STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SECURE ENTERPRISES, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3604F
	)	
OFFICE OF INSURANCE REGULATION AND FINANCIAL SERVICES COMMISSION,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

On December 10, 2012, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings conducted the final hearing in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to reimbursement of its attorneys' fees and costs under section

120.595(3), Florida Statutes, from its successful prosecution of a rule challenge in DOAH Case No. 12-1944RX.

PRELIMINARY STATEMENT

On November 5, 2012, Petitioner filed a Motion for Award of Attorney's Fees, under section 120.595(3), Florida Statutes. The request arises out of Petitioner's challenge to existing rules, and the undersigned's issuance, on October 19, 2012, of a Final Order in DOAH Case No. 12-1944RX invalidating certain of these rules (Final Order).

By joint stipulation filed December 5, 2012, the parties identified the issues to be tried in this case as whether Respondents had a reasonable basis in law and a reasonable basis in fact to adopt the rules that were invalidated in the Final Order.

The court reporter filed the transcript of the final hearing on January 2, 2013. On January 14, 2013, Petitioner filed a proposed final order and Respondents filed a memorandum of law.

FINDINGS OF FACT

1. In DOAH Case No. 12-1944RX, Petitioner challenged Florida Administrative Code Rules 69O-170.017 and 69O-170.0155 and incorporated forms OIR-B1-1699 (Form 1699) and OIR-B1-1655 (Form 1655). These rules generally relate to fixtures and construction techniques that mitigate wind loss and earn

homeowners a discount on the wind portion of their homeowners' insurance premium.

2. The most important of these rules, Form 1699 consists of two matrices: one matrix provides discounts for mitigative fixtures and construction techniques applied to existing residential construction (i.e., predating the 2001 Florida Building Code), and the other matrix provides discounts for mitigative fixtures and construction techniques applied to new residential construction (i.e., subject to the 2001 Florida Building Code or any of its successors). The Final Order invalidates the matrix applicable to existing residential construction, but not the matrix applicable to new residential construction. The Final Order concludes that the omission from Form 1699 of discounts for increased wind resistivity for doors modifies and contravenes the law implemented and is arbitrary. The Final Order finds other omissions from Form 1699--i.e., discounts for increased wind resistivities for windows and increased impact resistivities for doors--but these findings served the purpose of partly justifying the invalidation of the entire form for the omission of a single set of discounts substantially affecting Petitioner--i.e., the discounts for increased wind resistivities for doors. (Findings as to the interdependency of all of the discounts provided the remaining

justification for invalidating the entire form for the omission of a single set of discounts.)

3. Form 1655 advises homeowners of the availability of discounts applicable to the wind portion of their homeowners' insurance premiums for various mitigative fixtures and construction techniques. The Final Order invalidates Form 1655 in its entirety. The main reason is that Form 1655 fails to notify homeowners about the availability of discounts for fixtures and construction techniques that increase the wind resistivity of windows and doors. An additional reason is that Form 1655 mentions shutters as the sole fixture to increase the impact resistivity of windows and doors, misleadingly implying that shutters are the sole fixture or construction technique for increasing the impact resistivity of windows and doors.

4. Rule 69O-170.017 incorporates by reference Form 1699. The Final Order denied Petitioner's request to invalidate rule 69O-170.017 because the rule incorporates the still-valid, existing-construction matrix in Form 1699.

5. Rule 69O-170.0155 incorporates by reference several forms. The Final Order invalidates only rule 69O-170.0155(k), which is the subsection that incorporates Form 1655.

6. Petitioner commenced its rule challenge to obtain a wind-premium discount for homeowners who purchased and installed its bracing system on their existing, nonglazed garage doors in

order to increase their wind resistivity. The thrust of Petitioner's challenge was thus to the omission from Form 1699 of any discounts for fixtures and construction techniques that increase the wind resistivity of doors. Obviously, the shortcomings of Form 1655--and its adopting rule, rule 69O-170.0155(k)--were almost entirely derived from this omission from Form 1699. Respondents' liability for attorneys' fees and costs thus requires consideration only of its adoption of Form 1699 without any discounts for fixtures and construction techniques that increase the wind resistivity of doors.

7. As noted in the Final Order, the establishment of discounts for all mitigative fixtures and construction techniques is a complicated process. The actuarial expertise necessary to complete this task resides in Respondent Office of Insurance Regulation (OIR), but is itself dependent on engineering expertise that is not found within either respondent, or at least was not in 2006 when Form 1699 was adopted.

8. The engineering work underlying Form 1699 featured computer modeling, among other things, to project the salient features of storms that may be expected to strike various parts of Florida over thousands of years; as for impact resistivity, to project the trajectories and momentum of missiles that will be launched by these storms; to place in the path of these

storms and missiles various forms of residential construction with relevant combinations of mitigative fixtures and construction techniques covering several factors, including the protection of windows and doors from impacts and the protection of windows and doors from wind (without regard to impacts); to project the damage states that will result from these modeled storms upon individual hypothesized residential buildings; and to project the economic losses--with particular emphasis on insured losses--that will result from these damages.

9. The relevant timeframe for this case begins with Hurricane Andrew in 1992. As the Final Order describes, the Florida legislature and other federal and state agencies and organizations reacted swiftly and comprehensively to this storm and the catastrophic damage and loss that it caused. FEMA quickly published its analysis of, among other things, the relationship between construction and storm damage. In 2001, the legislature adopted the Florida Building Code (FBC), which required, among other things, new construction to meet wind loads specified in the code, based on projected wind speeds in different regions of Florida.

10. Almost at the same time that the 2001 FBC went into effect, in March 2002, Applied Research Associates, Inc., published the Development of Loss Relativities for Wind Resistive Features of Residential Structures (2002 ARA Report).

Procured by the Florida Department of Community Affairs, which, at the time, had considerable responsibilities in the adoption of the 2001 FBC, the 2002 ARA Report was a groundbreaking achievement in modeling the effects, in terms of reduced damage and loss, from various forms of mitigative fixtures and construction techniques, alone and in almost countless combinations.

11. For present purposes, the focal point of the 2002 ARA Report were tables of loss relativities, which provided factors by which to calculate how different combinations of mitigative fixtures and construction techniques reduced wind losses. Taking these data, OIR's actuaries issued in January 2003 an informational memorandum and a precursor to Form 1699, which suggested premium discounts to be used by homeowners' insurers when filing insurance rates. (Then and now, insurers are permitted to use other data sources in setting their rates, but all but two of them use the suggested discounts in Form 1699.)

12. In August 2004, Hurricane Charley struck Florida. A design wind event, like Hurricane Andrew, the timing of Charley, after the adoption of the 2001 FBC, proved the effectiveness of the 2001 FBC in requiring fixtures and construction techniques that demonstrably mitigated wind damage and loss. In 2006, respondents issued Form 1699 in its present form, eliminating a dampening factor that they had included in the precursor form

three years earlier. (To allow insurers to adapt to the new rate-setting environment, respondents had halved the discounts in the precursor form.)

13. The 2002 ARA Report claims to adhere to the statutory mandate contained in section 627.0629(1), to determine discounts for fixtures or construction techniques that "enhance roof strength, roof covering performance, roof-to-wall strength, wall-to-floor-to-foundation strength, opening protection, and window, door, and skylight strength." For reasons explained in the Final Order, "opening protection" is limited to the impact resistivity of windows and doors, and the "strength" of windows and doors (skylights being treated as windows) is limited to their wind resistivity. Unfortunately, the 2002 ARA Report collapsed opening protection and the strength of windows and doors into one category--opening protection--so ARA never developed loss relativities for fixtures and construction techniques that increased the wind resistivities of doors or, for that matter, windows.

14. As noted above, respondents were entirely dependent on the work of ARA due to its specialized knowledge of the FBC and, more generally, its expertise in engineering and computer modeling. ARA, not respondents, possessed this highly specialized knowledge, which was necessary to generate the loss relativities, on which respondents, in turn, could rely to

generate the legislatively mandated premium discounts. The omission of loss relativities for the strength of windows and doors--as a standalone category or within the category of opening protection--is not apparent in the richly detailed 2002 ARA Report. The above-described facts--coupled with the time-pressured nature of the task assigned to respondents--provide the reasonable basis in fact for the adoption of the portion of Form 1699 that has been invalidated.

15. The factual justification for the adoption of the portion of Form 1699 that has been invalidated is greater than any legal justification that respondents may claim. The statute truly is a model of clarity--and succinctness. Reduced to its plainest terms, the statute calls for discounts for six categories of mitigative fixtures and construction techniques, and ARA and respondents addressed only five.

16. However, some legal justification exists for the adoption of the portion of Form 1699 that has been invalidated. First, the legal mandate of section 627.0629(1) does not exist in a vacuum; it operates in the complex facts of engineers, computer programmers, and actuaries whose work is necessary to lend meaning to the statutory mandate. To this extent, respondents find some legal justification for the same reason that they find ample factual justification for the adoption of the portion of Form 1699 that has been invalidated.

17. Second, the legislature itself missed a clear, early opportunity to remind respondents of their failure--obvious, perhaps, only in hindsight--to address the omitted sixth factor enumerated in section 627.0629(1). The precursor of Form 1699 likewise omitted discounts for fixtures and construction techniques that increased the wind resistivities of doors and windows. When, in 2006, the legislature mandated the adoption of full discounts, without any dampening, it easily could have forcibly reminded respondents that they--and their contractor--had missed one of the six statutory discounts. The subtlety of respondents' legal error seems to have eluded the legislature, as well.

18. Third, even in hindsight, the legal underpinning of the invalidation of the existing-construction matrix of Form 1699 is sometimes elusive, given the temptation to join ARA and respondents in analyzing wind resistivities under the factor of opening protection. As disclosed at the hearing, the Administrative Law Judge spent a considerable amount of time, in preparing the Final Order, misanalyzing respondents' treatment of the wind resistivities of doors from the perspective of opening protection. Repeated, close readings of section 627.0629(1), in the context of the complex materials presented in the 2002 ARA Report, eventually revealed the now-clear legal principle that the omitted sixth statutory factor--the strength

of windows and doors--applied to wind resistivity (and opening protection was restricted to impact resistivity). And Petitioner itself joined in exactly the same misanalysis, both in its pleading and proof at the hearing in the rule challenge. Seeming to yield once more to this misanalysis, even in the fee hearing, Petitioner cross-examined OIR's lone witness with an emphasis on respondents' flawed decision, as described in the Final Order, to omit a discount for doors under opening protection.

CONCLUSIONS OF LAW

19. DOAH has jurisdiction of the subject matter. § 120.569(3), Fla. Stat.

20. Section 120.569(3) provides:

> If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

21. Because the Administrative Law Judge has invalidated the existing-construction matrix in Form 1699 pursuant to section 120.56(3), Petitioner is entitled to its reasonable attorneys' fees and costs, unless respondents prove that their

actions were "substantially justified." (Respondents have not claimed the existence of "special circumstances.")

22. The statute provides that the actions taken by the agency--here the adoption of Form 1699 in 2006--must be evaluated to determine if respondents can prove that there was a "reasonable basis in law and fact" for the adoption of the form. The "reasonable basis" standard lies somewhere between correct and frivolous. Agency for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1143-44 (Fla. 1st DCA 2011) (construing identical language in § 57.111). In attempting to narrow the analytic framework, the MVP Health opinion adds:

> The closest approximation is that if a state agency can present an argument for its action "'that could satisfy a reasonable person[,]'" then that action should be considered "substantially justified." *Helmy [v. Dep't of Bus. & Pro'al Reg.]*, 707 So. 2d [366] at 368, quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1998).

23. Clearly, the 2002 ARA Report provides a reasonable basis in fact to adopt Form 1699 in 2006. This situation is similar to an agency's justifiable reliance on an expert's opinion. Even if other expert opinions disagree, a lone expert's opinion can provide an agency with a reasonable basis for commencing a disciplinary prosecution against a licensee. Dep't of Health v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004) (construing § 57.111).

24. The question is closer as to whether respondents had a reasonable basis in law to adopt Form 1699 in 2006. Case law does not go to great lengths differentiating between reasonable bases in fact and in law, so the first justification described in paragraph 16--the extent to which complicated facts complicate a clearly drafted law--has some traction. The second and third justifications in paragraphs 17 and 18 are supportive of the first justification, although, perhaps due to a still-stinging recollection of his long, false start in drafting the Final Order, the Administrative Law Judge more easily finds legal justification for respondents' confusion in 2006, despite the clear mandates of section 627.0629(1).

25. Petitioner is not entitled to fees and costs because respondents have proved that their adoption, in 2006, of the invalidated matrix of Form 1699 was reasonable in fact and law.

ORDER

Based on the foregoing, it is

ORDERED that Petitioner's request for attorneys' fees and costs is denied.

DONE AND ORDERED this 16th day of January, 2013, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.