

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
FLORIDA BUILDING COMMISSION

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Department of Business and Professional Regulation	
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Date	<b>9/18/2015</b>
File #	

**In re: Petition for Declaratory Statement filed by  
Frank LaPete and Responsible Energy  
Codes Alliance.**

**DS 2015-086**

**NOTICE OF WITHDRAWAL OF PETITION FOR DECLARATORY STATEMENT**

Petitioners Frank LaPete and the Responsible Energy Codes Alliance (RECA) hereby respectfully withdraw the Petition for Declaratory Statement that they filed July 9, 2015 (DS No. 2015-086).

We have reviewed the arguments by opponents to the Petition and listened to a considerable amount of debate, including much incorrect information, about the subject of this Petition. As a result, we are very concerned that continuing the present process would not achieve our goal of producing uniform enforcement of energy conservation requirements for replacement fenestration that is consistent with Florida Statutes and the 2014 Florida Building Code-Energy Conservation (FBC-EC), but instead would unnecessarily consume substantial resources without a comprehensive final resolution of the issues. This concern stems primarily from the legal argument by the opponents that this process is not legally binding on locations or replacement projects other than the specific location and project identified in the Petition. We remain committed to finding an energy efficient solution to the current non-uniform code interpretations regarding the application of energy code requirements for replacement fenestration; indeed, we believe that incorporating the IECC's reasonable efficiency requirements for replacement fenestration is a key component of the Legislature's charge to the Commission to "provide for a statewide uniform standard for energy efficiency in the thermal design and operation of *all buildings statewide*,"<sup>1</sup> and

<sup>1</sup> Florida Statutes Section 553.901 (2015) (Emphasis added).

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to “select the most current version of the International Energy Conservation Code (IECC) as a foundation code.”<sup>2</sup> It is one of only a few opportunities the Commission has to implement efficiency improvements in Florida’s existing building stock. However, given the positions taken by various parties and the legal scope of a Declaratory Statement, we now believe that even if the Commission issues the Declaratory Statement, it will not provide that solution.

Although not required, we offer the following information to explain our course of action and to propose an alternative path that could lead to a reasonable resolution of the issues we have identified in the Petition:

1. At the outset, it is important to note that, as discussed herein, we do not agree with most of the arguments made by the opponents, which in many cases are simply not relevant to the interpretation of the code and whether it should be enforced and/or are not relevant to the specific issues raised by the Petition. We offer these observations to clarify our areas of disagreement.
2. We brought the current Petition because we believed Florida’s building officials had reached near-consensus on the application of 2014 FBC-EC Section R402.3.6. While there was considerable debate in the past over the interplay between Florida Statutes Section 553.903 and the 2010 FBC-EC, industry representatives including RECA, Commission Staff, and other stakeholders brought to the Commission several changes that were incorporated into the 2014 FBC-EC that we believed would clarify the issue for all code users. In fact, since the code went into effect June 30, 2015, there have been three Informal Interpretations issued by the Building Officials Association of Florida (BOAF), all of which support our position.<sup>3</sup> We did not receive any notice of opposing views in this proceeding

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<sup>2</sup> See Florida Statutes 553.73 (7) (a) (2015).

<sup>3</sup> See BOAF Informal Interpretation Nos. 7571, 7580, and 7581.

until the August 5, 2015 Energy TAC meeting, at which time we were presented with a copy of the Motion to Intervene and Motion to Dismiss (Motions) by a newly-created entity, the “Impact Window Affordability and Safety Association” (IWASA).

3. The Motions filed by IWASA, and associated testimony provided since then, have confused the real and relatively simple issue before the Energy TAC and the Commission – how does the energy code apply to a replacement window project in a residential home? As we outlined in our Petition, the Commission has the authority under Florida Statutes Section 553.903 to set thermal efficiency requirements for replacement systems and components, irrespective of whether the building meets the definition of “Renovated Building” under Section 553.902. The Commission acted on that authority in 2014 FBC-EC Sections R101.4.7 and R402.3.6, which require all replacement fenestration in residential homes to meet the requirements of 2014 FBC-EC Table R402.1.1. Thus, in Mr. LaPete’s specific circumstance, which involved a residential project in Tallahassee, in which several windows were proposed to be replaced with new products, it is appropriate to apply the uniform statewide requirements articulated in the 2014 FBC-EC to his circumstance.
4. However, while we disagree with IWASA’s position on the relevant law and code interpretation, we do not disagree with IWASA’s legal contention that a declaratory statement would only directly apply to the specific facts and circumstances brought before the Commission.<sup>4</sup> After all, as IWASA correctly points out, this was RECA’s own position in DS 2012-021. However, once a Declaratory Statement has been issued, code users – including builders, building officials, product manufacturers and retailers, among others – where appropriate, should be able to apply the analytical framework from the Declaratory

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<sup>4</sup> See Motions at 6.

Statement to the extent that the facts and circumstances are similar. To require each code user to request a Declaratory Statement for each new set of facts for any minor ambiguity in the FBC-EC would be a costly and unwieldy process and would bring the homebuilding industry and the work of the Florida Building Commission to a near-standstill. We continue to believe that where there is relative uniformity among building officials about the interpretation of a code requirement, a Declaratory Statement can be a useful tool to solidify the uniform application of code provision and clarify minor ambiguities – not only in the immediate case, but in other similar cases statewide. We also agree with IWASA that it is ultimately up to the local building official to apply the FBC-EC requirements to a specific set of circumstances.<sup>5</sup> However, because of the relative uniformity among fenestration replacement practices and uniform efficiency metrics for residential fenestration replacement, and the three Informal Interpretations that support the same position put forward in the Petition, the current Declaratory Statement was intended to provide that final clarity and confirmation for local building officials.

5. Unfortunately, IWASA’s Motions and testimony at the August 5<sup>th</sup> Energy TAC meeting introduced several issues which are not germane, and serve only to distract from the clear requirements of the 2014 FBC-EC. For example:

- **Cost and Industry Profitability.** IWASA’s Motions and subsequent testimony focused largely on the costs associated with meeting the FBC-EC, citing the cost-effectiveness requirement in Florida Statutes Section 553.901.<sup>6</sup> We note, however, that this section directs the Commission to “determine the most cost-effective energy-saving equipment and techniques available” as part of its broader mission to

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<sup>5</sup> See Motions at 8.

<sup>6</sup> See, e.g., Motions at 3, 13-15.

“provide for a statewide uniform standard for energy efficiency in the thermal design and operation of all buildings statewide.”<sup>7</sup> The Commission did precisely that when it set statewide fenestration efficiency requirements in the 2014 FBC-EC. Whether IWASA disagrees with the Commission’s decisions in setting the code requirements, whether costs increase or decrease as a result of the code, or what the impact might be on IWASA members’ bottom lines is *completely immaterial* to the current Petition. The cost-effectiveness requirement of the statute does not create an independent source of authority to dispute individual code sections after the Commission has finalized its rules through the normal rulemaking process.

- **Impact Resistance.** While not addressed at length in the Motions, much of the testimony at the Energy TAC Meeting focused on what effects the code requirements may have on the use of impact-rated fenestration in certain regions. As with the cost-effectiveness discussion, these concerns are immaterial to whether the current code should be enforced. Impact resistance requirements apply irrespective of the efficiency requirements, and the cost increment between efficient and inefficient impact-resistant fenestration has nothing to do with whether the FBC-EC applies to replacement fenestration. The 2014 FBC-EC already contains the nation’s largest exception for impact-rated fenestration U-factors – 0.75 in climate zone 1 and 0.65 in climate zone 2, compared to the baseline U-factor requirements of 0.50 and 0.40, respectively.<sup>8</sup> Whether these requirements or exceptions are adequate or cost-effective may be a significant issue, but it is not an appropriate topic for consideration in the Declaratory Statement process.

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<sup>7</sup> Florida Statutes Section 553.901 (Emphasis added).

<sup>8</sup> See 2014 FBC-EC Table 402.1.1, footnote j.

- **Commercial and Residential High-Rise Buildings.** IWASA's members raised multiple concerns about the application of the code requirements to commercial buildings and residential high-rise buildings.<sup>9</sup> As outlined above and in the original Petition, and as further clarified by Petitioners at the Energy TAC meeting, the current Petition for Declaratory Statement deals specifically with a straightforward residential home replacement window project in Tallahassee. The Petition does not apply to commercial buildings or high-rise residential buildings and does not cite any section of the commercial energy code, nor does it address local ordinances, covenants, homeowner association rules, wind loading issues, or other conditions that may impact the decision of the local building official in applying the code to a specific case. Obviously, if the building official determines that the circumstances are similar enough in other cases, the Declaratory Statement can be a useful tool. But IWASA's repeated concerns about issues completely unrelated to a typical single-family residential window replacement job have only confused the issue.

6. Most importantly, IWASA's Petition for Intervention and several participants in the Energy TAC meeting have argued that because the action would only apply to the specific circumstances referenced, that it would have no impact whatsoever on other buildings in other cities in Florida.<sup>10</sup> We believe the Declaratory Statement could be a useful tool for building officials to use in applying the code in all jurisdictions, in a variety of circumstances. However, we also understand that if there is still some disagreement about the applicability of the replacement fenestration requirements across Florida, the requested Declaratory Statement will be unlikely to definitively settle the issue. For that reason, we have decided to withdraw our

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<sup>9</sup> See, e.g., Motions at 13-14.

<sup>10</sup> See, e.g., Motions at 6.

Petition for Declaratory Statement and to seek a solution that could achieve a more uniform statewide application of the 2014 FBC-EC – ideally a solution that most stakeholders can support.

**7. To that end, we invite IWASA, BOAF, Commission Staff and other interested stakeholders to engage with us in a meaningful effort to find a solution that will serve the Commission’s statutory mission to set uniform, reasonable energy efficiency requirements for buildings statewide, including replacement windows, while also considering unique hurricane-resistance needs and other local and regional issues.**

We are interested in better understanding the specific concerns by IWASA, which are contrary to the views of large manufacturers and installers with whom we have discussed our Petition, and possible solutions that would address these concerns, rather than blanket exemptions from the Florida Building Code which could have a range of unintended negative consequences.

For example, one straightforward solution would be to adopt the IECC’s prescriptive U-factor requirement for climate zone 1, which is “No Requirement.” While we can appreciate the good intentions behind the 2014 FBC-EC’s requirement of a 0.65 U-factor in Table R402.1.1 (and we are not suggesting removing it from the Equivalent U-factors Table R402.1.3, which applies to trade-off calculations), changing the prescriptive U-factor requirement to “NR” in Table R402.1.1 would provide additional flexibility for fenestration manufacturers to meet impact-resistance requirements with a broad range of products in a replacement setting. In climate zone 1, the fenestration SHGC requirement is far more important to overall energy efficiency than the U-factor requirement. By our estimates, in a typical home the change from single-pane to double-pane windows (1.20 U-factor to a 0.65) may only improve overall efficiency by around 1%, whereas the improvement in SHGC from uncoated glass to code-compliant glass (0.80 SHGC to

0.25) could result in a 15-20% improvement, depending on the home's characteristics. All improvements in energy efficiency are important, but for this specific climate zone, achieving a low SHGC in replacement fenestration is clearly more important than achieving a lower U-factor.

There are other issues that may be more effectively resolved outside of the formal legal process associated with a Declaratory Statement, such as whether the replacement fenestration requirement should be clarified to apply only to low-rise residential construction, or whether any additional guidance is necessary to assist building officials in the appropriate enforcement of the code requirements. In the meantime, we believe that local building officials are still in the best position to apply the code in their own jurisdictions, according to the requirements of the code and any local conditions that may apply.

Wherefore, for the reasons set forth above, the Petitioners hereby withdraw the Petition for Declaratory Statement.

Respectfully submitted, this 18<sup>th</sup> day of September 2015.



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