

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF MIAMI BEACH,)
)
 Petitioner,)
)
 vs.) Case No. 08-5188RU
)
 DEPARTMENT OF BUSINESS AND)
 PROFESSIONAL REGULATION,)
 DIVISION OF HOTELS AND)
 RESTAURANTS,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on December 12, 2008, in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Respondent's statements regarding enforcement of the Florida Elevator Safety Code, as set forth in the Amended Petition Challenging Agency Statement Defined as a Rule filed November 21, 2008, constitute agency statements defined as rules that must be promulgated pursuant to Section 120.54(1), Florida Statutes (2008).¹

PRELIMINARY STATEMENT

On October 17, 2008, the City of Miami Beach, Florida ("City"), filed a Petition Challenging Agency Statement Defined as a Rule with the Division of Administrative Hearings. The City was granted leave to amend its Petition, and the Amended Petition Challenging Agency Statement Defined as a Rule ("Amended Petition") filed November 21, 2008, supersedes the original Petition. In the Amended Petition, the City challenged as agency statements defined as rules but not adopted pursuant to Section 120.54(1), Florida Statutes, certain statements of the Department of Business and Professional Regulation ("Department") contained in Industry Bulletin for Florida's Elevator Industry Number 2006-01, dated April 1, 2006; Industry

Bulletin for Florida's Elevator Industry Number 2006-04, dated August 1, 2006; Industry Bulletin for Florida's Elevator Industry Number 2008-03, dated July 18, 2008, and revised July 21, 2008; and contained in a posting on the Department's website entitled "Elevators Current Practices." The City also challenged certain statements made by the Bureau of Elevator Safety ("Bureau") in a Technical Advisory Issue 2008-01, dated August 18, 2008.²

The City alleged in its Amended Petition that, in the challenged statements, the Department

has made a unilateral determination that all elevators, including those installed before the adoption of the Florida Building Code, must comply with certain ASME^[3] standards referenced in the 2004 edition of the Florida Building Code (including the 2006 supplement) and that any elevator which does not comply with such standards constitutes a threat to public safety and presents a hazard to the riding public.^[4]

The City further alleges in its Amended Petition that "the Department's statements of general applicability contained within the three (3) industry bulletins constitute a rule as defined by Section 120.52(15), Florida Statutes, to the extent that such bulletins seek to require retrofitting of existing and older elevators to comply with current requirements of the Florida Building Code and the Elevator Safety Code."⁵ Upon receipt of the original Petition, the Division of Administrative

Hearings assigned an administrative law judge to hear the case, and pursuant to notice, the hearing was held on December 12, 2008.

Prior to the hearing, the Department filed a Motion for Official Recognition, in which it requested that official recognition be taken of House Bill 7183 (2007); the Governor's Veto Letter dated June 27, 2007, vetoing House Bill 7183; and Chapter 2008-104, Laws of Florida (2008). The motion was considered at the final hearing, and official recognition was granted to Chapter 2008-104, Laws of Florida (2008). The request for official recognition of House Bill 7183 and the Governor's Veto Letter was denied on the grounds of relevance.

At the final hearing, both the Petitioner and the Respondent presented the testimony of Doug Melvin, Chief of the Bureau, and Timothy Hemstreet, Assistant City Manager for the City of Miami Beach. Petitioner's Exhibits A through F were offered and received into evidence. Respondent's Exhibits 1 through 4 were offered and received into evidence.

The transcript of the proceedings was filed with the Division of Administrative Hearings on December 29, 2008, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, including the stipulated facts contained in the Pre-Hearing Stipulation, the following findings of fact are made:

1. The Department is the state agency "empowered to carry out all of the provisions of this chapter relating to the inspection and regulation of elevators and to enforce the provisions of the Florida Building Code." § 399.02(6), Fla. Stat. The Department is given rulemaking authority to carry out the provisions of Chapter 399, Florida Statutes. § 399.10, Fla. Stat.

2. The City is an incorporated municipality of the State of Florida. As a property owner, it is subject to the provisions of Chapter 399, Florida Statutes, and to the rules adopted by the Department to carry out its responsibilities under Chapter 399, Florida Statutes.

3. Pursuant to Section 399.061, Florida Statutes, "[a]ll elevators . . . subject to this chapter must be annually inspected," and the Department has the authority to require correction of any violations of Chapter 399, Florida Statutes, or of the Florida Building Code discovered in those inspections. § 399.061(1)(a) and (4), Fla. Stat. The Department also has the authority to protect the public safety by ordering that the use

of any elevator found to be in an unsafe condition be discontinued until the elevator has been repaired and may be operated safely. § 399.061(3).

4. Section 399.02(5)(b), Florida Statutes, places on the elevator owner the responsibility "for the safe operation, proper maintenance, and inspection and correction of code deficiencies of the elevator after a certificate of operation has been issued by the department."

5. The Department has adopted standards for the installation and maintenance of elevators in Florida Administrative Code Rule 61C-5.001, which provides in pertinent part:

(1) Adopted Standards. The installation and maintenance of elevators, dumbwaiters, escalators, moving walks, inclined and vertical wheelchair lifts, and inclined stairway chairlifts shall be governed by the following standards, which are hereby adopted and incorporated by reference.

(a) Chapter 30, Elevators and Conveying Systems, of the 2004 Florida Building Code, including the 2006 supplements;

(b) American National Standard Guide for Inspection of Elevators, Escalators, and Moving Walks, ASME A17.2-2004; and

(c) The Uniform Fire Safety Standards for Elevators, Chapter 69A-47, F.A.C., established by the Department of Financial Services.

6. Chapter 30 of the Florida Building Code provides in pertinent part:

3001.1 Scope

This chapter governs the design, construction, installation, alteration and repair of elevators and conveying systems and their components.

Note: Other administrative and programmatic provisions may apply. See the Department of Business and Professional Regulation [DBPR] Chapter 399, Florida Statutes, and 61C-5, *Florida Administrative Code*. The regulation and enforcement of the following sections of the adopted codes, and their addenda, are preempted to the Bureau of Elevator Safety of the Department of Business and Professional Regulation: ASME A17.1, Part 8, ASME A17.3, Sections 1.2, 1.5, ASME A18.1, Part 10.

3001.2 Referenced standards

Except as otherwise provided for in this code, the design, construction, installation, alteration, repair and maintenance of elevators and conveying systems and their components shall conform to ASME A17.1, ASME A17.1S, ASME A90, ASME B20.1, ALI ALCTV, ASME A17.3 and ASME A18.1.

The Division of Hotels and Restaurants may grant exceptions, variances and waivers to the *Elevator Safety Code* as authorized by the *Elevator Safety Code*. (ASME A17.1, Section 1.2) and Florida Statutes (Chapter 120).^[6]

The Department did not separately incorporate by reference ASME A17.1, Part 8 (2004), or ASME A17.3 (1996) in Florida Administrative Code Rule 61C-5.001.

7. ASME A17.2-2004, which is specifically incorporated by reference in Florida Administrative Code Rule 61C-5.001(1)(b), is entitled "Guide for Inspection of Elevators, Escalators, and Moving Walks" and provides in the Preface in pertinent part as follows

Requirements for Existing Elevators

Elevators and escalators in jurisdictions that have adopted the Safety Code for Existing Elevators and Escalators, ASME A17.3, . . . must, at a minimum, conform to the requirements identified in the Guide as "A17.3." If an existing installation does not meet the requirements of the A17.3 Code, it must be upgraded. If an existing installation was required to meet more stringent requirements, it must continue to meet those requirements.^[7]

8. The Preface to ASME A17.3 (1996), the edition of the standard used by the Department, includes a statement of the general purpose of the standard and provides in pertinent:

This Code is intended to serve as the basis for state and local jurisdictional authorities in adopting retroactive requirements for existing elevators and escalators to enhance the safety of the general public. It is also intended . . . as a standard of safety practices for building owners and managers of structures where existing elevator equipment covered in the scope of the Code is used.

The purpose of this Code is to establish minimum requirements that will provide a reasonable degree of safety for the general public. . . .^[8]

9. Section 1.2 of ASME A17.3 (1996) provides in pertinent part as follows: "Existing installations, as a minimum, shall meet the requirements of this Code. If an existing installation does not meet the requirements of this Code, it shall be upgraded. If an existing installation was required to meet more stringent requirements, it shall continue to meet those requirements."⁹

10. Section 1.5 of ASME A17.3 (1996) provides that existing installations must conform to Part X of ASME A17.1, Routine, Periodic, and Acceptance Inspections and Tests, and to Part XII, Alterations, Repairs, Replacements, and Maintenance.¹⁰

11. Part 8 of ASME A17.1 (2004), the edition of the standard used by the Department, "contains general requirements for *new and used existing equipment*."¹¹ A note appended to the statement of the scope of Part 8 states that "[r]equirements 8.1, 8.6, 8.9, 8.10, and 8.11 apply to both new and existing installations."¹² Requirement 8.1 deals with security for new and existing elevators; Requirement 8.9 requires placement of a Code data plate on all new and existing elevators; Requirement 8.10 applies to new installations and alterations to existing installations.

12. Pertinent to this proceeding, Requirement 8.6 "applies to maintenance, repairs, and replacements" and Requirement 8.6.1.2 provides as follows:

Maintenance, repairs, and replacement shall conform to 8.6 and the

(a) Code at the time of the installation

(b) Code requirements at the time of any alteration

(c) ASME A17.3 if adopted by the authority having jurisdiction[.]^[13]

Requirement 8.11 applies to "periodic inspections and tests of existing installations", and Requirement 8.11.1.2 provides as follows:

Inspections and tests required by 8.11.2 through 8.11.5 are to determine that the existing equipment conforms with the following Code requirements:

(a) the Code at the time of installation

(b) the Code effective as applicable to and for each alteration

(c) the ASME A17.3 Code, if adopted by the authority having jurisdiction[.]^[14]

13. Section 399.03, Florida Statutes, governs the design, installation, and alteration of conveyances, and provides in pertinent part: "(7) Each elevator shall comply with the edition of the Florida Building Code or Elevator Safety Code that was in effect at the time of receipt of application for the construction permit for the elevator."¹⁵

14. The Department publishes Industry Bulletins and Technical Advisories regarding the implementation of Chapter 399, Florida Statutes, and it also publishes statements

of "Current Practices" on its website. At issue herein are statements made in Industry Bulletin for Florida's Elevator Industry Number 2006-01, dated April 1, 2006; Industry Bulletin for Florida's Elevator Industry Number 2006-04, dated August 1, 2006; Industry Bulletin for Florida's Elevator Industry Number 2008-03, dated July 18, 2008, and revised July 21, 2008; Technical Advisory Issue 2008-01, dated August 18, 2008; and contained in a posting on the Department's website entitled "Elevators Current Practices." In each of these documents, the Department indicated that, to ensure the safety of the public, it would enforce the provisions of the then currently-adopted edition of the Florida Building Code to the extent that the Florida Building Code required retrofitting or modification of existing elevators.

15. In Industry Bulletin Number 2006-01, dated April 1, 2006, the Department stated that, notwithstanding the provision in Section 399.03(7), Florida Statutes, "that elevators 'shall comply with the edition of the Florida Building Code or Elevator Safety Code that was in effect at the time of the receipt for [sic] application for the construction permit for the elevator,'" it would not exempt existing elevators from the provisions of the "new" edition of the Florida Building Code that "require[] retrofitting older elevators because aging equipment may pose a threat to public safety." The Department

stated that "Florida Statutes [specifically section 399.001 and 399.061(3)] are in agreement with ASME A17.1 (2000) and A17.3 (1996) regarding life safety issues" and that the Department would require "that, in the interest of public safety, the older and potentially hazardous elevator be brought into compliance with the newer code."¹⁶

16. In Industry Bulletin Number 2006-04, dated August 1, 2006, the Department reiterated its intent to enforce the "new" edition of the Florida Building Code regarding the modification of existing elevators to protect public safety because public safety was its paramount regulatory responsibility. It also reiterated that it could not "provide an elevator owner with an exemption from a new code provision essential to the safe operation of the elevator." The Department advised that it would specifically "require the single wall hydraulic cylinder safety provision of the ASME A17.1 2000 code [Section 8.6.5.8] [to] be enforced as part of the annual elevator inspection." The Department observed that "[t]he ASME Standards Committee considered these sections [Section 8.6.5.8 and sections reference therein] so important to life safety that corrective action is required for all existing single wall hydraulic cylinder elevators." The Department also advised elevator owners that, because compliance with certain code requirements might be "costly and/or complex," they "may submit to the bureau

[of Elevator Safety] a letter of intent to comply within 30 days of the date of issuance of an Order to Correct and a plan of corrective action (PCA) within 60 days of the date of issuance of an Order to Correct."¹⁷

17. In Industry Bulletin Number 2008-03 dated July 18, 2008, and revised July 21, 2008, the Department stated in pertinent part:

The Elevator Safety Code, Chapter 399, F.S.; Chapter 61C-5, Florida Administrative Code; Chapter 30 of the Florida Building Code; and the American Society of Mechanical Engineers (ASME) national standards ASME A17.1-2004 with A17.1a-2005 addenda, A17.2-2004, A17.3-1996, and ASME A18.1-2003 provide a minimum standard for public safety. These are the codes currently in effect and they will be enforced. In fact, the more stringent of the codes in effect apply, unless specifically stated or otherwise adopted by the Bureau of Elevator Safety, which is the Authority Having Jurisdiction (AHJ). There are no exceptions. The elevator safety code is not subject to individual interpretation. The codes collectively apply to all elevators and provide for the health, safety, and welfare of the riding public.^[18]

18. In Technical Advisory Number 2008-01 dated August 18, 2008, headed "Temporary Variance for ASME A17.3 Violations," the Department stated that "elevator owners of older elevators have stated they cannot meet the 30-day requirement to correct costly and complex violations [of A17.3(1996)]." The Department advised that the Bureau of Elevator Safety "was moving forward to extend the current temporary compliance alternative

(variance) to include additional A17.3(1996) violations beyond the initial cylinder replacement issue [see Industry Bulletin Number 2006-04]." The Department described the purpose and effect of the temporary variances, set out requirements that must be met in order for the temporary variance to remain in effect, and outlined requirements for elevator owners to request a temporary variance. In addition to information regarding temporary variances, the Department reiterated that "ASME A17.3 (1996) code applies to all existing elevators according to the 2002 revision of the Florida Building Code."

19. In an undated document entitled "Current Practices" related to elevators, found on the Department's official website, the Department made the following statement:

In recent months there has been some confusion regarding which version of the safety code the division uses to conduct safety inspections. The division relies upon Chapter 399, Florida Statutes; 61C-5(1)(a), Florida Administrative Code; and Chapter 30 of the Florida Building Code.

The division follows Chapter 30 of the Florida Building Code which in turn adopts ASME A17.1 and ASME A17.3 as governing the maintenance of elevators. Consequently, when inspecting elevators, pursuant to 399.061, Florida Statutes, the division uses ASME A17.1 and A17.3 codes.

Nothing has changed the division's reliance on any of these documents.

The division has not ceased enforcing A17.3.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.56(4), Florida Statutes (2008).

21. Section 120.56(4)(a), Florida Statutes, requires that a party challenging an agency statement defined as a rule be "substantially affected by the agency statement." The parties have stipulated that the City has standing to maintain this challenge.

22. Section 120.54(1)(a), Florida Statutes, requires that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." The party challenging an agency statement that meets the definition of a rule but that has not been adopted pursuant to Section 120.54, Florida Statutes, has the burden of proving by a preponderance of the evidence that the challenged statements are unadopted rules. § 120.56(1)(e) and (4)(b), Fla. Stat.

23. Section 120.52(16), Florida Statutes, defines a "rule" in pertinent part as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or

solicits any information not specifically required by statute or by an existing rule."

Department's failure to adopt as rules agency statements defined as rules

24. The City has framed the issue in this case in its Proposed Final Order as follows

The requirement and procedures, purportedly pursuant to ASME A17.3(1996 ed.) and ASME A17.1, Part 8 (2004 ed.), as set forth in the . . . Industry Bulletins and Technical Advisory that all existing elevators, regardless of the date of installation, be retrofitted to comply with the current Florida Building Code, rather than the code at the time of installation, as provided in section 399.03(7), Florida Statutes, is being challenged as an agency statement defined as a rule but not adopted as required by section 120.54(1)(a), Florida Statutes.^[19]

25. The Department has adopted Florida Administrative Code Rule 61C-5.001(1), which adopts and incorporates by reference Chapter 30 of the 2004 Florida Building Code, with the 2006 supplements, as one of the standards to be applied to elevators in the State of Florida. Chapter 30 of the Florida Building Code specifies that "the design, construction, installation, alteration, repair and maintenance of elevators . . . shall conform to ASME A17.1 . . . [and] ASME A17.3" and that the regulation and enforcement of ASME A17.1, Part 8, and ASME A17.3 is preempted to the Department.²⁰ As set forth in the findings

of fact herein, ASME A17.3 applies, by its terms, to existing elevators, as do several requirements in ASME A17.1, Part 8.

26. The City contends that the Department has no rule that reflects an interpretation of Section 399.03(7), Florida Statutes, which would allow the provisions of the current Florida Building Code to apply to existing elevators. This is correct, but the Department is not interpreting Section 399.03(7), Florida Statutes, in the Industry Bulletins, Technical Advisory, and Current Practices identified by the City as agency statements. Rather, the Department explained in those statements that its primary statutory responsibility in regulating elevators under Chapter 399, Florida Statutes, is to protect the safety of the public and that, in doing so, it will enforce the Florida Building Code, adopted and incorporated by reference in Florida Administrative Code Rule 61C-5.001(1), by requiring without exception that existing elevators conform to the ASME A17.1 and ASME A17.3 standards, which are the minimum requirements necessary to provide a reasonable degree of safety to the public.

27. It appears from the arguments in the City's Proposed Final Order and the allegations in its Amended Petition that the City takes the position that Section 399.03(7), Florida Statutes, prohibits the Department from applying the provisions of Chapter 30 of the Florida Building Code, specifically ASME

A17.1, Part 8, and ASME A17.3, to existing elevators. If this is indeed the City's position, it has raised an issue that cannot be resolved in a challenge to agency statements that have not been adopted as rules. Section 120.54(1), Florida Statutes, requires only that agency statements defined as rules be adopted "by the rulemaking procedure provided by this section."

Failure to specifically incorporate ASME A17.1 and ASME A17.3 by reference in Florida Administrative Code Rule 61C-5.001(1)

28. In its Proposed Final Order, the City contends for the first time that the ASME A17.1, Part 8, and ASME A17.3 standards must be specifically adopted and incorporated by reference in Florida Administrative Code Rule 61C-5.001(1) in order to be considered part of the rule. The City does not, however, cite any statute, rule, or case law requiring an agency to specifically incorporate by reference standards that are adopted in a document that is incorporated by reference in a rule.

29. The Department of State set forth the requirements for incorporating materials into a rule by reference in Florida Administrative Code Rule 1B-30.005, which provides in pertinent part:

(1) Any ordinance, standard, specification or similar material may be incorporated by reference in a rule adopted pursuant to Section 120.54, F.S., and Rule 1B-30.002, F.A.C., subject to the following conditions:

(a) The material shall be generally available to affected persons.

(b) The material shall be published by a governmental agency or a generally recognized professional organization.

(2) The agency incorporating material by reference shall file with the Department of State a correct and complete copy of the referenced material with an attached certification page which shall state a description of the referenced material and specify the rule to which the referenced material relates. . . .

Chapter 30 of the Florida Building Code is incorporated by reference in Florida Administrative Code Rule 61C-5.001(1) and a copy of that portion of the Florida Building Code was filed with the Secretary of State, as required by Florida Administrative Code Rule 1B-30.005(2). There is no requirement in that rule that copies of all standards or specifications adopted in material incorporated by reference in a rule must also be filed with the Secretary of State.

30. Support for the Department's position that it need not specifically incorporate by reference all of the standards adopted in the Florida Building Code is found in the statutory requirements governing the adoption of the Florida Building Code. The Florida Building Code was adopted pursuant to Section 553.73, Florida Statutes, which provides in pertinent part:

(1)(a) The commission shall adopt, by rule pursuant to ss. 120.536(1) and 120.54, the Florida Building Code which shall contain or

incorporate by reference all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such laws and rules, except as otherwise provided in this section.

* * *

3) The commission shall select from available national or international model building codes, or other available building codes and standards currently recognized by the laws of this state, to form the foundation for the Florida Building Code. The commission may modify the selected model codes and standards as needed to accommodate the specific needs of this state. Standards or criteria referenced by the selected model codes shall be similarly incorporated by reference. If a referenced standard or criterion requires amplification or modification to be appropriate for use in this state, only the amplification or modification shall be specifically set forth in the Florida Building Code. . . .

31. Pursuant to Section 553.73(3), Florida Statutes, the Florida Building Commission need only incorporate in the Florida Building Code by reference the standards or criteria that are contained in the selected model codes that are, in turn, incorporated by reference in the Florida Building Code: "[O]nly the amplification or modification shall be specifically set forth in the Florida Building Code." Accordingly, the Florida Building Code was adopted in Florida Administrative Code

Rule 9B-3.047, without incorporating by reference the standards and model codes adopted in the Florida Building Code itself:

(1) The Florida Building Code, 2004 Edition, as updated by the Florida Building Commission on July 1, 2005, and as amended by the Commission on December 11, 2005, December 8, 2006, and May 21, 2007, incorporated herein by reference is hereby adopted as the building code for the State of Florida until February 28, 2009.

32. It would be unreasonable to require the Department to incorporate by reference in Florida Administrative Code Rule 61C-5.001(1) all of the specific standards and model codes adopted in Chapter 30 of the Florida Building Code, when the Florida Building Commission is not required to incorporate by reference in Florida Administrative Code Rule 9B-3.047 all of the standards and model codes adopted in the Florida Building Code. The City's position on this issue is, therefore, rejected.

Plans of Corrective Action and Temporary Variances

33. The City asserts in its Proposed Final Order that the procedures set out in Industry Bulletin Number 2006-04 allowing elevator owners to submit a plan of corrective action when cited for violations of the Florida Building Code is an agency statement not adopted as a rule in violation of Section 120.54, Florida Statutes.²¹ It also alludes in its Proposed Final Order to the temporary variance described in Technical Advisory

Number 2008-01 and states that "the subject of temporary variance is not set forth in Chapter 399 or Chapter 61C-5, Florida Administrative Code"²²

34. The City did not, however, mention the statements related to the plan of corrective action in the Amended Petition. The position of the City set out in the Pre-Hearing Stipulation filed by the parties refers to "overall guidelines and standards regarding plans of corrective action of purported ASME A17.3 standards" and states that "the plan of corrective action and accompanying standards and guidelines are neither provided for by statute nor rule." The emphasis in the City's position statement is, however, on the Department's enforcement of ASME A17.3 (1996) and ASME A17.1 (2004) to existing elevators and on the City's assertion that "such enforcement is contrary to the provisions of Section 399.03(7)."

35. It is unclear that the City is challenging the procedures for plans of corrective action set out in Industry Bulletin Number 2006-04 as an agency statement defined as a rule but not adopted pursuant to Section 120.54, Florida Statutes. First, the statement of the Nature of the Controversy included in the Pre-hearing Stipulation refers only to the policy of the Department "regarding the application of certain standards to existing elevators under Chapter 399, Florida Statutes." In addition, the final sentence in the City's position statement in

the Pre-Hearing Stipulation is ambiguous: "The Division's [of Hotels and Restaurants] plan of corrective action process, while well intended, is but further evidence that the agency statements constitute an unadopted rule as that term is defined in Section 120.52(20), F.S."

36. Section 120.56(4)(a), Florida Statutes, requires that the petition challenging an agency statement defined as a rule include "the text of the statement or a description of the statement." The purpose of this requirement is to provide notice to the agency of the specific statement being challenged as an unpromulgated rule. See Aloha Utils., Inc. v. Public Serv. Comm'n, 723 So. 2d 919, 921 (Fla. 1st DCA 1999). The court in Aloha Utilities observed that the defective notice can be cured if the specific policies and/or procedures being challenged are "stated with precision" in the pre-hearing stipulation. Id. Here, the City did not precisely state in the Pre-Hearing Stipulation that it was challenging as unadopted rules the Department's statements in Industry Bulletin Number 2006-04 regarding the procedures for plans of corrective action. The City is, therefore, precluded from challenging these procedures in the instant case.

37. The City is also precluded from challenging the temporary variance procedures and requirements set out by the Department in Technical Advisory Number 2008-01 as unadopted

rules. In the Amended Petition, the City includes the following quotes from the Technical Advisory:

"The bureau is moving forward to extend the current temporary compliance alternative (variance) to include additional A17.3(1996) violations beyond the initial cylinder replacement issue.

.

The temporary variance for compliance will remain in force until modernization is complete as established by the owner (petitioner)."^[23]

The City, however, prefaced the quote with the following statement: "The fourth bulletin, number 2008-01, issued on or about August 18, 2008, provides that the Department would now require all existing elevators to comply with ASME standards beyond the initial cylinder placement."²⁴

38. Taken in the context of the emphasis in the Amended Petition on the Department's statements regarding the "retrofitting of existing and older elevators to comply with current requirements of the Florida Building Code and the Elevator Safety Code,"²⁵ it cannot be said that the City provided notice to the Department in its Amended Petition that it was challenging the temporary variance procedure as an unadopted rule. In addition, the Pre-Hearing Stipulation does not provide the Department with notice that the City intended to challenge the temporary variance; the Pre-Hearing Stipulation contains no mention of the temporary variance procedure. The City is,

therefore, precluded from challenging these procedures in the instant case. See Aloha Utils., Inc., 723 So. 2d at 921 (The appellants "did not describe the specific agency statements they intended to challenge at the final hearing in sufficient detail, either in their petitions or in the prehearing stipulation" and the agency was, therefore, deprived of notice of the statements being challenged.).

39. For the reasons stated above, the City has failed to prove by a preponderance of the evidence that the challenged agency statements are unadopted rules.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Amended Petition Challenging Agency Statement Defined as a Rule of the City of Miami Beach is dismissed.

DONE AND ORDERED this 27th day of February, 2009, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February 2009.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2008 edition unless otherwise indicated.

^{2/} The Bureau is part of the Department's Division of Hotels and Restaurants ("Division"). The Department, the Division, and the Bureau are referred to collectively herein as the "Department."

^{3/} ASME is the acronym for the American Society of Mechanical Engineers and will be used herein when references are made to the American Society of Mechanical Engineers.

^{4/} Amended Petition at paragraph 9.

^{5/} Amended Petition at paragraph 20.

^{6/} Petitioner's Exhibit F.

^{7/} Petitioner's Exhibit F at page xvi of ASME A17.2.

^{8/} Respondent's Exhibit 2.

^{9/} Id.

^{10/} Id.

^{11/} Respondent's Exhibit 1.

^{12/} Id.

^{13/} Respondent's Exhibit 1.

^{14/} Id.

^{15/} Section 3001.5 of the Florida Building Code, which also governs the design, installation and alteration of elevators, includes an almost identical provision: "1. Each elevator shall comply with the *Elevator Safety Code* that was in effect at the time of receipt of application for the construction permit for the elevator." Petitioner's Exhibit F.

- ¹⁶/ Petitioner's Exhibit A.
- ¹⁷/ Petitioner's Exhibit B.
- ¹⁸/ Petitioner's Exhibit C.
- ¹⁹/ Petitioner's Proposed Final Order at paragraph 7.
- ²⁰/ Petitioner's Exhibit F.
- ²¹/ City's Proposed Final Order at paragraphs 11; see also paragraph 45 and 46.
- ²²/ Id. at paragraph 14; see also paragraph 47.
- ²³/ Amended Petition at paragraph 14.
- ²⁴/ Id.
- ²⁵/ Id. at paragraph 20.

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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 agency 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.