

**STATE OF FLORIDA
BUILDING COMMISSION**

IN RE:

FLORIDA HOMEBUILDERS
ASSOCIATION, BUILDERS ASSOCIATION
OF SOUTH FLORIDA, THE RELATED
GROUP, ZOM FLORIDA, INC., FLORIDA
EAST COAST REALTY, RUDG, LLC,
NEWGARD DEVELOPMENT GROUP,
FLORIDA EAST COAST INDUSTRIES,
VERZASCA GROUP, LLC, and ALLEN
MORRIS COMPANY.

CASE NO. _____

**PETITION FOR RULEMAKING BY THE
FLORIDA BUILDING COMMISSION**

The Petitioners, pursuant to Subsections 120.54(7), Florida Statutes (2014), respectfully petition the Florida Building Commission (the “Commission”) to undertake rulemaking to address the effective dates of three provisions of the Fifth Edition of the Florida Building Code (2014) (“the 2014 Code”) that would otherwise take effect on June 30, 2015.

The amendments requested do not constitute technical amendments to the 2014 Code. Instead, the Petitioners merely request that the Commission delay the effective date of three provisions in the 2014 Code: sections 303.4 and 402.4.1.2, which relate to the requirement for blower door testing and mechanical ventilation; and section 403.6.1, which imposes a requirement for two emergency elevators in buildings with dwellings higher than 120 feet above the highest level of access by fire emergency vehicles.

THE PETITIONERS

The Petitioners are comprised of the following entities and organizations: Florida Homebuilders Association (“FHBA”); Builders Association of South Florida (“BASF”), The

Related Group; ZOM Florida, Inc.; Florida East Coast Realty, RUDG, LLC, Newgard Development Group; Florida East Coast Industries; Verzasca Group, LLC, and Allen Morris Company.

FHBA is a Florida not-for-profit corporation that has more than 6,513 members throughout the State of Florida. FHBA is affiliated with the National Association of Home Builders (NAHB) and has 25 local/regional affiliated home builders associations throughout the State of Florida. FHBA aims to “serve, advance and protect the welfare of the home building industry in such a manner that adequate housing will be made available by private enterprise to all Americans.” FHBA’s core mission is one of advocacy and its legislative, legal and political initiatives work together to create the best possible economic and regulatory environments for our members to succeed. FHBA enjoys a legacy that spans more than 65 years. BASF is a local association, affiliated with FHBA, that represents individuals and businesses involved in the residential construction industry in South Florida. A significant number of FHBA and BASF’s members will be subject to sections 303.4, 402.4.1.2, or 403.6.1. and will be adversely affected by their current effective date.

The remaining Petitioners are real estate developers of residential condominiums, residential rentals, commercial offices, and mixed use projects that involve towers of 120 feet in height or higher that will be subject to Sections 303.4, 402.4.1.2, and 403.6.1 and will be adversely affected by the current effective date of sections 303.4, 402.4.1.2, and 403.6.1 of the 2014 Code.

For the purposes of this petition, Petitioners’ telephone numbers and addresses are of those of their undersigned attorneys.

BACKGROUND

On or about May 20, 2013 the Commission commenced its triennial rulemaking cycle to create and adopt the Fifth Edition of the Florida Building Code (2014)(Vol.39, No. 98, F.A.R. May 20, 2013). On August 22, 2013, the Commission held a rule development workshop where it opened Rule 61G20-1.001 for development to address the statutorily required triennial Florida Building Code update process. On December 5, 2014, the Commission adopted a proposed rule to adopt by reference the 2014 Code. (Vol. 40, No. 234, F.A.R., December 4, 2014). As set forth in a Notice of Correction published on January 6, 2015 (Vol. 41, No. 03, F.A.R., January 6, 2015), the effective date of the 2014 Code is June 30, 2015.

In adopting the 2014 Code, the Commission, its staff, and its technical advisory committees (“TACs”) considered hundreds of changes that occurred between the 2009 and 2012 editions of the International Building Code, and the 2009 and 2012 editions of the National Electrical Code (NFPA 70), both of which are foundational codes for the Florida Building Code. They also considered hundreds of proposed Florida-specific amendments to the foundation codes, ultimately leading to the adoption of 2014 Code on December 5, 2014. Once the 2014 Code was adopted, it could not take effect any sooner than 6 months after publication of the updated code, § 553.73(6), Fla. Stat. (2014), to allow for persons who work in or around the development and building industries (*e.g.*, architects, contractors, building officials) to review and familiarize themselves with the new code edition before it takes effect.

Between the time that the 2014 Code was adopted and now, architects and life safety consultants for a number of the Petitioners and others similarly situated studied and familiarized themselves with 2014 Code as the statute intended. Two major concerns in particular were noted: 1) the requirement for a second fire service access elevator along with the required companion features; and 2) the provisions found in the Residential and Energy Conservation

Codes mandating “blower door” testing and possible mechanical ventilation for one and two family dwellings.

2014 CODE PROVISIONS ON FIRE SERVICE ELEVATORS

Section 403 of the 2010 Florida Building Code, which remains in effect until June 29, 2015, pertains to “high-rise buildings,” and Section 403.6 of the 2010 Code, in particular, addresses “[e]levator installation and operation in high-rise buildings” as follows:

403.6.1 Fire service access elevator. In buildings with an occupied floor more than 120 feet (36 576 mm) above the lowest level of fire department vehicle access, *a minimum of one fire service access elevator shall be provided* in accordance with Section 3007.

(Emphasis added).

During the six-month review period following the Commission’s adoption of the 2014 Code, architects and consultants for Petitioners-EL came across revised language in Section 403.6.1 as part of the various other amendments that the Commission adopted with the new code. As amended, the 2014 version of Section 403 provides the following relevant language regarding “[f]ire service access elevator[s]”:

403.6.1 Fire service access elevator. In buildings with an occupied floor more than 120 feet (36 576 mm) above the lowest level of fire department vehicle access, *no fewer than two fire service access elevators, or all elevators, whichever is less, shall be provided* in accordance with Section 3007. Each fire service access elevator shall have a capacity of not less than 3500 pounds (1588 kg).

§ 403.6.1, 2014 Code (emphasis added). This new amendment is scheduled to take effect on June 30, 2015.

The emphasized language in both the 2010 and 2014 versions of Section 403.6.1 of the Florida Building Code highlight the relevant and principal difference between the former and newly adopted provision. In short, the 2010 Florida Building Code requires only *one* fire service

access elevator to be provided in accordance with Section 3007, but the 2014 Code *doubles that requirement* and mandates *at least two* fire service access elevators to be provided in accordance with Section 3007.¹ If implemented as written, Section 403.6.1 of the 2014 Code will have a catastrophic effect on Florida's economy and the building, design, and real estate development industry, and will result in job losses of a significant nature.

When the amended version of Section 403.6.1 takes effect on June 30, 2015, numerous development projects throughout the State of Florida that are in the development process, but which have not yet applied for a building permit, will become subject to the new two-fire-service-access-elevator requirement (the "Second Elevator Requirement"). Because of the amount of time it normally takes to complete the entitlements process(es) for large and very large developments, as well as the amount of time it typically takes to prepare construction documents after the entitlements are approved and granted, many of these projects were commenced well before the 2014 Code was even published in December 2014. Nevertheless, the construction documents for these large-scale projects may not be sufficiently complete by June 29, 2015, to apply for building permits as necessary to be vested under the 2010 Building Code, which has only one fire-service-access-elevator requirement.²

As of the date of this filing, there are approximately 122 high rise projects that are a mix

¹ It should be noted that the concerns and difficulties with providing a second fire service access elevator are not based on the providing of a second such elevator alone, but the adding of a second fire service elevator complying with the requirements for fire service access elevators and associated requirements mandated by Section 3007.4 and 3007.5 (2010) and 3007 (2014).

² Indeed, one or more of the entities comprising Petitioners have projects that were commenced with timing such that under typical circumstances they would have comfortably been able to apply for a building permit on or before June 29, 2015. However, unanticipated delays in the entitlements process, such as unplanned multiple continuances of hearings critical to attaining necessary entitlements, have made it so that even if construction drawings could be, or even are, ready to submit with a permit application prior to June 30, those petitioners are now unable to do so.

of condominium and rental properties, representing 41,631 residential units throughout Florida that currently are in the planning and/or design stages and will be greatly impacted by the new Second Elevator Requirement. At the most basic level, the addition of a second fire service elevator will require a redesign of these projects. But these necessary redesigns will have dramatic consequences on the financial feasibility of a development.

Redesigning creates the very real possibility of the following: 1) developers being unable to secure the necessary changes to the entitlements they have previously secured in order to include a new second fire service access elevator; and 2) the significant loss of usable square feet for these projects; and the loss of market timing.³ It is estimated that approximately 44 of the 122 high-rise projects in the pipeline will be cancelled in light of this amendment⁴ In other words, 18,311 of the 41,631 units presently in the pipeline throughout the state will be completely lost or abandoned. In practical terms, then, what the implementation of Section 403.6.1 of the 2014 Code, ultimately translates to is a dramatic – and irremediable – reduction in the revenue generated by construction and unit-owner household spending, as well as the loss of numerous jobs and potential earnings for those who could have otherwise been employed.

The actual statistics that demonstrate these trends are even more alarming. As expert

³ A developer (or lender or investors) who is concerned that a many months to a year or more delay will result in a project that does not come to market during appropriate market conditions will likely discontinue the project resulting in a financial loss to the developer and investors, but a much smaller loss than might have been incurred if the delayed project came back to market during unfavorable market conditions.

⁴ For example, various development projects are moving forward based on *pro formas*, with ascertained budgeted construction costs and an ascertained minimum amount of usable square feet. Increases in construction costs, combined with a loss of usable square feet, will result in the financial infeasibility of certain projects. Those projects will be cancelled to protect the developers and investors from larger losses than they might otherwise incur if constructed under different or the prior code's requirements. It should be noted that public entities supported by property tax revenues will be hit with unanticipated revenue shortfalls, having planned on the revenues from these large projects in the pipeline that will no longer break ground.

economist Hank Fishkind, Ph.D, of Fishkind & Associates, Inc., opines,⁵ if Section 403.6.1, FBCB-2014, goes into effect, the State of Florida can expect to suffer deleterious consequences over the next three years due to lost or cancelled development, including:

- a total loss of 58,700 jobs.⁶
- a net construction loss of \$8.4 billion;⁷
- a net loss in household spending of \$2.8 billion;⁸
- a direct economic impact of a loss of \$10.8 billion to the economy;
- a total economic impact of a loss of \$21.1 billion to the economy; and

The foregoing projected losses will then undoubtedly stress the still-recovering banking system, with the potential to create a weakened or even failed system, in which developers who borrowed from banks in the tens of millions (in some cases over 100 million) dollars for land will have no way to pay back interest and principal on such sums due and owing.

2014 CODE PROVISIONS ON BLOWER DOOR TESTING OF BUILDING ENVELOPES

The 2014 Code also imposed new thermal envelope testing and mechanical ventilations requirements. Those provisions read as follows:

⁵ The Petitioners will file a full report to supplement the truncated report attached to this Petition as soon as it becomes available.

⁶ Development projects employ a number of people. These employees are fed and otherwise serviced by small businesses in the neighborhood surrounding each of these construction sites. They each either pay rent or have mortgages that they are able to afford based on the typically high-paying jobs that are found at these high-rise construction sites. When one of these projects gets cancelled, the construction workers then find themselves unemployed. As a result, they may find it difficult if not impossible to pay their mortgages or rent.

⁷ This figure actually includes a 20% reduction in the total loss, to account for the fact that some money generated by Florida development is directed outside of the state.

⁸ This figure actually assumes that half of all buyers will be accommodated elsewhere in Florida.

R303.4 Mechanical ventilation. Where the air infiltration rate of a dwelling unit is less than 5 air changes per hour when tested with a blower door at a pressure of 0.2 inch w.c (50 Pa) in accordance with Section R402.4.1.2 of the *Florida Building Code, Energy Conservation* the dwelling unit shall be provided with whole-house mechanical ventilation in accordance with Section M1507.3.

R402.4.1.2 Testing. The building or dwelling unit shall be tested and verified as having an air leakage rate of not exceeding 5 air changes per hour in Climate Zones 1 and 2, and 3 air changes per hour in Climate Zones 3 through 8. Testing shall be conducted with a blower door at a pressure of 0.2 inches w.g. (50 Pascals). Where required by the *code official*, testing shall be conducted by an *approved* third party. A written report of the results of the test shall be signed by the party conducting the test and provided to the *code official*. Testing shall be performed at any time after creation of all penetrations of the *building thermal envelope*.

During testing:

1. Exterior windows and doors, fireplace and stove doors shall be closed, but not sealed, beyond the intended weatherstripping or other infiltration control measures;
2. Dampers including exhaust, intake, makeup air, backdraft and flue dampers shall be closed, but not sealed beyond intended infiltration control measures;
3. Interior doors, if installed at the time of the test, shall be open;
4. Exterior doors for continuous ventilation systems and heat recovery ventilators shall be closed and sealed;
5. Heating and cooling systems, if installed at the time of the test, shall be turned off; and
6. Supply and return registers, if installed at the time of the test, shall be fully open.

Sections R402.4.1 and R402.4.1.1 incorporate the blower door testing requirement by reference.

Blower door testing is used to measure the airtightness of a structure and the airflow between building zones, to test the airtightness of ductwork, and to locate any leaks in a building envelope. Under the 2010 Building Code, the airtightness of residential buildings could be tested either through use of blower doors or by visual inspection. Currently, approximately two-thirds of the single family homes constructed in Florida are measured for airtightness using visual inspection. Unless the effective date is delayed, the new provisions – like those relating to emergency elevators described above – will become effective on June 30, 2015.

In at least some areas of the State, there are currently insufficient numbers of inspectors certified to conduct blower door testing to meet the demands of the recovering home

construction industry. For example, there are less than 10 entities qualified to conduct blower door testing in the Florida Panhandle. Implementation of the blower door testing requirement on June 30, 2014, will therefore create significant disruption in some areas of the State, resulting in additional costs resulting from both the demand for inspectors and the delay costs associated with “waiting in line” for a certified inspector to become available.

In addition, the results of the blower door test will often trigger the need for additional mechanical ventilation. The mechanical ventilation provision in the 2014 Code is unclear and could easily be interpreted to result in an oversized application, resulting in an additional cost per house ranging anywhere from \$300 to \$2500 and creating the potential for excess energy loss – the very problem that the airtightness testing is intended to prevent. A delay in the effective date of these Code provisions is necessary to avoid the economic impacts associated with the blower door and mechanical ventilation requirements and to allow the Commission time to clarify the intent of the mechanical ventilation provision either through rulemaking or declaratory statement.

The new blower door testing and mechanical ventilation requirements also raise the specter of harm to the public health. There is real concern that the airtightness standard established in the 2014 Code is not appropriate for Florida’s warm and humid climate. Buildings are constructed without sufficient exchange of air can quickly be overcome with the growth of harmful mold. Thus, a rule delaying the effective date of these Code provisions will provide the Commission time to more carefully consider whether Florida-appropriate modifications should be adopted, as provided in section 553.73(7)(c), Florida Statutes (2014).

V. EFFORTS TO ADDRESS THESE ISSUES LEGISLATIVELY

When the 2014 Code was published and the updated Section 403.6 was found to raise the

concerns described above, the Commission was not in one of its rulemaking cycles. The Legislature, however, was in session. Some of Petitioners went to the Legislature to seek relief.

Over a period of several weeks, Petitioners worked out appropriate legislative language and met with legislators and representatives of Florida's fire marshals and inspectors. The result was consensus legislation in both chambers of the Legislature, that passed committee votes with unanimous support. The legislation, in pertinent part, provided that Sections 553.73 and 553.908, Florida Statutes be amended to add the following:

553.73(20) The Florida Building Code may not require more than one fire service access elevator in residential occupancies where the highest occupiable floor is less than 420 feet above the level of fire service access and all remaining elevators are provided with Phase I and II emergency operations. Where a fire service access elevator is required, a 1-hour fire-rated fire service access elevator lobby with direct access from the fire service access elevator is not required when the fire service access elevator opens into an exit-access corridor, which can be no less than 6 feet wide for its entire length that is a minimum of 150 square feet with the exception of door openings, and has a minimum 1-hour fire rating with three-quarter-hour fire- and smoke-rated openings; and, during a fire event, the fire service access elevator is pressurized and floor-to-floor smoke control is provided. However, where transient residential occupancies occur at floor levels more than 420 feet above the level of fire service access, a 1-hour fire-rated fire service access elevator lobby with direct access from the fire service access elevator is required. The requirement for a second fire service access elevator is not considered to be a part of the Florida Building Code and, therefore, does not take effect until July 1, 2016.

553.907 Inspection. . . . Notwithstanding any provision of the Florida Building Code or other provision of law, mandatory blower door testing and mechanical ventilation for residential buildings or dwelling units takes effect on April 1, 2016.

CS SB 1232, §§ 22 & 27, 2015 Leg. Sess. (Fla. 2015).

Unfortunately, the legislative session ended just a few hours short of the final vote needed for passage of the legislation. With the Legislature now out of session, and the extreme unlikelihood that a curative bill will be taken up in the upcoming special session, using

emergency rulemaking procedures is *the only available mechanism* that has the ability to delay the effective date of Sections 303.4, 402.4.1.2, and 403.6.1 in the 2014 Code to: (1) allow for development projects that cannot be ready to file an application for building permit by June 29, 2015, additional time to hopefully be ready and file an application for building permit; (2) to allow the Commission to commence the rulemaking process to provide for an additional, longer extension of the effective date as necessary for the Commission to evaluate, and amend as appropriate, to resolve the issues of concern as described in this Petition; and/or (3) to allow the Commission time to consider a declaratory statement resolving the current issues regarding the application of the mechanical ventilation requirement.

REQUESTED RULES

BASED ON THE FOREGOING, the Petitioners request that the Commission adopt rules that provides essentially as follows:

61G20-1.003 Second Emergency Elevator Effective Date.

Notwithstanding any provision of the Florida Building Code the requirement for a second fire service access elevator for buildings with an occupied floor higher than 120 feet above the highest level at which fire emergency vehicles have access does not take effect until July 1, 2016.

61G20-1.004 Blower Door Testing and Mechanical Ventilation Effective Date.

Notwithstanding any provision of the Florida Building Code or other provision of law, mandatory blower door testing and mechanical ventilation for residential buildings or dwelling units does not take effect until July 1, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by hand delivery to:

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This 29th day of May, 2015,


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