

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM R. MULDROW,)
)
 Petitioner,)
)
 vs.) Case No. 07-5126RU
)
 FLORIDA DEPARTMENT OF COMMUNITY)
 AFFAIRS, DIVISION OF HOUSING)
 AND COMMUNITY DEVELOPMENT and)
 the FLORIDA BUILDING)
 COMMISSION,)
)
 Respondents.)
 _____)

FINAL ORDER

Pursuant to notice, a hearing was held on the parties' Motion and Cross Motion for Summary Final Order, before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on May 22, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William R. Muldrow, pro se
3070 Waterford Drive
Tallahassee, Florida 32309

For Respondent: James Richmond, Esquire
Deputy General Counsel
Department of Community Affairs
2555 Shumard Oaks Boulevard
Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

Whether Summary Final Order should be granted and, if so, whether Florida Administrative Code Rule 9B-3.475 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

In October 2007, Respondents adopted Florida Administrative Code Rule 9B-3.0475. On November 8, 2007, Petitioner, Doctor William R. Muldrow, filed a Petition challenging the validity of the Rule.

Subsequent to the filing of the Petition in this action, Respondents amended Florida Administrative Code Rule 9B-3.0475. The amended Rule was filed with the Department of State on March 17, 2008, and became effective on April 6, 2008.

The amended Rule did not completely resolve Petitioner's challenge to the Rule, and Petitioner filed an amended Petition on May 7, 2008. Specifically, Petitioner alleged that the Rule was vague and outside Respondents' delegated legislative authority.

Both parties filed Motion's For Summary Final Order. At the hearing on those Motions, Petitioner offered the testimony of one witness. From the record and the hearing, it is clear that no disputed issues of fact remain. Therefore, Summary Final Order is appropriate.

FINDINGS OF FACT

1. Petitioner is the owner of a construction company that constructs roof-overs in the Leon County area. A roof-over is a construction method where an existing roof is covered over with an additional layer of roofing material without removing the old roof. The construction method is specifically authorized by section 1510, Florida Building Code, Building Volume (2004 as amended 07/2007), and Section 511, Florida Building Code, Residential Volume (2004 as amended 07/2007). Roof-overs are not considered roof replacements; roof-overs are considered a form of reroofing.

2. As indicated, amended Florida Administrative Code Rule 9B-3.0475 was effective on April 6, 2008. The rule adopted, by reference, the Manual of Hurricane Mitigation Retrofits for Existing Site-Built Single Family Residential Structures (the Manual). In general, Section 101 of the Manual provides the requirements for mitigation as prescribed by law. Section 201.2 provides permissible techniques for accomplishing the requirements defined by Section 101. The Manual is not part of the Florida Building Code.

3. Section 101 of the Manual provides:

Retrofits Required. Pursuant to Section 553.844, Florida Statutes, strengthening of existing site-built, single family residential structures to resist hurricanes shall be provided. Site built single-family

residential structures shall mean site built family detached residential structures.

101.1 When a roof on an existing site-built, single family residential structure is replaced, the following procedures shall be permitted to be performed by the roofing contractor: (emphasis supplied)

(a) Roof-decking attachment and fasteners shall be strengthened and corrected as required by section 201.1.

(b) A secondary water barrier shall be provided as required by section 201.2.

Section 201.2 of the Manual provides the methods for installation of a secondary water barrier when an existing residence is subject to work that includes a "reroof."

4. The term "reroof" is not defined within the Manual.

5. The authority for Florida Administrative Code Rule 9B-3.0475 is Section 553.844, Florida Statutes. Section 553.844(3)(a) states:

A roof replacement must incorporate the techniques specified in subparagraphs (2)(b) 2 and 4. (emphasis supplied)

Subparagraph (2)(b)2 states:

Secondary water barriers for roofs and standards relating to secondary water barrier. The criteria may include, but not limited to. . . .

6. Chapter 2 of the Florida Building Code, defines reroofing, for purposes of the Florida Building Code, to include roof replacement and roof-overs. However, the Florida Building Code definition of reroofing is not determinative of the meaning of the term reroof in the Manual since the Manual is not part of the Florida Building Code. Testimony demonstrated that Leon

County's Building Inspector recognized the fact that the mitigation manual was not meant to apply to roof-overs because application of the requirement for a secondary water barrier requires removal of an existing roof covering and is inconsistent with the practice of roof-overs. Additionally, the Respondents do not intend the requirement for secondary water barriers to apply to roof-overs and have stipulated to that interpretation in this hearing.

7. While the Manual could have been more precise in the use of the terms roof replacement and reroofing, it is clear that, when read as a whole, the Manual only addresses roof replacement and does not apply to roof-overs. Such a requirement is within the Respondents' statutory authority.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.56, Fla. Stat. (2007).

9. Petitioner has the burden of proving by a preponderance of the evidence that the challenged rule is an invalid exercise of delegated legislative authority. § 120.56(1)(e), Fla. Stat. (2007).

10. Consideration of the validity of a rule must necessarily commence with an analysis of Respondent's rulemaking authority in accordance with the legislative mandate set forth in Section 120.52(8), Florida Statutes (2007), states:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

* * *

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to

extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

11. The standard of review in this proceeding has been established in Section 120.56(1)(e), Florida Statutes (2007), which provides, in pertinent part, that “[h]earings held under this section shall be de novo in nature,” which effectively superceded the earlier standard of review set forth in Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So.2d 243,257 (Fla. 1st DCA 2002)(the standard was “to limit the scope of review by ALJ’s in rule challenge proceedings to whether legally sufficient evidence exists supporting the agency’s proposal”).

12. In this case, Section 553.844, Florida Statutes, limits the Respondents’ authority to require secondary water barriers to roof replacements. The evidence demonstrated that, the Manual’s use of the term reroof in Section 201 is limited by the term replacement in Section 101. Thus, when read as a whole, the manual is not vague and only requires the use of secondary water barriers when replacing a roof. With that limitation Florida Administrative Code Rule 9B-3.475 is a valid exercise of the Respondents’ legislative authority and the Petition challenging the Rule is dismissed.

ORDER

Based on the foregoing, Findings of Fact and Conclusions of Law, it is

ORDERED that, the Petition challenging Florida Administrative Code Rule 9B-3.475 is dismissed.

DONE AND ORDERED this 1st day of July, 2008, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of July, 2008.

COPIES FURNISHED:

William R. Muldrow
3070 Waterford Drive
Tallahassee, Florida 32309

James Richmond, Esquire
Deputy General Counsel
Department of Community Affairs
2555 Shumard Oaks Boulevard
Tallahassee, Florida 32399-2100

Thomas Pelham, Secretary

Department of Community Affairs
2555 Shumard Oaks Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Shaw Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oaks Boulevard, Suite 325
Tallahassee, Florida 32399-2160

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.