash and glazing, **the replacement fenestration unit shall meet the applicable requirements for U-factor and SHGC in Table 402.1.1.**⁸

⁸ There is NO “renovation” exception in the Energy Conservation Code for window replacements.

SUMMARY OF ARGUMENT

The Petition should be dismissed because it fails to comply with the requirements for issuance of a declaratory statement in Section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code. It does not seek a declaratory statement regarding the applicability of any statute, rule or order to the Petitioner's particular circumstances. Instead, Petitioners impermissibly seeks a declaratory statement regarding the conduct of others that may have already occurred and with respect to situations and potential future conduct that is speculative and hypothetical. This Petition also seeks a statement of general applicability that would apply to all window manufacturers, vendors and installers, as well as every local government in Florida, and amounts to a rule. For these reasons, the Commission should dismiss the Petition.

Indeed, the named Petitioners have no standing to request this opinion, because they do not allege how they are substantially affected as required by Section 120.565(3), Florida Statutes (2011); in fact, Aluminum Association of Florida has no standing at all. Even if the Petitioners had standing, and the Petition otherwise complied with all of the requirements of Section 120.565, Florida Statutes, and with Rule 28-105.001, such that the Commission was authorized to issue a declaratory statement (which it does not), the only possible declaration statement that could be made by the Commission is that the Energy Conservation Code requires the replacement of fenestration units in all existing building to meet the 2010 Florida Building Code requirements, unless otherwise approved by an Authority Having Jurisdiction (“AHJ”) pursuant to code section 102.1.

MEMORANDUM OF LAW

The Petition Must Be Dismissed For Lack of Authority

The Commission's authority to issue a declaratory statement is limited by Section 120.565, Florida Statutes, “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.**” § 120.565(1), Fla. Stat. (2011) (emphasis added); *Lennar Homes, Inc. v. Dep't of Bus. and Prof'l Regulation*, 888 So. 2d 50, 53 (Fla. 1st DCA 2004) (Department of Business and Professional Regulation (“DBPR”) did not have authority to issue declaratory statement). The statutory limitation on this authority is also reflected in Rule 28-105.001, Florida Administrative Code, which states in pertinent part: “A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances.”

The purpose of a declaratory statement is “to answer the petitioner's questions about how the statutes or rules apply to his own circumstances so that he may select a proper course of action.” *Carr v. Old Port Prop. Owners Ass'n, Inc.*, 8 So. 2d 403, 404 (Fla. 4th DCA 2009) (affirming DBPR denial of petition for declaratory statement); *see also Nat'l Ass'n of Optometrists and Opticians v. Fla. Dep't of Health*, 922 So. 2d 1060, 1062 (Fla. 1st DCA 2006) (The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of an agency in particular circumstances so that the person obtaining the statement may select the proper course of action in advance) (citing *Chiles v. Dep't of State, Div. of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998)).

The Commission has no authority to issue a declaratory statement in response to the Petition because it does not seek a declaration regarding the applicability of any statutory provision, rule, or order of the Commission, as it applies to any of the Petitioners' particular set

of circumstances. The Commission should dismiss the Petition because it would be improper for the Commission to address the Petition under Section 120.565, Rule 28-105.001, and established case law because the Petition:

- A. seeks a declaration concerning the conduct of persons other than the Petitioners;
- B. does not seek a declaration regarding Petitioners' particular circumstances;
- C. may attempt to seek a declaration regarding past conduct;
- D. seeks a declaration regarding situations and potential future conduct that is speculative or hypothetical; and,
- E. seeks a broad statement of general applicability, which can only be promulgated as a rule.

In addition, the Petitioners have failed to allege sufficient facts to demonstrate how each of them is "substantially affected," as required by law. For all these reasons, the Petition must be dismissed.

A. The Petition Improperly Seeks a Declaration Regarding Conduct of Others.

It is well established under Florida law that a declaratory statement proceeding cannot be used to determine the conduct of a person other than the petitioner. *Manasota-88, Inc. v. Gardinier, Inc.*, 481 So. 2d 948, 949 (Fla. 1st DCA 1986) (petitioner improperly sought declaratory statement regarding applicability of statutory provisions to third party "contrary to unambiguous statutory language" in Section 120.565); *see also Kahn v. Office of Ins. Regulation*, 881 So. 2d 699, 699 (Fla. 1st DCA 2004) (affirming dismissal of petition where petitioner sought declaratory statement regarding conduct of agency instead of his own conduct); *B.J.L. v. Dep't of Health and Rehab. Servs.*, 558 So. 2d 1078, 1078 (Fla. 1st DCA 1990) (a petition for

declaratory statement under Section 120.565 is not the appropriate means to challenge agency decisions). Rule 28-105.001, Florida Administrative Code, states clearly that: “A declaratory statement is not the appropriate means for determining the conduct of another person.”

Notwithstanding unmistakable legal authority to the contrary, the Petition seeks a declaration regarding the conduct of window manufacturers, vendors and installers, as well as that of local governments (“AHJs”). Thus, the Petition is an attempt to seek a declaration from the Commission regarding the conduct of other persons and local governments based on allegations that are not related to a particular set of circumstances. Accordingly, if the Commission were to issue the requested declaratory statement the Commission would exceed its authority under Section 120.565, Florida Statutes, as implemented by Rule 28-105.001, Florida Administrative Code.

B. The Petition Does Not Seek a Declaration As to the Applicability of a Statute or Rule to Petitioners’ Particular Circumstances.

As described above, a declaratory statement is only available pursuant to Section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, to determine the applicability of a statute, rule or order to the petitioner in its particular set of circumstances. Here, Petitioners seek a declaration regarding whether or not the 2010 Florida Building Code, Energy Conservation Code, requires that fenestration replacement units in existing buildings are not required to meet this code, unless the total costs of such replacements exceed thirty (30%) of the assessed value of the property. In addition, since Petitioners have failed to provide a description and assessed value of a particular project, as well as the cost for replacement of

specific fenestration units, it is not possible for the Commission to even determine if such a 30% “threshold” is applicable the Petitioners’ particular set of circumstances.⁹

The Petitioners are really attempting to improperly seek a declaration about the applicability of the Florida Building Code under ALL circumstances in which non-code compliant fenestration units are being replaced in existing buildings where this 30% “threshold” has not been meet. Here, it would be improper for the Commission to issue a declaratory statement because there is nothing in the Petition that alleges that Petitioners’ rights, status or legal relations regarding applicability of any statute or rule to a particular set of circumstances are in doubt. *Sutton v. Dep’t of Envtl. Prot.*, 654 So. 2d 1047, 1047 (Fla. 5th DCA 1995) (dismissal of petition for declaratory statement was appropriate where there was no question regarding applicability of any statute, rule or order to the petitioner).

C. The Petition May Improperly Seek a Declaration Regarding Past Conduct.

Just as it is impermissible under Florida law for a petitioner to seek a declaratory statement regarding the conduct of others, a declaratory statement may not be issued regarding past conduct. As previously noted, Florida courts have recognized that the purpose of a declaratory statement is to allow a petitioner to select a proper course of action regarding the petitioner's conduct in advance. *Novick v. Dep’t of Health*, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002). Therefore, “a petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied.” *Id.* (citations omitted); *see also Kahn*,

⁹ Movant does not agree that there is any such code exemption, due in large part to an amendment to Section 553.903, Florida Statutes (2010), to which additional language was added in 1993 in order to make the energy efficiency code also applicable to “building systems and components,” such as windows, IN ADDITION TO “new” and “renovated” buildings as set forth in the original 1977 statute.

881 So. 2d at 699 (affirming dismissal of petition for declaratory statement through which petitioner sought to obtain approval or disapproval of conduct that already occurred).

It is not possible from the allegations of the Petition to determine whether or not fenestration units have already been replaced in a particular project or not. The Petition is totally devoid of any factual allegations regarding the status of a particular project for which Petitioners are seeking a declaratory statement. Because the Petitioners may be seeking approval or disapproval of past conduct, it would be error for the Commission to issue the requested declaratory statement, other than to deny the Petition or to declare that replacement fenestration units in all existing buildings must comply with the current code.

D. The Petition Improperly Seeks a Declaration Based on Speculation or a Hypothetical Set of Facts.

Petitioners suggest, in part, that a declaratory statement should be rendered because “[E]stimated costs for compliance are estimated at more than 50% increase per unit.,” which they cite as an increase from \$275 to \$350 per unit, in order to comply with the current Code.¹⁰

Cost increases alone do not confer any authority on the Commission to make an “exception” to the current code. However, in the absence of any evidence of such cost increases (particularly given that the labor costs should be the same for fenestration replacements, regardless of the unit being re-installed) Petitioners are speculating and offering a hypothetical set of facts for their unstated “particular set of circumstances.”

¹⁰ Interestingly, Petitioners also allege that upgrading from inefficient jalousie windows to new more efficient windows is going to constitute \$115 to \$127 of this cost increase, with the results that the adjusted costs, per Petitioners’ own estimations, are actually only \$160 to \$223 higher for windows that comply with the new Code requirements. Even these adjusted costs fail to account for the reduced energy costs (savings) resulting from the use of code-complaint windows, nor for various government financial incentives that may be available to offset these costs.

Again, section 120.565 limits declaratory statements to a “petitioner's particular set of circumstances.” § 120.565(1), Fla. Stat. (2011). The particularity requirement means that an agency may not issue a declaratory statement with respect to a set of facts that may or may not occur in the future and that would be speculative or hypothetical. *Nat'l Ass'n of Optometrists and Opticians*, 922 So. 2d at 1062 (Board of Optometry exceeded its authority in issuing declaratory statement regarding terms that were not at issue in a lease but that may or may not be included in a future lease). Petitioners cannot present facts to the Commission regarding projects that may be procured in the future, and this is yet another reason why dismissal of the Petition is required.

E. The Petition Improperly Seeks a Broad Statement of General Applicability that Meets the Definition of a Rule.

The Florida First District Court of Appeal has stated:

Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances. Thus, petitions which provide only a cursory factual recitation or which use broad, undefined terms . . . should be carefully scrutinized. . . .[Emphasis Added]

Fla. Optometric Ass'n v. Dep't of Prof'l Regulation, 567 So. 2d 928, 937 (Fla. 1st DCA 1990).

Thus, although a declaratory statement can be issued even if it may affect not only the petitioners, but also others within a limited group, a declaratory statement should not be issued if the declaration requested is a statement of general applicability that would amount to a rule. *Fla. Dep't of Bus. and Prof'l Regulation*, 747 So. 2d 374, 381 (Fla. 1999); see *Lennar Homes, Inc. v. Dep't of Bus. and Prof'l Regulation*, 888 So. 2d 50, 51 (Fla. 1st DCA 2004) (agency is without

authority to announce a general policy of far-reaching applicability through a declaratory statement proceeding).

In this case, Petitioners do not seek a declaration that would apply only to them, but one that could apply to and affect a very large number of other individuals or entities involved in the fenestration industry. What Petitioners' seek is a statement of general applicability that would apply to **all** window manufacturers whose products are sold in Florida, and to **all** window vendors and **all** window installers, as well as to **all** local governmental entities in Florida. Accordingly, the declaration that Petitioners seek falls within the definition of a "rule" in Section 120.52(16), Florida Statutes, as follows:

(16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

In fact, there is already a rule addressing the subject at issue in the Petition -- Rule 61G20-1.001, Florida Administrative Code, which adopts the 2010 Florida Building Code. Any effort by Petitioners to repeal portions of the rule, or to amend the rule, should be done through the applicable rulemaking process,¹¹ and not by way of a petition for declaratory statement.

Alternatively, the Commission Should Issue a Declaration that Fenestration Replacements in Existing Buildings Must Comply with the Code, regardless of the definition of "Renovated building."

Putting aside the fact that the Petition does not provide any specifics regarding the "particular set of circumstances" for which it seeks a declaratory statement, and the utter and complete failure of the Petitioners to comply with the requirements for issuance of a declaratory

¹¹ At its telephonic meeting on May 4, 2012, the Commission approved and scheduled a rules development workshop to be held at its next meeting on June 12, 2012, to address possible code changes to Rule 61G20-1.00., Florida Administrative Code.

statement in Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code, the applicable statutes and Code provisions permit only one possible conclusion. That conclusion is that Section 553.903, as amended in 1993, INCLUDES the replacement of “building systems and components” as being within the Commission’s authority and mandate to regulate under the Florida Building Code. The 2010 adoption of the IECC, as mandated by the legislature in 2008, did not change that authority.

There is simply no basis under Section 553.903, which “applies” the Florida Building Code to the interpretation sought by Petitioners. In addition, the 2008 Florida Legislature made it very clear that the IECC was to be adopted as part of the base or foundation code, as does the current Florida Building Code.

This is a matter within the purview of the Legislature, not the Commission. Based on the statutes and code provisions as they exist today, the only possible declaration that can be issued is that replacement of fenestration units in all existing buildings must be accomplished, if at all, with windows that meet the requirements of Table 402.1.1, as expressly set forth in code Section 402.3.6, unless determined otherwise by the AHJ pursuant to code section 102.1. 1

REQUEST FOR RELIEF

WHEREFORE, Custom Window System, Inc. respectfully requests that the Commission:

- (a) dismiss the Petition as improper and beyond the authority of the Commission, or alternatively;
- (b) respond to the Petition with a declaratory statement that replacement fenestration units in all existing buildings must comply with the 2012 Florida Building Code.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 30th day of May, 2012 a true and correct copy of the foregoing has been provided by hand-delivery to the Agency Clerk, Department of Business and Professional Regulation, and by United States Mail and e-mail to Leslie Anderson-Adams, Asst. General Counsel, Office of the General Counsel, both located at 1940 N. Monroe Street, Tallahassee, Florida 32399-2202, and by United States Mail and e-mail to Joe Belcher, agent for the other Petitioners, AWP Windows and Doors, LLC and Aluminum Association of Florida, 41 Oak Village Boulevard, Homosassa, Florida 34446.


Fred R. Dudley

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