STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POOL AND SPA ASSOCIATION, INC.,	)	
Petitioner,	)	
and	)	
MARK RODRIGUE,	)	
Intervenor,	)	
vs.	)	Case No. 02-2505RX
FLORIDA BUILDING COMMISSION,	)	
Respondent.	)	

FINAL ORDER

Upon due notice, final hearing was held on October 1, 2002, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Fred R. Dudley, Esquire
Mia L. McKown, Esquire
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For Intervenor: Steve Pfeiffer, Esquire
Theriaque and Pfeiffer
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For Respondent: James L. Richmond, Esquire
Patricia Morell, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
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STATEMENT OF THE ISSUES

Count I: Whether Rule 424.2.17.1.9 of the Florida Building, Code, through an amendment of Rule 9B-3.047, Florida Administrative Code, is an invalid exercise of delegated legislative authority because it: (a) enlarges, modifies, or contravenes the statute; (b) exceeds the statutory rule-making authority of the Florida Building Commission; (c) is arbitrary and capricious; and/or (d) is not based on competent substantial evidence.

Count II: Whether this Rule was adopted contrary to, and in violation of, the Florida Building Commission's stated rule-making procedure due to a prior settlement.

Count III: Whether, with regard to this Rule, the Florida Building Commission failed to adopt a less costly regulatory alternative; and

Count IV: Whether Chapter 515, Florida Statutes, is unconstitutional.[1/]

PRELIMINARY STATEMENT

Respondent Florida Building Commission (the Commission) is the state agency authorized by statute to adopt, amend, promulgate, and maintain the Florida Building Code (the Code), which is a unified statewide set of building codes authorized by Chapters 98-287, 2000-141, 2001-186, 2001-372, and 2002-1, Laws of Florida.

The challenge herein is directed to Rule 424.2.17.1.9 of the Florida Building Code which was adopted by reference when Rule 9B-3.047, Florida Administrative Code, was adopted and became effective December 16, 2001.

On June 17, 2002, Petitioner Florida Pool and Spa Association, Inc., (FPSA), filed its Petition challenging the validity of existing Rule 424.2.17.1.9 on the four counts set forth above.

Upon Petition, Mark Rodrigue was granted Intervenor status by an August 12, 2002 Order.

By agreement, final hearing, pursuant to Section 120.56(3), Florida Statutes, was held on October 1, 2002.

Petitioner presented the oral testimony of Jim Manning, John Salvo, Tarry Baker, and Merle Stoner and had thirteen exhibits admitted in evidence. Intervenor testified on his own behalf and presented the oral testimony of Jack Glenn. He had two exhibits admitted in evidence.[2/]

At the close of Petitioner's and Intervenor's cases, Respondent moved ore tenus to dismiss Count III of the Petition. This motion was taken under advisement for resolution in this Final Order. (TR-224-227)

Respondent presented the oral testimony of Jeff Blair, Mohammad Madani, and Richard Dixon and had four exhibits admitted in evidence.

At the close of all evidence, Petitioner moved ore tenus to amend the Petition "to conform to the evidence." No specific amendment was proposed nor was any evidence presented to show that Respondent would not be prejudiced by such an amendment. This motion was denied. (TR-328-329).[3/]

A Transcript was filed on October 23, 2002.

The parties stipulated to thirty days from the filing of the Transcript for the filing of their respective proposals. This date would have been November 23, 2002. Respondent and Intervenor timely filed their respective Proposed Final Orders, pursuant to the stipulation. Petitioner's "Proposed Recommended Order" [sic] was not filed until November 25, 2002. However, no motion to strike has been filed, and it appearing that no advantage has been gained by Petitioner's late-filing, Petitioner's proposal has been treated as its Proposed Final Order and considered.

The parties waived the statutory time limit for entry of this Final Order.

FINDINGS OF FACTS

1. The Code is a unified statewide set of building codes authorized by Chapters 98-287, 2000-141, 2001-186, 2001-372, and 2002-1, Laws of Florida.

2. The Commission is the state agency authorized by statute to adopt, amend, promulgate and maintain the Code.

3. The rule under challenge is Section 424.2.17.1.9 of the Florida Building Code which provides:

> 1. All doors and windows providing direct access from the home to the pool shall be equipped with an exit alarm complying with UL2017 that has a minimum sound pressure rating of 85dBA at 10 feet and is either hard-wired or of the plug-in type. The exit alarm shall produce a continuous audible warning when the door and its screen are opened. The alarm shall sound immediately after the door is opened and be capable of being heard throughout the house during normal household activities. The alarm shall be equipped with a manual means to temporarily deactivate the alarm for a single opening. Such deactivation shall last no longer than 15 seconds. The deactivation switch shall be located at least 54 inches above the threshold of the door.
>
> Exceptions:
> a. Screened or protected windows having a bottom sill height of 48 inches or more measured from the interior finished floor at the pool access level.
> b. Windows facing the pool on floor above the first story.

c. Screened or protected pass-through kitchen windows 42 inches or higher with a counter beneath.

2. All doors providing direct access from the home to the pool must be equipped with a self-closing, self-latching device with positive mechanical latching/locking installed a minimum of 54 inches above the threshold, which is approved by the authority having jurisdiction.

4. Section 424.2.17.1.9, above, was adopted by the Commission by reference when it adopted Rule 9B-3.047, Florida Administrative Code. The Florida Administrative Code indicates this amendment to Rule 9B-3.047, also adopted the November 6, 2001, Florida Building Code and took effect December 16, 2001.[4/] Previous amendments to Rule 9B-3.047, Florida Administrative Code, had been effective on November 28, 2000, and February 7, 2001.

5. Although several portions of the rule were addressed at hearing, see infra., the main thrust of this rule challenge is that Petitioner and Intervenor contend that the rule discriminates against battery-powered alarms in favor of hard-wired or plug-in alarms for doors and windows accessing a swimming pool.

6. Prior drafts of 424.2.17.1.9 and prior provisions of the Standard Building Code and other swimming pool codes relating to exit alarms do not require that exit alarms be "hard-wired" or "plug-in" type alarms. The Standard Building

Code does not eliminate battery-powered exit alarms as a means for limiting access to swimming pool areas. No state besides Florida has eliminated them as an option.

7. The rule only applies to new pools or new home construction.

8. FPSA is a non-profit statewide construction trade association of 850 company members, with 10,000 employees, whose membership includes contractors engaged in swimming pool and spa construction, repair, renovation, and service, and whose work is regulated by the Code. It promotes the swimming pool industry through educational business-to-business programs and provides legislative and administrative rule monitoring and lobbying services on behalf of its membership. The subject matter of the challenged rule is within FPSA's scope of interest and activity as a trade association.

9. Only a licensed electrician or alarm specialist can legally install hard-wired alarms. Anyone, including the homeowner; pool contractors, such as FPSA members; or a general contractor, such as Intervenor, can install a battery-powered window or door alarm for a swimming pool.

10. The rule has resulted in members' potential customers delaying decisions to purchase swimming pools. The rule has resulted in FPSA pool contractors having to employ licensed electricians and alarm specialists to do work swimming pool

contractors previously could do themselves. Awaiting completion of work by these specialists can delay the approval (Certificate of Completion) of the pool work by building inspectors.

11. Only licensed electricians can legally install swimming pool pumps and pool lights. Awaiting completion of this work can also delay the Certificate of Completion.

12. The type of alarm used affects the swimming pool contractor's cost of doing the project and ultimately impacts the swimming pool contractor's "bottom line." The record is silent about the cost of plug-in alarms. Installation of hard-wired devices currently on the market which would meet the requirements of the challenged rule have been costing FPSA members approximately $400.00-$500.00 for two windows and two doors. This expense may be increased by the number of doors and windows accessing the pool by approximately $150.00-$160.00 per extra door and $70.00 per extra window. Battery alarms cost about $40.00 apiece.

13. Intervenor is a member of the Florida Home Builders' Association. He is a Florida-licensed general contractor. As such, he is required to comply with the Code. In recent years, he has operated through a franchise agreement with Arthur Rutenberg Homes. Ninety-eight percent of his business is construction of new, custom-built, single family residences. Approximately one-third of the homes Intervenor builds include

swimming pools as an amenity. Most of his homes range in price from $300,000 to $1,200,000.

14. Intervenor usually hires swimming pool installation sub-contractors, such as members of FPSA, who obtain a separate permit for construction of any pool. Intervenor leaves it to the swimming pool contractor to call for inspections and to see to it that the pool is compatible with all existing building codes, but Intervenor has ultimate responsibility for his new residences' final Code compliance.

15. For a new home, Intervenor usually subcontracts to have hard-wired pool alarm systems installed for approximately $695.00 for two doors and four windows in conjunction with a home security system which itself costs approximately $695.00. This expense can be increased by the number of doors and windows accessing the pool.

16. When a hard-wired alarm is installed in a house under construction after drywall has been installed, Intervenor has to tear out the drywall so the wiring for the alarm can be run in, and then he must re-install the drywall. This method becomes necessary in the few older homes he upgrades with a swimming pool and other amenities or where a new home customer decides to install a pool in mid-construction of the house after further financing has been obtained. This method and expense would not

be incurred if battery-powered alarms were allowable under the Code.

17. During the years 2000-2001, the Florida Building Commission was engaged in a marathon rule adoption procedure designed to integrate into the Code, and thereby render uniform, all the competing local building codes within the State of Florida. The purpose thereof was to fulfill the intent of the Florida Legislature that once a uniform basis was established, any amendments to specific components, such as 424.2.17.1.9, would thereafter proceed on triennial or annual cycles. To reach a uniform starting point for the rule amendments and cycles, enabling or implementing statutes were frequently amended by the Legislature to extend their effective dates so as to coincide with the Commission's adoption of the full state-wide Code, which ultimately took effect March 1, 2002. Rule-making, pursuant to Chapter 120, Florida Statutes, continued throughout the various time frames of the statutory amendments.

18. As of June 8, 2001,[5/] Section 44, Chapter 2001-186, Laws of Florida, directed that:

> The Commission shall adopt no amendments to the Florida Building Code until after July 1, 2002, except for the following: emergency amendments, amendments that eliminate conflicts with state law or <u>implement new authorities granted by law,</u> and amendments to implement settlement agreements executed prior to March 1, 2002. (Emphasis added)

19. Section 25, Chapter 2001-186, Laws of Florida, also directed, in pertinent part, that:

> Further, the Florida Building Code must provide for uniform implementation of Chapters 515.25, 515.27, and 515.29 by including standards and criteria for residential swimming pool barriers, pool covers, latching devices, door and window exit alarms, and other equipment required therein, which are consistent with the intent of Section 515.23....

This legislation was ultimately codified at Section 553.73(2), Florida Statutes (2002).

20. Section 1, Chapter 2000-143, Laws of Florida, had previously set out the following specific legislative findings and intent which ultimately was codified into Section 515.23, Florida Statutes (2002).[6/]

> Legislative findings and intent.--The Legislature finds that drowning is the leading cause of death of young children in this state and is also a significant cause of death for medically frail elderly persons in this state, that constant adult supervision is the key to accomplishing the objective of reducing the number of submersion incidents, and that when lapses in supervision occur a pool safety feature designed to deny, delay, or detect unsupervised entry to the swimming pool, spa, or hot tub will reduce drowning and near-drowning incidents. In addition to the incalculable human cost of these submersion incidents, the health care costs, loss of lifetime productivity, and legal and administrative expenses associated with drownings of young children and medically frail elderly persons in this state each year and the lifetime costs for the care and

> treatment of young children who have suffered brain disability due to near-drowning incidents each year are enormous. Therefore, it is the intent of the Legislature that all new residential swimming pools, spas, and hot tubs be equipped with at least one pool safety feature as specified in this chapter. It is also the intent of the Legislature that the Department of Health be responsible for producing its own or adopting a nationally recognized publication that provides the public with information on drowning prevention and the responsibilities of pool ownership and also for developing its own or adopting a nationally recognized drowning prevention education program for the public and for persons violating the pool safety requirements of this chapter.

21. Pursuant to the foregoing amendments, which all concerned felt would take effect much sooner than they did, the Commission had the obligation to adopt amendments to the Code to implement new authorities granted by statute, which, in part, included adoption of standards and criteria for swimming pool exit alarms, provided the standards and criteria were consistent with the intent of Section 515.23, Florida Statutes.

22. Section 1, Chapter 2000-143, Laws of Florida, also created Section 515.27, Florida Statutes, effective October 1, 2000, which provided:

> (1) In order to pass final inspection and receive a certificate of completion, a swimming pool must meet at least one of the following requirements relating to pool safety features.

> (a) The pool must be isolated from access to a home by an enclosure that meets the pool barrier requirements of Section 515.29;
> (b) The pool must be equipped with an approved safety pool cover;
> (c) <u>All doors and windows providing direct access from the home to the pool must be equipped with an exit alarm that has a minimum sound pressure rating of 85 dB A at 10 feet; or</u>
> (d) All doors providing direct access from the home to the pool must be equipped with a self-closing, self-latching device with a release mechanism placed no lower than 54 inches above the floor. (Emphasis added)

23. One of the four statutorily permissible safety options was that all doors and windows that provide direct access from the home to the pool be equipped with an exit alarm which has a minimum sound pressure rating of 85 dB A at 10 feet. <u>See</u> Section 515.27(1)(c), Florida Statutes.

24. Section 515.25(4), Florida Statutes, defines "exit alarm" as:

> "Exit alarm" means a device that makes audible, continuous alarm sounds when any door or window which permits access from the residence to any pool area that is without an intervening enclosure is opened or left ajar.

25. During 2001, the Commission was mindful of Section 44, Chapter 2001-186, Laws of Florida, which had been signed by the Governor and filed on June 8, 2001. In fulfilling its mandate to adopt rules to implement the Florida Building Code, the Commission was careful to state on its tracking charts, agendas,

and workshop materials that it was only considering the four exceptions for which it was permitted to adopt rules prior to July 1, 2002.

26. The Commission employed the services of the Florida Conflict Resolution Consortium to facilitate its processes. The Consortium is an entity housed within Florida State University that is legislatively mandated to perform consensus building with regard to public policy issues.

27. In 2001, the Commission referred issues to one of three types of subcommittee: Technical Advisory Committees (TACs), Program Oversight Committees (POCs) or Ad Hoc Committees. Ad Hoc Committees were/are comprised solely of Commission members. Public comment was received by the respective subcommittees. If an issue (proposed rule amendment) received a favorable vote by at least 75% (three quarters) of the subcommittee members, a recommendation was developed and forwarded to the Commission as a whole.

28. A 75% (three-quarters) favorable vote of the Commission was also required to adopt a rule.

29. The failure of a subcommittee or the Commission to take affirmative action upon an issue amounted to a rejection of that issue for incorporation into a rule, but the Commission and its subcommittee did not act on motions to deny. They only voted on motions to approve the resolution of an issue.

30. In July 2001, the Commission, sua sponte, took up provisions related to criteria and standards for pool safety measures prescribed by Chapter 515, Florida Statutes. The Commission, with the assistance of the Florida Conflict Resolution Consortium, applied its procedures described above.

31. Commission staff generated draft provisions integrating portions of a recommendation by the Building Officials Association of Florida, independent research and review, and the existing provisions of Section 424.2, Florida Building Code.

32. No amendments were proposed directly to the Commission or its subcommittees from the public relating to pool safety measures on the form promulgated by the Commission for that purpose.

33. On July 9, 2001, the Commission convened an Ad Hoc Committee meeting to consider recommendations for resolution of issues raised relating to implementation of the pool safety measure. Petitioner had representatives, one of whom was its Executive Director, Mr. Bednerik, attend the meeting and offer oral comments. It appears from the transcript of that meeting that written submissions of Petitioner's and other interested persons' concerns were also received.

34. The draft provisions authored by Commission staff included adoption of UL2017, a standard developed by

Underwriters Laboratories, and specified in Section 515.27(1)(c), Florida Statutes.

35. At the Ad Hoc Committee meeting, FPSA's Executive Director cited the need for the Code to specify a power source for exit alarms, and specifically stated that, at the time of the meeting, some jurisdictions were allowing battery-powered alarms and some were requiring hard-wired alarms.

36. The Ad Hoc Committee also received comment from Mr. Sparks, a building official from Sarasota. Mr. Sparks expressed a preference that exit alarms be hard-wired, and that if battery-powered alarms were to be allowed, that their use should be limited to homes for which a building permit had been pulled before October 1, 2000, the effective date of Chapter 515, Florida Statutes.

37. The Ad Hoc Committee heard comments that batteries always ultimately fail due to limited battery life and that the date of failure cannot be predicted.

38. The Ad Hoc Committee discussed allowing plug-in type alarms as a possible solution to difficulties with installation of a hard-wired system. Mr. Sparks informed the Committee that plug-in type alarms were available and that he had worked with manufacturers of such devices.

39. The Ad Hoc Committee unanimously voted to recommend to the Commission, during its July 11, 2001 Rule Development

Workshop, that exit alarms for new construction after the amendment's effective date be hard-wired or a plug-in type.

40. The Ad Hoc Committee's recommendation was integrated into the proposed Code amendment for the Commission's review, by providing a complete printed copy of the proposed amendment, striking through for eliminated language, and underlining for new language being added.

41. A Rule Development Workshop was convened by the Commission on July 11, 2001.

42. The Ad Hoc Committee's recommendation was submitted to the Commission during the Rule Development Workshop held on July 11, 2001, as a committee report.

43. During the Workshop, Petitioner's Executive Director offered comment to the Commission urging that requiring a retrofit of existing homes was impracticable and would not comport with the "legislative intent" expressed by one of the legislators involved with the passage of Section 515.27(1), Florida Statutes. Petitioner's Director opposed any restriction to hard-wired alarms but acknowledged that battery-powered alarms require positive action to refresh their power source. He acknowledged that Underwriters' Laboratories had attempted to mitigate this shortcoming in a chirper to alert when the battery in a battery- powered alarm runs low.

44. Comments were heard that plug-in type alarms might be dangerous to, or deactivated, by toddlers.

45. The Commission unanimously approved the recommendations of the Ad Hoc Committee with regard to limiting allowable power sources for exit alarms to hard-wired or plug-in types, inherently rejecting the comments of Petitioner's representative.

46. The Commission also approved Committee recommendations allowing a temporary deactivation feature and an exception of specified windows from the requirement for alarms. The expressed purpose for these provisions was to address the practical effects of the exit alarm requirement without diminishing the intent of improved safety.

47. The Commission noticed the Code revisions for rule adoption in the Florida Administrative Weekly published on August 3, 2001, with a hearing to be held on August 28, 2001.

48. At the Rule Adoption Hearing on August 28, 2001, Petitioner's representative expressed his belief that it was the Legislature's intent that inexpensive battery-powered alarms be used everywhere and affirmatively stated that Petitioner would concur in the view that battery-powered alarms should be permitted in existing dwellings. Petitioner's representative also implied that the Commission had the authority to adopt UL2017.

49. The UL2017 standard provides criteria and specifications for "residential swimming pool entrance alarms." It addresses requirements for alarms that are battery-powered, hard-wired, and plug-in. The standard was adopted by Underwriters' Laboratories and available in 1995 or 1996. It encompasses 85 dBA at 10 feet of sound pressure. Its concept of "continuous" means "not intermittent" or "not variable." It allows a seven-second delay before an alarm activates and then requires that an alarm activate immediately and continually.

50. Evidence was adduced in the instant rule challenge hearing that none of the four protective options provided in Section 515.27(1), Florida Statutes, is required to be maintained after the final inspection or certificate of occupancy has been completed.

51. Batteries expire or homeowners may intentionally remove them. In either situation, the alarm will not sound. One of Intervenor's witnesses described a study in which the main reason for failure of battery-powered smoke detectors is that the battery had discharged. The Florida Life Safety Code (Fire Code) permits battery-powered smoke detectors in older, existing homes, but like the challenged rule, requires hard-wired devices in new home construction.

52. Hard-wired pool exit alarms can be disabled by a power outage or by deliberately flipping a circuit breaker.

53. Plug-in alarms can be unplugged so as to be rendered ineffective. They also may present a danger to children or the elderly if extension cords are used.

54. Some witnesses consider it inconsistent of the rule to require an alarm deactivation switch and a self-latching device that is 54 inches above the threshold but fail to specify that an electric plug for a plug-in door or window alarm also be 54 inches above the threshold, due to the potential for children to unplug plug-in alarms.

55. Some witnesses at hearing complained that because Section 515.27(1)(d), Florida Statutes, specifies that a release mechanism switch for self-closing, self-latching doors is to be 54 inches above the floor and the challenged rule for door and window exit alarms specifies deactivation switches are to be at least 54 inches from the threshold, there is a variance between the rule and the statute, and the rule is confusing. However, a door's "threshold" as used in the rule, is a consistent place to measure the 54 inches from; is a spot that can be agreed upon by the contractor and inspectors; and is a designation which eliminates any confusion as to whether measurement is to begin from the outside or inside "floor," while serving the spirit of the statute.

56. Some witnesses at hearing complained that the language "immediately after the door is opened and be capable of being

heard throughout the house during normal household activities," as used in the rule is vague. However, it appears that any vagueness is cured by the inclusion of the UL2017 standard in the challenged rule.

57. Witnesses who complained of confusion as to whether doors and screens must each be "alarmed" were not credible because the challenged rule clearly specifies "warning when the door and its screen are opened." (Emphasis supplied)

58. Some witnesses complained that they thought the term "plug-in" could refer to installing a battery into an alarm. This concept defies both the first approved dictionary definition in evidence and common sense.

59. There were a number of battery-powered exit alarms on the market when the rule was adopted and when it became effective which would make an audible, continuous alarm when a door or window which permits access to the pool area is opened, but there were no such hard-wired or plug-in devices available at that time. Acceptable hard-wired and plug-in alarms which meet the rule's requirements are available now.

60. The Florida Home Builders Association (FHBA) had previously challenged unrelated proposed Code rules in DOAH Case No. 00-1252RP. That rule challenge was resolved by an October 17, 2000, Settlement Agreement, which was amended on November 1, 2001, after the case was closed.

61. The FHBA Settlement Agreement provided that, in exchange for FHBA's dismissal of DOAH Case No. 00-1252RP, the Commission would adopt a rule setting forth a procedure for adoption by the Commission of any other new amendments to the Code, including creating a fiscal statement in connection with all proposed Code revisions; review by a TAC of all technical revisions; providing notice on the Internet of all proposed revisions; providing 45 days between the date of notice and consideration of an issue by a TAC or by the Commission; and providing a reasonable time period in which the Committee and Commission respectively would hear testimony on rule proposals.

62. The FHBA Settlement Agreement did not require immediate application of the agreed rule promulgation procedures prior to adoption, by rule, of those rule promulgation procedures. It also did not require application of new statutory requirements to the Commission's rule promulgation procedures prior to the effective date of any new statute.

63. The Commission did not perform a fiscal analysis/statement; have a TAC consider challenged Rule 9B-3.047 or 424.2.17.1.9; or provide 45 days' notification of Committee or Commission meetings. However, pursuant to Chapter 120, Florida Statutes, Internet notice of all proposed rules and amendments was provided.

64. The procedures required by the FHBA Settlement Agreement, including but not limited to the requirement of a fiscal impact statement, plus additional procedures, were codified in Sections 553.73(2), 553.73(3), 553.73(6) and 553.73(7), Florida Statutes. These statutes originated in Chapter 2001-186, Laws of Florida, which was subsequently amended or superceded by other legislative action. The legislative history shows the effective dates of these statutory rule promulgation procedures was postponed to March 1, 2002. See the Conclusions of Law

65. Also, similar rule promulgation procedures which equate with the FHBA Settlement Agreement were promulgated in Rule 9B-3.050, Florida Administrative Code, which the Florida Administrative Code states took effect on November 20, 2001.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.54, 120.56(1), 120.56(3), and 120.56(9), Florida Statutes.

67. Respondent has not suggested that Petitioner FPSA is without standing herein. The facts as found support standing, and it is concluded that Petitioner has standing to bring this rule challenge.

68. Respondent asserts that Intervenor is without standing, primarily on the grounds that his involvement with swimming pool alarms is remote and speculative since he works through subcontractors and his increased cost for installing hard-wired swimming pool alarms is de minimus. However, upon the facts as found, Intervenor is also concluded to have standing herein.

69. Count IV of the Petition assails the constitutionally of Chapter 515, Florida Statutes. The Division of Administrative Hearings is without jurisdiction to consider this issue, and it is not addressed herein.

70. Respondent's oral motion to dismiss Count III of the Petition, which alleges that the Commission did not explore a lower cost regulatory alternative as required by Section 120.54, Florida Statutes, is well taken. There is no evidence that either Petitioner or Intervenor timely submitted to the Commission a good faith written proposal suggesting a lower-cost regulatory alternative that accomplishes the same objectives as the challenged rule. Count III is dismissed. See Sections 120.52(8)(g); and 120.541(1)(c)3.b., Florida Statutes, and Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So.2d 243, (Fla. 1st. D.C.A. 2002).

71. As to Count II, Petitioner and Intervenor rely on FHBA's October 27, 2000/November 1, 2001 Settlement Agreement

with the Commission to assert that (1) the Settlement Agreement was violated by the Commission, and (2) the Commission should have applied the terms of the FHBA Settlement, specifically the requirement of providing a fiscal impact statement, to the development of challenged Rule 9B-3.047 (424.2.17.1.9), and did not. In this same vein, they argue that the Commission failed to comply with its announced non-rule policy, the non-rule policy being the FHBA Settlement Agreement which ultimately became Rule 9B-3.050, for the development of challenged Rule 9B-3.047 (424.2.17.1.9). Ultimately, they argue that the Commission failed to comply with its announced "non-rule policy" which was developed as Rule 9B-3.050, Florida Administrative Code, contemporaneously with the challenged rule, during the summer and autumn of 2001, and/or they assert that the Commission failed to comply with a statutory requirement for rule-making by failing to adhere to the criteria set forth in Section 553.73(7)(b), Florida Statutes (2002), which reads, in pertinent part:

> A proposed amendment shall include a fiscal impact statement which documents the costs and benefits of the proposed amendment. Criteria for the fiscal impact statement shall be established by rule by the commission and shall include the impact to local government relative to enforcement, the impact to property and building owners, as well as to industry, relative to the cost of compliance.

72. Petitioner's Proposed Final Order also makes the argument that the Commission allegedly offended Section 553.73(4)(b)9., Florida Statutes.

73. As to the challengers' first argument, no privity of Petitioner or Intervenor with FHBA, nor authorization of them by that entity, has been demonstrated which would permit either Petitioner or Intervenor to enforce the FHBA's Settlement Agreement. In any case, the Division of Administrative Hearings is not the appropriate forum to enforce a settlement. That jurisdiction lies with the Circuit Courts.

74. With regard to the challengers' concept that the FHBA Settlement Agreement constituted some "free form" Commission obligation to adhere to the Settlement Agreement provisions in all subsequent rule-making, the Commission correctly suggests that the Commission's only obligation under the FHBA Settlement was to adopt Rule 9B-3.050, which it did. See further discussion in Conclusion of Law 77, infra.

75. The Commission further states that because Section 553.73(7)(b), Florida Statutes, was not in effect during the promulgation of Rule 9B-3.050, the Commission had no obligation to furnish a fiscal impact statement in the promulgation of Rule 9B-3.047.

76. Finally, the Commission asserts that even if Rule 9B-3.050, effective November 20, 2001, were applicable to

promulgation of Rule 9B-3.047, effective December 16, 2001, the content of Rule 9B-3.050(3), excuses a fiscal impact statement where, as here, there is no evidence of a written request for a lower cost alternative.[7/]

77. The two rules were promulgated contemporaneously but did not take effect simultaneously, as the parties herein attempted to stipulate. Until Rule 9B-3.050 was in effect, the Commission was not bound by it. The most that any agency can guarantee is that it will attempt to promulgate a rule that pleases a specific complaining party, which is what happened in the FHBA Settlement Agreement. Although certain defenses against challenges to statements of general applicability (undeclared and unpromulgated rules) are available to agencies which promptly engage in good faith rulemaking, these defense opportunities for an agency cannot reasonably be construed to require the Commission to put the terms of a proposed rule (Rule 9B-3.050) into effect before the Commission has complied with all of the procedures for adoption of that rule as required by Chapter 120, Florida Statutes (2002). See Section 120.56 (4)(a) and (e), Florida Statutes (2002). To conclude otherwise would be to promote an inequitable concept that is the antithesis of the "level playing field" envisioned by the Administrative Procedure Act. Moreover, until the statutory authority for Rule 9B-3.050 (various delayed provisions of Chapter 553 Florida

Statutes) went into effect, that rule could not legitimately impact challenged Rule 9B-3.047, which was contemporaneously on the rule promulgation trail established by Chapter 120, Florida Statutes. See Section 120.54(1)(f), Florida Statutes.

78. With regard to the suggestion that the Commission's promulgation of Rule 9B-3.047, offended Section 553.73(7)(b), Florida Statutes, it is noted that Code amendments adopted and reviewed pursuant to Legislative command in 2000 were expressly subject to the requirement of a fiscal impact statement. Section 109, Chapter 2000-141, Laws of Florida, and the current language of Section 553.73(7), Florida Statutes (2002), also mandate that the Commission consider cost, regardless of a third party written request. However, in its efforts to bring the Florida construction industry's statutes and rules into compatible cycles, the Legislature, through a series of amendments, ultimately prescribed an effective date of March 1, 2002, for those statutory provisions. See Section 40, Chapter 98-287; Section 75, Chapter 2000-141; Sections 34 and 35, Chapter 2001-186; and Sections 2, 3, 4, 5, and 13, Chapter 2001-372, Laws of Florida. [Note: Chapter 2001-372 is found in Vol. I, Part One, of the 2002, bound version of the Laws of Florida.] Therefore, when the 2001 legislation at Section 44, Chapter 2001-186, Laws of Florida, (see Finding of Fact 18), prohibited all but a limited menu of amendments without

re-imposing any cost consideration over and above that required by Chapter 120, Florida Statutes, there was no statutory requirement that the Commission comply, for the promulgation of Commission rules, with the fiscal impact statement requirement in Section 553.73(7)(b), Florida Statutes. Therefore, the challengers' reliance on these statutes is misplaced because these statutes could not apply to the promulgation of Rule 9B-3.047, Florida Administrative Code.

79. The Agency's failure to comply with Section 553.73(4)(b)9., Florida Statutes, was not pled in the Petition, and the challenge related thereto appears to be an afterthought of Petitioner's Proposed Final Order. That statutory provision does require a fiscal impact statement, but it applies to review of local building codes which adopt more stringent requirements than the (State) Code. In addition to not applying to the rule here challenged, and probably not being in effect at any time material (See Section 13, Chapter 2001-372 and Section 86, Chapter 2002-1, Laws of Florida), Section 553.73(4)(b)9., Florida Statutes, contains the specific provision that the absence of a fiscal impact statement may not be used as a basis for challenging that type of rule amendment for compliance.

80. That said, even though it was not specifically pled by Petitioner or Intervenor, Section 13, Chapter 2001-372, Laws of

Florida, which was signed by the Governor on December 17, 2001, cannot be ignored. It provided, in pertinent part:

> . . . Notwithstanding Section 10 [of Chapter 2001-372], the residential swimming pool safety requirements of the Florida Building Code, Section 424.2, relating to private swimming pools, of Rule 9B-3.047, Florida Administrative Code, as adopted November 28, 2000, shall take effect January 1, 2002. (Emphasis and bracketed material supplied)[8/]

81. The Legislature intended that "the residential swimming pool safety requirements of the Florida Building Code, Section 424.2, [including 424.2.17.1.9], relating to private swimming pools, of Rule 9B-3.047, Florida Administrative Code, as adopted November 28, 2000," that is, the language of 424.2.17.1.9 which was in effect before the challenged amendments, were to take effect on January 1, 2002. Stated somewhat differently, the Legislature intended that the language of 424.2.17.1.9 which was in effect on November 28, 2000, to the extent that language addressed swimming pool safety requirements, was to be re-established on January 1, 2002.

82. The Legislature clearly indicated that it did not want Rule 9B-3.047, to the extent it incorporated the challenged new swimming pool safety requirements into 424.2.17.1.9, to go into effect on the date of the recent rule amendment, which the Florida Administrative Code shows was December 16, 2001. Accordingly, Rule 9B-3.047, as amended December 16, 2001, to the

extent it contained the amendments to 424.2.17.1.9 here challenged, was, to all intents and purposes, invalidated by the Florida Legislature, effective January 1, 2002. Note also that the Legislature specifically reinstated the November 28, 2000 Rule 9B-3.047 as opposed to the February 7, 2001 or the December 16, 2001 Rule 9B-3.047. (See Finding of Fact 4).

83. There cannot be a valid delegation of legislative authority where the Legislature has clearly determined that the rule amendment should be superceded by previous rule language.

84. However, since only the portions of challenged Rule 9B-3.047 (December 16, 2001), and the portions of its February 7, 2001 amendments, which dealt with swimming pool safety requirements, were not in effect due to the direct legislative action of Section 13, Chapter 2001-372, Laws of Florida, only those portions of 424.2.17.1.9, are, and remain, invalid. All technical amendments, not related to residential swimming pool safety requirements, which were adopted on February 7, 2001, or December 16, 2001, into Rule 9B-3.047, remain undisturbed and in full force and effect.

85. Rule 9B-3.050, Florida Administrative Code, which substantively complied with the FHBA Settlement Agreement, became effective on November 20, 2001. The requirements of Section 553.73, Florida Statutes, which also substantively

complied with the Settlement Agreement, became effective March 1, 2002.

86. If the Commission now wants to adopt those amendments to the residential swimming pool safety requirements which are here deemed invalid, the Commission will have to promulgate those changes as part of its next rule adoption cycle, pursuant to the procedures outlined in Rule 9B-3.050, Florida Administrative Code, and those portions of Chapter 553 that finally became effective on March 1, 2002, simultaneously with the effective date of the Florida Building Code.

87. Due to the foregoing Conclusions of Law, it is not necessary to address any other issues.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is determined that:

(1) Rule 9B-3.047 (424.2.17.1.9) of the Florida Building Code [Amended 2/7/01; 12/16/01] to the extent it incorporates changes to 424.2.17.1.9 of the Florida Building Code since November 20, 2000, is an invalid exercise of delegated legislative authority;

(2) Those parts of 424.2.17.1.9 as they were in effect on November 20, 2000, are, and remain, in full force and effect; and

(3) This ruling does not invalidate any other portions of Rule 9B-3.047, Florida Administrative Code, as adopted either February 7, 2001 or December 16, 2001.

DONE AND ORDERED this 12th day of February, 2003, in Tallahassee, Leon County, Florida.

____

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2003.

ENDNOTES

1/ This issue is beyond the scope of this hearing. See the Conclusions of Law.

2/ The Transcript's Table of Contents is in error. Intervenor's Exhibit 2 was, in fact, admitted in evidence. (TR-209-210, 221).

3/ Petitioner did not renew earlier arguments raised at TR-25-28, wherein Respondent opposed such motion on several grounds, including prejudice by surprise. See Section 120.56(1)(b), Florida Statutes (2002).

4/ December 16, 2001, was a Sunday, so this date may be in error, but it is the date designated by the Department (Secretary) of State in its official publication, the Florida Administrative Code.

5/ As more fully set out in the Conclusions of Law, this date is not necessarily accurate for effectiveness, but it is the

date Chapter 2001-186 was signed into law, and upon which the Commission assumed it had authority to proceed. See also Section 40, Chapter 98-287; Sections 75 and 109, Chapter 2000-141; Sections 25, 34, 35, 36, 44, and 47, Chapter 2001-186; Sections 2, 3, 4, 5, 10, and 13, Chapter 2001-372; and Section 86, Chapter 2002-1, Laws of Florida, and the Conclusions of Law.

6/ See Sections 1 and 2, Chapter 2000-143 Laws of Florida; endnotes 5 and 8; and the Conclusions of Law.

7/ It also is noted that Rule 9B-3.050(9), Florida Administrative Code, provides that each amendment approved by the Florida Building Commission shall take effect no earlier than three months after the rule amendment is filed for adoption with the Department of State.

8/ Section 13, Chapter 2001-372 also "re-enacts" the language described at Finding of Fact 19, which language was ultimately codified at Section 553.73(2), Florida Statutes (2002). A "Note" following that statute and following each of Sections 515.25, 515.27, and 515.29, Florida Statutes (2002), describes this legislative action.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.