

**STATE OF FLORIDA
BUILDING COMMISSION**

IN RE:

MALIBU LODGING INVESTMENTS,
LLC, a Florida limited liability
corporation.

AMENDMENT

CASE No. DCA09-DEC-259

**AMENDED PETITION FOR DECLARATORY
STATEMENT**

Malibu Lodging Investments, LLC, (“Malibu”) files this petition for declaratory statement (the “Petition”) and states as follows:

A. Jurisdiction.

1. The Florida Building Commission (the “Commission”) has jurisdiction to issue declaratory statements pursuant to section 120.565, Florida Statutes, relating to an agency’s interpretation and enforcement of the specific provisions of the Florida Building Code (“FBC”), which the agency is authorized to enforce. *See* § 553.775(3)(a), Fla. Stat.¹; Ch. 28-105, F.A.C. (2009).

¹ All references are to the 2009 Florida Statutes unless otherwise indicated.

B. The Petitioner.

2. Petitioner's address is 660 N.W. 81st Street, Miami, Florida 33150; its telephone number is (305) 324-0800 and its facsimile number is (305) 547-1820.

3. Petitioner is a Florida limited liability corporation. Petitioner is also the owner of the property located at 660 N.W. 81st Street, Miami, Florida 33150.

4. Petitioner is represented in this petition by Robert S. Fine, Esq., AIA, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131; telephone (305)579-0826; facsimile (305) 961-5826.

C. The Code Provision and its effect on Petitioner.

5. Petitioner owns and/or operates a building located at 660 N.W. 81st Street, Miami, Florida. (the "Miami Location"). Petitioner leases the exterior of the building to entities who cover significant portions of certain facades of the building with a lightweight material mural that contains artwork which presents an advertising message. In addition, Petitioner may consider acquiring additional sites in other areas of Florida such as in the general metropolitan areas of Tampa and Orlando (as well as additional locations in South Florida) to conduct the same business (lease the exterior of the buildings for advertising murals).

6. Because of the time and costs involved in preparing permit applications and associated submittals (if required), as well as the potential for

differing interpretations of Section 105.1 of the FBC by building officials in the various jurisdictions leading to inconsistent standards that Petitioner would have to abide by if expands its business in the state, the questions regarding the application or non-application of Section 105.1 of the FBC (2004, 2007)² to Petitioner's business substantially affects Petitioner.

7. Petitioner seeks a declaratory statement as to whether the installation and maintenance of such building facade murals require a building permit, as might otherwise be required by Section 105.1 of the FBC, and certain other related information as set forth below.

D. Nature of Declaratory Statement Sought.

8. Petitioner seeks a declaratory statement answering the following questions:

(a) Does the installation of lightweight material (such as vinyl mesh) murals on the exterior of existing buildings, where the material does not encroach the public right-of-way, require a building permit under Section 105.1 of the FBC (2004 and 2007 editions); and

² Both the 2004 and 2007 edition of the FBC are referred to on purpose. For a building that is currently undergoing construction, alteration or repair pursuant to a master building permit issued under FBC 2004, a subsidiary permit, should it be required, for the installation, replacement, or repair of a vinyl mural, *might* be subject to FBC 2004 as opposed to FBC 2007, even though FBC 2007 is now in effect. *See* § 553.73(6)(d), Fla. Stat.

(b) If the answer to question (a) above is in the affirmative, then, on an existing building which had a mural as described in question (a) above installed prior to the original effective date of the Florida Building Code (*i.e.*, the 2001 edition), would the lowering and then rehanging the mural material to the existing fasteners periodically for maintenance purposes (or, for example, during hurricane warning through the passing of the storm periods) constitute a repair or an alteration under FBC Existing Building Volume (2007 edition)(“FBC-EB”); and,

(c) Regarding the scenarios set forth in questions (a) and (b) above, would the vinyl murals described in questions (a) and (b) above be considered “structural elements” for the purposes of FBC-EB?

9. The FBC’s provision requiring permits provides, in pertinent part:

Required. Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any required impact-resistant coverings, electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

§ 105.1, FBC (2004, 2007).³

³ Section 105.1 of the FBC is consistent with Section 553.79(1), Florida Statutes, which sets forth the statutory mandate for when a building permit is required.

10. Because the vinyl murals in question do not fall within mandate of Section 105.1 of the FBC, their installation should not require a building permit.

11. Because the vinyl murals in question are not “structural,” they should not be considered to be structural elements for the purposes of the FBC-EB. *See* Definition of “Structural Determination,” §202, FBC-EB.

**MEMORANDUM OF LAW IN SUPPORT OF MALIBU’S
AMENDED PETITION FOR DECLARATORY STATEMENT**

12. The Florida Building Code contains or incorporates 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. § 553.73(1)(a), Fla. Stat.

13. The Florida Building Code is an administrative rule. *Id.*; Rule 9B-3.047 (2009).

14. The Florida Supreme Court has observed: “Our courts have long recognized that the rules of construction applicable to statutes also apply to rules.” *Brown v. State of Florida*, 715 So. 2d 241, 243 (Fla. 1998).

i. The murals described in paragraph 8(a) should not require a building permit.

15. Section 101.2 of the FBC provides:

The provisions of this code shall apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures.

Note that while this provision discusses what activities the FBC has jurisdiction over, it does not state which activities require a building permit.

16. Section 105.1 of the FBC is the governing section that expressly sets forth what activities require a building permit, as follows:

Required. Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a *building or structure*, or to erect, install, enlarge, alter, repair, remove, convert or replace any required impact-resistant coverings, electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

§ 105.1, FBC (2004, 2007)(emphasis added).

17. Because Section 105.1 of the FBC expressly states what activities require a building permit, it would be inappropriate to use Section 101.2 to make a determination as to which activities require a building permit. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995)(“When the legislature has used a term... in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.”).

18. Section 105.1 is comprised of a list of verbs and subjects that define the instances for which a building permit is required. In the sections below, it will

be demonstrated that the murals discussed herein are not implicated by any of the verbs listed in Section 105.1 or the subjects contained within Section 105.1

19. "...required impact-resistant coverings, electrical, gas, mechanical or plumbing system[s]," are not in any way related to the issue of vinyl murals, therefore these subjects in Section 105.1 are not applicable to the questions posed in this petition. § 105.1, FBC.

20. Similarly, because the (existing) buildings referred to in this petition are not being constructed, enlarged, repaired, moved, demolished or undergoing a change of occupancy, these verbs in Section 105.1 are inapplicable to the question posed in this petition. *Id.*

21. With the verbs and subjects from Section 105.1 set forth in paragraphs 18 and 19 above excluded from the question posed in this petition, the only remaining verb is "alter." In other words, would the installation of the murals "alter" the existing building.

22. The FBC does not define the word "alter," but does define "alteration." Alteration is defined as "[a]ny construction or renovation to an existing structure other than a repair or addition." § 202, FBC-EB (2007).

23. Addition is defined as "[a]n extension or increase in floor area, number of floors, or height of a building or structure. *Id.* Therefore, this term is inapplicable to the question posed in paragraph 8(a) above.

24. Repair is defined as “[the] patching, restoration and/or minor replacement of materials, elements, components, equipment and/or fixtures for the purposes of maintaining such materials, elements, components, equipment and/or fixtures in good or sound condition. *Id.* Therefore, this term is inapplicable to the question posed in paragraph 8(a) above.

25. Renovation is not defined in the FBC. However, the dictionary definition of “renovate” is “to restore to a former better state (as by cleaning, repairing, or rebuilding). *See* Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/renovation>, last accessed September 10, 2009. Therefore, the term “renovation” is inapplicable to the question posed in paragraph 8(a) above.

26. Therefore, the answer to the question posed in paragraph 8(a) above falls to whether the installation of vinyl murals on an existing building is “construction.”

27. The word “construction” is defined in the Merriam-Webster dictionary as “the process, art, or manner of constructing something; *also* : a thing constructed.” *See* Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/construction>, last accessed September 10, 2009.

28. The Florida Supreme Court has held, in regard to interpreting statutes and administrative rules: “[w]hen the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning.” *Brown*, 715 So.2d at 243.

29. The hanging of a 5 foot by 10 foot American flag outside of a patriots’ home’s second story window from the window sill would not be considered to be constructed or construction. Similarly, the hanging of the same flag horizontally from the house’s façade with tacks in each corner would not be considered “construction.”

30. The murals in question are but a larger version of the flag in paragraph 25. And like the flag, they are removable (for maintenance and) in times of severe weather. *See* ¶ 8(b). As such, the murals do not fall within the plain meaning of “construction.”

ii. The fact that a building permit is not required does not preclude enforcement of FBC requirements.

31. There should be no concern that because a building permit is not required the building code will not be enforced. As discussed below, there are mechanisms for enforcement of the FBC that do not require effectuating by the issuance of a building permit.

32. Florida Statutes mandate that local governments shall regulate building construction. § 553.80(1), Fla. Stat. However, the statutes do not set forth

all manner and methods in which such enforcement must take place. *See* Ch. 553, Part IV, Fla. Stat., *generally*.

33. Using Miami-Dade County as an example, the Code of Miami-Dade County (“MDC Code”) incorporates the FBC by reference. § 8-1, 8-2, MDC Code.

34. The MDC Code further provides: “Upon presentation of the proper credentials, the Building Official or his duly authorized representatives may enter, at any reasonable time, any building, structure or premises for the purposes of inspection or to prevent violation of this Chapter.” § 8-21.1(c), MDC Code.

35. The FBC bolsters the ability of that building official who has entered a premises (as described above) in enforcing the FBC, whether or not a permit for the work in question was required. One such FBC provision is as follows:

Tests. Whenever there is insufficient evidence of compliance with the provisions of this code, or evidence that a material or method does not conform to the requirements of this code, or in order to substantiate claims for alternative materials or methods, the building official shall have the authority to require tests as evidence of compliance to be made at no expense to the jurisdiction. Test methods shall be as specified in this code or by other recognized test standards. In the absence of recognized and accepted test methods, the building official shall approve the testing procedures. Tests shall be performed by an approved agency. Reports of such tests shall be retained by the building official for the period required for retention of public records.

104.11.2, FBC (2004, 2007).

36. Therefore, in the particular case of the murals being discussed herein, the building official may enter the premises in accordance with the FBC and

appropriate law, and require that the property owner demonstrate that the murals meet any applicable requirements of the FBC, even if no permit is/was required for the murals. Accordingly, it cannot be argued that by not requiring a building permit, the local government/building official is precluded from assuring itself that the vinyl murals do not meet any applicable FBC requirements.

iii. The vinyl murals described in this petition are not structural elements.

37. The FBC-EB (2007) states as follows:

STRUCTURAL DETERMINATION. For purposes of this code, "structural" shall mean any part, material or assembly of a building or structure which affects the safety of such building or structure and/or which supports any dead or designed live load and the removal of which part, material or assembly could cause, or be expected to cause, all or any portion to collapse or fail.

§ 202, FBC EB 2007. Because the vinyl murals discussed in this petition clearly do not fall within the definition above, they cannot be considered to be structural elements for the purpose of the FBC.

CONCLUSION

Petitioner respectfully requests that the Commission issue a declaratory statement declaring that the installation of vinyl murals on the exterior of buildings does not require a building permit, although such murals may be subject to applicable FBC requirements; that the lowering and rehangng of such murals for

maintenance purposes and during severe weather events do not constitute a repair or alteration; and that such murals are not “structural” elements under the FBC.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing by Registered E-mail and FedEx upon:

James Richmond, Esq.
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Mo Madani
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This 11 day of September, 2009.

By: _____



Robert S. Fine

Counsel for Malibu Lodging Investments, LLC