

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES, AND MOBILE HOMES

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2009000290

ANTHONY C. APFELBECK, in  
CAPISTRANO CONDOMINIUM ASSOCIATION, INC.

**DS 2008-096**

**DECLARATORY STATEMENT**

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to section 120.565, Florida Statutes (2008).

PRELIMINARY STATEMENT

On December 12, 2008 the Division received a Petition for Declaratory Statement from Anthony Apfelbeck requesting an opinion as to whether Capistrano Condominium Association, Inc. (Association) may opt out of a stand alone fire alarm system under section 718.112(2)(l), Florida Statutes, and Florida Administrative Code Rule 61B-23.002.

On February 13, 2009, the Association filed its response. Both parties filed additional pleadings.

Notice of receipt of the petition was published in Florida Administrative Weekly on January 30, 2009. No hearing was requested.

FINDINGS OF FACT

The following findings of fact are based on information submitted by the parties. The Division takes no position as to the accuracy of the facts, but merely accepts them as

submitted for purposes of this final order.

1. Petitioner, Anthony Apfelbeck, is a fire official with the City of Altamonte Springs. Pet for Dec. Stmt. at 1. He is responsible for enforcing the Florida Fire Prevention Code. Id.

2. Capistrano Condominium is a complex of low-rise residential buildings with more than eleven apartment units; it is located in the City of Altamonte Springs. Id.

3. Mr. Apfelbeck asserts that the Association has elected to forgo retrofitting a fire sprinkler and/or engineered life safety system. Id. He questions, however, whether this allows the Association to opt out of a stand alone fire alarm system. Id. Mr. Apfelbeck attached declaratory statements addressing the issue

4. In February 2006, the fire safety and building officer inspected Capistrano for compliance with the fire safety code. Ex. Fire Inspection Rpt., Ass'n Reply to Pet'r Reply to Pet. for Decl. Stmt. (Ass'n Reply). The officer found 33 enumerated violations and required the Association to install a fire alarm system. The inspection report also required the Association to "[s]end a memo to all residents that they must check there [sic] smoke detectors on a monthly basis. If they do not have them installed then they are in violation of the National Fire Protection Agency, code section 101 – 31.3.4.5.1." Id. The smoke alarms are required inside the units and must be located "outside every sleeping area in the immediate vicinity of the bedrooms and on all levels of the dwelling unit." Id.

5. On January 15, 2008, the Association recorded a Certificate Attesting to Vote for Waiver of Engineered Lifesafety System Requirements for Capistrano Condominium in the public records of Seminole County, Florida. Pet. ex. Certificate. The Certificate

attests that two-thirds of the unit owners voted to forego retrofitting the common elements and units with a “fire sprinkler system or other engineered lifesafety systems.”

Id.

6 On October 15, 2008 the Florida Department of Financial Services (DFS) issued a declaratory statement specific to Apfelbeck’s requirement that Capistrano install a fire alarm system. DFS determined that the fire alarm system is not in and of itself an engineered life safety system. In re: Pet. Decl. Stmt., Anthony Apfelbeck, Case No. 96849-08-FM (Dep’t Fin. Servs.) (Oct. 15, 2008). DFS did not determine whether Capistrano could opt-out of installing the fire alarm system by a vote under section 718.112(2)(l), Florida Statutes. Id.

7. Capistrano Condominium Association, Inc filed a response on February 13, 2009. The Association argues that the Division does not have the authority to interpret the fire safety code; that the fire marshal’s requirement of unit owners installing smoke detectors inside their units combined with the requirement for the association to install a fire alarm system on the common elements constitutes an engineered life safety system so the opt-out vote applies, and that the petition must be dismissed because it would affect the substantial interests of all of the unit owners who are not parties to this proceeding. Amend. Response to Decl. Stmt.

8. Apfelbeck agreed that the Division may not interpret the life safety code; that he was not requiring unit owners to install smoke detectors; that an engineered life safety system does not apply to Capistrano because it is a low-rise building;<sup>1</sup> that this is not an

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<sup>1</sup> Apfelbeck argues that the fire code does not require an automatic fire sprinkler system in low-rise buildings where an approved, engineered life safety system has been installed and that engineered life safety systems are an alternative to fire sprinkler retrofit systems in high-rise buildings Reply to Response to Pet Decl Stmt (Mar 18, 2009)

issue because he only required the association to notify the owners of the requirement of installing smoke detectors, which the association did on March 14, 2006.

### CONCLUSIONS OF LAW

9. Section 120.565, Florida Statutes, provides:

(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 or circumstances.

10. Rule 28-105.001, Florida Administrative Code (2008), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. 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.

11. Section 718.112(2)(l), Florida Statutes, provides:

(l) *Certificate of compliance.*--There shall be a provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code. Notwithstanding the provisions of chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements or units of a residential condominium with a fire sprinkler system or other

engineered lifesafety system in a building that has been certified for occupancy by the applicable governmental entity, if the unit owners have voted to forego such retrofitting and engineered lifesafety system by the affirmative vote of two-thirds of all voting interests in the affected condominium. However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common areas in a high-rise building. For purposes of this subsection, the term "high-rise building" means a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story. For purposes of this subsection, the term "common areas" means any enclosed hallway, corridor, lobby, stairwell, or entryway. In no event shall the local authority having jurisdiction require completion of retrofitting of common areas with a sprinkler system before the end of 2014.

1. A vote to forego retrofitting may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and shall be effective upon the recording of a certificate attesting to such vote in the public records of the county where the condominium is located.

(emphasis added).

12. Florida Administrative Code Rule 61B-23.002(3) and (4) provide for a form to use to report to the Division on retrofitting the condominium and a method of voting. The voting method and the reporting of the vote to the Division are not in issue, so the rule is not germane to the question.

13. Section 718.112(2)(l), Florida Statutes, permits condominium associations to opt-out of installing a fire sprinkler system or an "engineered life safety system" if an amendment is passed by an affirmative vote of two-thirds of all voting interests in the affected condominium. § 718.112(2)(l), Fla. Stat. (2008). This "opt-out" becomes effective upon recording the certificate attesting to the vote in the public records where

the condominium is located. Id.

14. The opt-out provision in section 718.112(2)(l), Florida Statutes, relies upon terms properly interpreted by the State Fire Marshal and applied by local officials. According to those authorities a fire alarm system by itself, without any other life safety system, feature or attribute, is not an “engineered life safety system.” In re: Pet. Dec. Stmt., Tavss, Ro-Mont So. Exec. Council, Inc., Case No. 83852-05-FM (Dep’t Fin. Servs.) (Jan. 10, 2006); In re: Pet Dec Stmt., Anthony Apfelbeck, Case No 96849-08-FM (Dep’t Fin. Servs.) (Oct. 15, 2008). A fire alarm system may be one component of an engineered life safety system, but would not constitute such a system by itself. Id. The Ro-Mont declaratory statement was affirmed by the Third District Court of Appeal Ro-Mon So. Condo J, Inc. v. Dep’t of Fin. Servs., Case No. 3D06-303 (Fla. 3d DCA 2006). See also Biscayne Cove Condo. Ass’n, Inc. v. Biscayne Cove S E., Inc., 582 So. 2d 806 (Fla. 3d DCA 1991) (holding developer not negligent and no breach of implied warranties for failing to install life safety equipment, which included sprinklers, alarms, and smoke removal systems, because development permit was grandfathered under county firesafety code).

15. Accordingly, under Section 718.112(2)(l), Florida Statutes, a condominium association can opt-out of installing a fire sprinkler system or an “engineered life safety system.” However, an association may not opt out of the installation of a fire alarm system if the fire alarm system is installed by itself rather than as a component of an engineered lifesafety system. In re: Pet. Dec. Stmt. Tavss, Ro-Mont So. Exec. Council, Inc., Case No. 2006044670 (Dep’t of Bus. & Prof’l Reg.) (Dec. 19, 2006).

16. The Association argued that the fire marshal required the installation of an

engineered life safety system because he required both a fire alarm system for the common elements and smoke detectors in the units. Response at 6. The Association also argued that the provisions of the fire safety code and actions of the DFS supported its position Id. at 4-8. The Association argues that this combined requirement creates a dispute of fact that requires dismissal of the petition. Ass'n Reply.

17 Mr. Apfelbeck responded that the fire marshal required the Association to notify the unit owners of a requirement that smoke detectors be installed inside the units, not that it was requiring the association or the owners to actually install the detectors. Apfelbeck Reply. Mr. Apfelbeck states that single station smoke alarms in units are not part of an engineered life safety system, are regulated under the life safety code, and are not an issue in this case. Apfelbeck Reply.

18. Whether the smoke detector alarms in the units are components of an engineered life safety system or not is beyond the authority of the Division to address. DFS is charged with authority in these matters. Furthermore, DFS has already addressed the fire safety code issues specific to Capistrano. Apfelbeck, Case No 96849-08-FM. The Division is without authority to review or set aside the DFS finding. For the reasons stated above it is hereby:

**ORDERED** that Capistrano Condominium Association, Inc. may not opt out of a stand alone fire alarm system under section 718.112(2)(l), Florida Statutes.

DONE and ORDERED this 20<sup>th</sup> day of April, 2009,

at Tallahassee, Leon County, Florida.



  
MICHAEL T. COCHRAN, Director  
Department of Business and  
Professional Regulation  
Division of Florida Condominiums,  
Timeshares, and Mobile Homes  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, FL 32399-1030


**NOTICE OF RIGHT TO APPEAL**

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY ADVERSELY AFFECTED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Anthony C. Apfelbeck, 225 Newburyport Avenue, Altamonte Springs, FL 32701; Mary Sneed, Esq., 28 West Central Blvd., Orlando, FL 32801; and Patryk Ozim, Esq., Larsen & Associates, P.A., 300 S. Orange Ave., Suite 1200, Orlando, FL 32801, on this 22<sup>nd</sup> day of April, 2009.

*for:*   
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson  
Chief Assistant General Counsel