

**STATE OF FLORIDA
BUILDING COMMISSION**

IN RE:

940 OCEAN DRIVE, LLC.,

Petitioner/Appellant

CASE NO. DCA _____

LOWER TRIBUNAL (BOAF
PANEL) PETITION NO. 65

**APPEAL OF FLORIDA BUILDING
CODE BINDING INTERPRETATION**

Petitioner, 940 Ocean Drive, LLC., files this appeal of Florida Building Code Binding Interpretation No. 65 and states as follows:

Introduction

Petitioner is the owner/developer of the Breakwater/Edison Hotel, a historic property located in the south Miami Beach historic Art Deco District. As part of its plans to restore and renovate the hotel, Petitioner plans to construct a spa pool. Petitioner applied to the Department of Health (“DOH”) for variances from two of the requirements for public swimming pools and bathing places that are codified in the DOH rules in the Florida Administrative Code (Chapter 64E-9) and restated in the Special Occupancy Chapter (Chapter 4) of the 2007 edition of the Florida

Building Code (“FBC”). The Building Official refused to recognize and be bound by the DOH-issued variances. Under Section 553.775, Florida Statutes, Petitioner appealed the decision of the Building Official first to the local board of appeals, and then through the binding interpretation process set forth in Section 553.775(3). Petitioner now appeals the resulting binding interpretation of the FBC.

Jurisdiction

1. The Florida Building Commission (the Commission) has jurisdiction to hear and adjudicate appeals of binding interpretations of the FBC. *See* § 553.775(3)(c)(7), Fla. Stat.¹

The Agencies

2. The Binding Interpretation being appealed was issued by the Commission upon review by a panel coordinated by the Building Officials Association of Florida, Inc. (“BOAF”). The Commission’s address is 2555 Shumard Oak Boulevard, Tallahassee, Florida 32399-2100, Attention: Jim Richmond, Esq., Deputy General Counsel and Paula Ford, Agency Clerk.

3. This appeal involves a decision of the Building Official of the City of Miami Beach, Florida. The address is 1700 Convention Center Drive, Miami Beach, Florida 33139, Attention: Richard McConachie, Building Official and Rhonda Montoya-Hasan, Esq., Senior Assistant City Attorney.

¹ All references to Florida Statutes shall be to the 2010 edition unless otherwise indicated.

4. The subject matter of the appeal involves a variance issued by the DOH. DOH's address is 4052 Bald Cypress Way, Bin # A02, Tallahassee, Florida 32399 -1703, Attention: Lucy Schneider, Esq. The DOH variance is Swimming Pool/Bathing Place Variance Request Application #2114.

The Petitioner

5. Petitioner, 940 Ocean Drive, LLC's, address is 1400 Broadway, 15th Floor, New York, New York 10018. Its telephone number is (646) 383-8251.

6. Petitioner's representative is Robert S. Fine, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131. The telephone number is (305) 579-0826, and e-mail address is FineR@gtlaw.com.

7. As set forth in the online petition for binding interpretation quoted below, Petitioner's substantial interests will be affected by the agency determination as follows:

Petitioner owns the Breakwater/Edison Hotel (the "Hotel") located at 940 Ocean Drive, Miami Beach, Florida. The Hotel is an historic building located in the south Miami Beach historic Art Deco District. The Hotel is undergoing renovations that include preservation activities as well as "updating" of some of the hotel amenities. Part of this work includes the construction of a small pool intended to be used as a spa pool (the "Pool").

The Florida Department of Health ("DOH") granted variances from two of its pool construction regulations which are included in the Florida Building Code's (the "FBC") Special Occupancy section. However, the local building official (the "Building Official") will not accept DOH's final order. The local building official first interpreted

the FBC and the Florida Administrative Code (the "FAC") as not authorizing DOH to granting variances from the Code. At hearing before the Miami-Dade County Board of Rules and Appeals (the "Local Board"), the Building official, through counsel, conceded that the DOH has jurisdiction to grant variances from the Code but that he was not bound by the variance. The Building Official explained that he would not issue a building permit absent his own independent determination that the provisions of the FBC for which the DOH had granted variances were complied with.

As a result of the Building Official's interpretation, the pool permitting and construction is being delayed pending the outcome of this dispute. Additionally, absent a favorable binding interpretation of the Florida Building Commission, petitioner will be required to redesign and construct the pool differently than already designed and desired. Finally, the delay caused by the Building Official's interpretation has prolonged completion deadlines, has increased project costs and threatens further cost increases.

The Agency Decision

8. Petitioner received the Binding Interpretation (i.e., the agency decision) on September 7, 2010. The decision was posted on the Commission's Binding Interpretation Internet website at:
http://www.floridabuilding.org/bi/bi_pub_bind_interp_dtl.aspx?param=ACcitd%2fvMjIpOBM23iHLYA%3d%3d (last visited September 13, 2010). A copy of the Binding Interpretation is attached hereto as Exhibit A.

Concise Statement of Ultimate Facts Alleged

9. Petitioner applied for, and was granted, two variances from the requirements of Chapter 64E-9.010(5) and 64E-9.006(1) of the Florida

Administrative Code (“F.A.C.”)(the “Variances”). *See* Variance letter final order attached hereto as Exhibit B.

10. These provisions are restated in the FBC at Sections 424.1.8.5; and, 424.1.2.1 and 424.1.2.4, respectively.

11. The Building Official made a determination that he is not bound by the Variances, and that “the DOH cannot waive the requirement of the deck as per the FBC.” E-mail from Richard McConachie to Robert Fine dated June 29, 2010, attached as Exhibit C.

12. Upon appeal of the decision of the Building Official, the Miami-Dade County Board of Rules and Appeals (“BORA”) affirmed the determination of the Building Official. *See* Letter order dated July 28, 2010, attached as Exhibit D.

13. The decision of BORA was timely appealed to the Commission as a request for Binding Interpretation of the Florida Building Code. The BOAF panel affirmed the decision of BORA-- that the DOH may not “issue a variance to the FBC which binds the Building Official to abide such variance.” *See* Exhibit A.

14. The decision of the Commission, by way of the BOAF panel, is being timely filed herewith. *See* § 553.775(3)(7), Fla. Stat.

15. Sections 514.021 and 514.0115(5), Florida Statutes, set out the respective jurisdiction(s) of the Commission (and by extension, the Building

Official), and DOH, in regard to provisions of the FBC governing public swimming pools.

16. One of the variances attained by Petitioner is in regard to the Petitioner's desire to utilize a clear acrylic material as opposed to white or light pastel colored tile on one wall of the pool. DOH's jurisdiction over this issue has been confirmed by the Department of Administrative Hearings (DOAH). *See Flamingo Inn of Grassy Key v. Dept. of Health*, DOAH Case no. 88-4561 (1989)(DOAH recommends that DOH grant a variance from the DOH's regulations requiring light colored surfaces in pools.).

17. The second variance attained by Petitioner is in regard to the length of unobstructed four feet wide pool deck around the pool. DOH's jurisdiction over this issue has likewise been confirmed by DOAH. *See City of Sunrise v. Dept. of Health*, DOAH Case No. 05-2955 (2006)(DOAH recommends that DOH grant a variance from the requirement that wading pools have a minimum 10 foot deck around at least 50% of their perimeter with the remainder at least four feet wide).

18. The binding interpretation issued by the BOAF panel does not address the express language in Section 514.021(2), Florida Statutes, that states that DOH is authorized to conduct plan reviews, to issue approvals, and to enforce the special occupancy provisions of the FBC which apply to public swimming pools and bathing places.

19. There are no material facts in this matter that are in dispute.

**Statement of Rules or Statutes that Require Reversal of the
Binding Interpretation**

20. Attached as Exhibit E is the *Statement in Support of Petitioner's Interpretation* that was submitted as part of the petition for Binding Interpretation. This statement sets forth the rules and statutes that require reversal of the BOAF Binding Interpretation and support adoption of Petitioner's proposed interpretation.

21. Attached as Exhibit F is the complete Petition for Binding Interpretation that was submitted to the BOAF panel for consideration.

22. Section 553.775(3)(c)9., Florida Statutes, provides that the fact that Petitioner has commenced construction may not be grounds for determining this issue to be moot if the issue is likely to arise in the future. Because the Building Official (as well as the five building officials in the BOAF panel) have taken the position that building officials are not bound by variances issued by DOH for public swimming pools and bathing places, it is certainly likely that this issue may arise in the future and therefore, this appeal should not become moot even if Petitioner starts construction before the appeal is completed.

Statement of Relief Sought by Petitioner

23. Petitioner seeks a binding interpretation of the FBC, solely in regard to public swimming pools (and bathing places including spa pools), as defined in

Sections 514.011(2), Florida Statutes, and Section 424.1, Florida Building Code (the “FBC”), that holds:

The provisions in the Section 424 of the FBC that are intended to protect the health, safety and welfare of persons using public swimming pools and bathing places including measures to ensure the safety of bathers, and which are found in the special occupancy provisions of the FBC, are subject to enforcement by DOH, which authority includes conducting plan reviews, issuing approvals and conducting inspections.

Regulations governing the design, alteration, modification, or repair of public swimming pools or bathing places which have no impact on the health, safety and welfare of persons using public swimming pools or bathing places, including those governing the construction, erection or demolition of public swimming pools or bathing places, are preempted to the Florida Building Commission and as such, are enforced by local governments (building officials), and not DOH.

As a result of the above, when DOH grants a variance from the provisions in Chapter 424 of the FBC that are intended to protect the health, safety and welfare of persons using public swimming pools and bathing places including measures to ensure the safety of bathers, the building officials may not circumvent that variance by conducting a second independent plan review for compliance with the provisions for which the variance was granted and then withholding approval or denying the plan (unless the denial is based upon provisions of the FBC that govern the construction, erection or demolition of public swimming pools or bathing places). An interpretation of the Florida Statutes and Rules (including DOH regulations and the FBC) that would allow the building official to reject such a variance would be an absurd result that is prohibited by the rules of statutory construction.

The variance final order issued by DOH to the Breakwater/Edison Hotel for its pool (#2114) is valid and may not be rejected by the building official. The building official must adopt and recognize the variance and cannot deny the permit on the basis of noncompliance

with the FBC provisions from which DOH granted the Breakwater/Edison Hotel variances.

Conclusion

For the reasons set forth above, and supported by the Exhibits attached hereto, Petitioner respectfully requests that the Commission reverse Binding Interpretation of the FBC Number 65 issued by the BOAF panel, replace it with the binding interpretation described in paragraph 21 above, and hold that the variance order #2114 issued to Petitioner by DOH is valid and binding on the Building Official.

Respectfully submitted,

Robert S. Fine, Esq.
Florida Bar No. 0155586
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0717
E-mail: FineR@gtlaw.com

By: 

Counsel for 940 Ocean Drive, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by Registered e-mail with a courtesy copy by U.S. Mail upon:

Richard McConachie
Building Official
Rhonda Montoya-Hasan, Esq.
Senior Assistant City Attorney
City of Miami Beach
1700 Convention Center Drive
Miami Beach, Florida 33139
e-mail:
richardmconachie@miamibeachfl.gov
rhondamontoya@miamibeachfl.gov

Jim Richmond, Esq.
Deputy General Counsel
Florida Building Commission
2555 Shumard Oaks Boulevard
Tallahassee, Florida 32399-2100
e-mail:
jim.richmond@dca.state.fl.us

Doug Harvey, Executive Director
Building Officials Association of Florida
Lake Emma Road
Lake Mary, FL 32746-6121
email:
doug@boaf.net

Lucy Schneider, Esq.
Florida Department of Health 3697
4052 Bald Cypress Way, Bin # A02
Tallahassee, Florida 32399 -1703
e-mail:
Lucy_Schneider@doh.state.fl.us

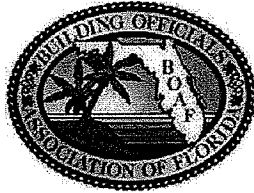
This 14th day of September, 2010.

By: 
Robert S. Fine

Counsel for 940 Ocean Drive, LLC

Exhibit A

EXHIBIT "A"



FLORIDA BUILDING CODE BINDING INTERPREATION



Date: September 6, 2010

Report # 65

Petitioner: 940 Ocean Drive, LLC

Year: 2007

Code: Building

Section: 424.1

Submittal: The Florida Department of Health ("DOH") granted variances from two of its pool construction regulations which are included in the Florida Building Code's (the "FBC") Special Occupancy section. However, the local building official (the "Building Official") will not accept DOH's final order. The local building official first interpreted the FBC and the Florida Administrative Code (the "FAC") as not authorizing DOH to granting variances from the Florida Building Code. At a hearing before the Miami-Dade County Board of Rules and Appeals (the "Local Board"), the Building official, through counsel, conceded that the DOH has jurisdiction to grant variances from the Code under their jurisdiction, but he was not bound by the variance. The Building Official explained that he would not issue a building permit absent his own independent determination that the provisions of the FBC for which the DOH had granted variances were complied with.

Question: May the Department of Health issue a variance to the Florida Building Code which binds the Building Official to abide such variance?

Answer: No.

Commentary: While the Department of Health may have authority to issue a variance or waiver to the rules which govern the Department where properly authorized to do so, the Florida Building Code is interpreted and enforced by the Building Official, licensed and charged under Florida Statute 468, Part XII. The DOH is given authority by statute to grant variance only to rules adopted under Florida Statute, Section 514. The Florida Building Code was adopted under Florida Statute Section 553 Part IV, therefore,

the DOH does not have authority to waive any provision of the Florida Building Code (FBC). Plan reviews by any state or local agency are in addition to plan reviews by the local jurisdiction having building code enforcement authority, and cannot be waived by said agency.

Florida Statute 514.0115 states: Exemptions from supervision or regulation; variances.

(5)The department may grant variances from any rule adopted under this chapter pursuant to procedures adopted by department rule.

Therefore, it is our interpretation that the DOH does not have authority to grant a waiver of any provision of the FBC and the local Building Official for Miami-Dade County CCO is not required to recognize the waiver granted by DOH in this case.

In addition, F.B.C. 424.1 reminds us that “other administrative and programmatic provisions may apply”. This statement simply means that DOH can impose additional requirements above what the Building Official may be require in accordance with the Florida Building Code - Building. In other words, the Department of Health may enforce stricter requirements but they cannot waive or lessen the requirements imposed by the Florida Building Code, and, therefore, the Building Official.

Exhibit B

EXHIBIT "B"



Charlie Crist
Governor

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General

April 2, 2009

Certified No.

7005 1820 0003 1856 3614

940 Ocean Drive, LLC
1400 Broadway, 15th Floor
New York, NY 10018

RE: Swimming Pool/Bathing Place Variance Request
Application #2114
Breakwater/Edison Hotel Spa

Dear Sir or Madam:

Please be advised that the Advisory Review Board for Swimming Pools and Bathing Places reviewed your application for variance on March 11, 2009. Where variance is requested, the board considers whether the hardship was caused intentionally, whether a reasonable alternative exists, and whether the health and safety of pool patrons are at risk. The board recommended approval of your application for variance regarding:

1. Chapter 64E-9.010(5), Florida Administrative Code (F.A.C.) (If the spa water area is 120 square feet or larger the spa shall have 4 feet wide deck around the entire spa perimeter).
2. Chapter 64E-9.006(1), F.A.C. (Acrylic wall color-slip resistant. Pool shall be white or light pastel in color and be slip resistant).

After reviewing your application and considering the board's recommendation, I hereby approve your request for variance with the following provisos:

1. Pool shall be permitted as a spa.
2. Provide contrasting color around acrylic panels.

Fact: Chapter 64E-9.010(5), F.A.C., requires that If the spa water area is 120 square feet or larger the spa shall have a four feet wide deck around the entire spa perimeter and Chapter 64E-9.006(1), F.A.C., requires that acrylic color shall be slip resistant. Pool shall be white or light pastel in color and be slip resistant. You indicate that these requirements have not been met.

940 Ocean Drive, LLC
Breakwater/Edison Hotel Spa
April 2, 2009
Page 2

Conclusion: The requirements of Chapter 64E-9.010(5), F.A.C., and Chapter 64E-9.006(1), F.A.C., have not been met. With the above proviso met, it is not likely that significant impact on the health and safety of bathers will occur.

This variance, as approved, applies only to that section of the Florida Administrative Code for which the variance was requested. This variance in no way exempts compliance with other state and local regulations.

A party who is adversely affected by this action may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Attached is the Notice of Rights to Appeal procedure.

If you have any questions concerning this matter, please call Robert Pryor at (850) 245-4444, extension *2369.

Sincerely,



Patti Anderson, P.E.
Chief, Bureau of Water Programs

PA/phd
Attachments
cc: Miami-Dade County Health Department

NOTICE OF RIGHT TO APPEAL

A party whose substantial interest is affected by this Order may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Chapter 28-106, Florida Administrative Code, governs such proceedings. A petition for hearing must be in writing and must be received by the Agency Clerk for the Department within twenty-one (21) days from receipt of this Order. The address for the Agency Clerk is: 4052 Bald Cypress Way, BIN #A02, Tallahassee, Florida 32399-1703. The Agency Clerk's facsimile is (850) 410-1448.

Mediation is not available as an alternative remedy.

Your failure to submit a petition for hearing within 21 days from receipt of this Order will constitute a waiver of your right to administrative hearing, and this Order shall become a "Final Order."

Should this Order become a "Final Order," a party who is adversely affected by it 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 may be commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Department of Health and a second copy, accompanied by the filing fees required by law, with the Court of Appeal in the appropriate District Court. The notice must be filed within (thirty) 30 days of the rendition of the Final Order.

Exhibit C

Fine, Robert (Shld-Mia-ADA/Env)

From: McConachie, Richard [RichardMcConachie@miamibeachfl.gov]
Sent: Tuesday, June 29, 2010 1:00 PM
To: Fine, Robert (Shld-Mia-ADA/Env)
Cc: Montoya, Rhonda; Gonzalez, Alfredo J. (Shld-Mia-Env); Medrano, Leonel; Anderson, Miguel; Salas, Gladys; Zeigler, James
Subject: RE: Breakwater Hotel Spa Pool

Robert,

I was in contact with Bob Vincent with the DOH and it is still my determination that the DOH cannot waive the requirement of the deck as per the FBC. The plans submitted do not comply with the FBC and will remain denied. Please check all comments as I believe you may have other comments that need to be addressed.

Rich

MIAMIBEACH

Richard McConachie, Building Official
BUILDING DEPARTMENT
1700 Convention Center Drive, 2nd Floor, Miami Beach, FL 33139
Tel: 305-673-7610, Ext. 6806 / Fax: 786-394-4073 / www.miamibeachfl.gov

We are committed to providing excellent public service and safety to all who live, work and play in our vibrant, tropical, historic community.

From: FineR@gtlaw.com [mailto:FineR@gtlaw.com]
Sent: Tuesday, June 29, 2010 12:23 PM
To: McConachie, Richard
Cc: Montoya, Rhonda; gonzalezaj@gtlaw.com
Subject: Breakwater Hotel Spa Pool

Richard:

I know the issue of jurisdiction between the building department and DOH is not an easy one and that you are working on it. I wanted to let you know that on Thursday, if you have not resolved the issue by then that I will be filing an appeal letter with BORA. Please know that my telling you now that I am going to do this, or the fact that I do do this, is not intended to be any sort of a threat, shot across the bow, etc. It is just that if I don't file by Thursday, I miss the agenda cutoff and my client will lose a month.

Even if I file on Thursday, it is really being done in an abundance of caution and with the hope that I can withdraw the letter and appeal within a few days after I file it. Again, this is not intended to push or pressure you, just to make sure that I don't miss an agenda deadline just in case you ultimately don't agree with my analysis and position. I am hopeful that after you have had time to fully consider my materials, you will agree with my position.

Thanks and best regards,

Robert

*Robert S. Fine, Esq., AIA
Environmental, Land Development, Accessibility,
Building and Life Safety Codes Law
Board Certified in Construction Law
Greenberg Traurig, PA
1221 Brickell Avenue
Miami, Florida 33131
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Exhibit D



MIAMI-DADE COUNTY, FLORIDA
MIAMI-DADE FLAGLER BUILDING
BOARD OF RULES AND APPEALS
SUITE 1603
140 WEST FLAGLER STREET
MIAMI, FLORIDA 33130-1563

Chairperson
William Derrer

Vice-Chairperson
Richard Horton

Sergeant of Arms
Thomas Utterback

Members
J. Robert Barnes, R.A.
Rolando Diaz, P.E.
Mario R. Esplora, Jr.
Alfonso Fernandez-Fraga,
P.E.
Chief Virgil Fernandez
Carmen T. Garcia
Jesus M. Gomez
Herbert Gopman, P.E.
John Kurzman
Gregory Pierce
Juan Datta Rizze, P.E.
Myron Rosner
Enrique Salvador
Paul L. Smith
Edward V. Woodward

Staff
Kathy Charles
Yvonne Bell
Nelly Nicvos

Secretary
Hermínio F. Gonzalez, P.E.

July 28th, 2010

Robert Fine, Esq.
Greenberg Traurig PA
1221 Brickell Avenue
Miami, FL 33131

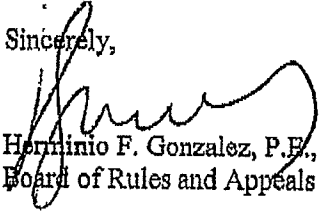
Re: Appeal of Building Official
City of Miami Beach
Breakwater/Edison Hotel Spa
940 Ocean Drive
Process No. B1002333
Swimming Pool/Bathing Place
2007 FBC Section 424.1.8.5
Variance Recognition

Dear Mr. Fine:

On July 22nd, 2010, the Board of Rules and Appeals (BORA) considered an appeal regarding the decision of the City of Miami Beach Building Official's refusal to accept the State of Florida Department of Health variance and require the installation of a four foot wide wet deck around the entire perimeter of the pool/spa. The Board determined that the requirements contained in the 2007 edition of the Florida Building Code, Building Section 424.1.8 were clear and specific. In doing so, the Board denied the appeal and affirmed the decision of the Building Official.

Please contact our Office at the above listing, if you require additional information.

Sincerely,


Hermínio F. Gonzalez, P.E., M.S., Secretary
Board of Rules and Appeals

cc: William Derrer, Chairperson, Board of Rules and Appeals
Richard McConachic, Building Official, City of Miami Beach
Rhonda Montoya-Hasan, Attorney, City of Miami Beach

Pursuant to Section 8-4 of the Code of Miami Dade, Appeals of decisions of the Board within the review jurisdiction of the Florida Building Commission shall be to the Florida Building Commission in the manner prescribed by law. Review of other decisions of the Board shall be to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules and Appellate Procedure for the review of rulings of any commission or board.

Exhibit E

EXHIBIT "E"

STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION PETITION 65

2. Statement in support of Petitioner's interpretation.

Brief synopsis of the local government/building official's interpretation

The local building official and staff of the Miami-Dade County Building Code Compliance Office (collectively, the "Building Official") have stated two positions. First, the Building Official originally argued that *any* requirement set forth in the FBC is under the exclusive jurisdiction of the building official for permitting and enforcement purposes. As such, the Building Official argues, a variance issued in a final order by DOH regarding a public swimming or bathing facility from provisions in the FBC need not be recognized and accepted by the Building Official. *See e-mail from Richard McConache (Building Official) to Robert Fine, dated June 29, 2010, Subject: Breakwater Hotel Spa Pool.*

The Building Official's second position was stated by counsel for the Building Official at hearing before the Miami-Dade County Board of Rules and Appeals (the "Local Board"). The Building Official's counsel argued that both local building officials and DOH have *independent* authority to interpret the FBC and that the Building Official is not required to recognize or adopt variances granted by the DOH. *See Transcript of Local Board Hearing dated July 22, 2010, p. 20, ln. 18-21.*

Discussion of Petitioner's Interpretation

The Building Official's position violates the clear and binding directives of the Florida legislature and should therefore be overruled and replaced by the binding interpretation requested here. When a conflict arises between statutes and administrative rules, the conflict must be decided in favor of the statute. *McLaughlin v. Dept. of Highway Safety and Motor Vehicles*, 2 So. 3d 988, 992 (Fla. 2d DCA 2008). The FBC is an administrative rule enacted pursuant to the express mandate of Florida Statute. Fla. Stat. § 553.73(1)(a); Rule 9N-1.001, F.A.C. (2010). The Building Official's interpretation, which relies upon the provisions of the FBC, disregards Florida Statutes that provide (1) that DOH is responsible for developing and enforcing regulations and FBC provisions regarding the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers); (2) that the Building Official is not responsible for such provisions; and (3) that DOH can delegate its authority to the Building Official by formal agreement (but has not done so). As such, the Building Commission should overrule the Building Official's interpretation as upheld by the Local Board and replace it with the binding interpretation requested here.

The legislature has stated its clear intent that the FBC be "enforced by authorized state and local government enforcement agencies." Fla. Stat. § 553.73(3). Accordingly, Section 553.80(1) of the Florida statutes provides that each authorized state agency "shall regulate building construction and, where authorized in the state agency's enabling legislation, each state agency shall enforce the Florida Building Code required by this part on all public or private buildings, structures, and facilities, unless such responsibility has been delegated to another unit of government pursuant to s. 553.79(9)." Fla. Stat. § 553.80(1) (emphasis added). Section 553.79(9) of the Florida Statutes allows state agencies to delegate their authority to enforce the FBC to the Building Official through a written agreement. No such written delegation

**STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65**

agreement between DOH and the Building Official has been produced by the Building Official or found in our research.

DOH has been authorized to enact and enforce regulations and FBC provisions regarding the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers). The pertinent enabling legislation provides:

514.021 Department authorization.--

(1) The department may adopt and enforce rules, which may include definitions of terms, to protect the health, safety, or welfare of persons using public swimming pools and bathing places. The department shall review and revise such rules as necessary, but not less than biennially. Sanitation and *safety standards shall include, but not be limited to, matters relating to structure; appurtenances; operation; source of water supply; bacteriological, chemical, and physical quality of water in the pool or bathing area; method of water purification, treatment, and disinfection; lifesaving apparatus; measures to ensure safety of bathers; and measures to ensure the personal cleanliness of bathers.*

(2) The department may not establish by rule any regulation governing the design, alteration, modification, or repair of public swimming pools and bathing places which has no impact on the health, safety, and welfare of persons using public swimming pools and bathing places. Further, the department may not adopt by rule any regulation governing the construction, erection, or demolition of public swimming pools and bathing places. It is the intent of the Legislature to preempt those functions to the Florida Building Commission through adoption and maintenance of the Florida Building Code....Further, *the department is authorized to conduct plan reviews, to issue approvals, and to enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places* in conducting any inspections authorized by this chapter. This subsection does not abrogate the authority of the department to adopt and enforce appropriate sanitary regulations and requirements as authorized in subsection (1).

(Emphasis added) In addition, Section 514.0115(5) of the Florida Statutes authorizes DOH to “grant variances from *any* rule adopted under this chapter pursuant to procedures adopted by department rule.”

In short, the above Florida Statutes plainly demonstrate the legislature's intent that DOH develop, enforce and grant variances from FBC provisions related to the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers), and that Building Officials' review be confined to other matters unless DOH delegates the responsibility to the Building Official.

**STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65**

The Building Official takes the position that DOH may grant a variance if it wants, but that under his jurisdiction enforcing the FBC, he should not, and will not, accept it. The building official argues that DOH cannot waive a(ny) requirement for a pool in the FBC:

Robert,

I was in contact with Bob Vincent with the DOH and it is still my determination that the DOH cannot waive the requirement of the deck as per the FBC. The plans submitted do not comply with the FBC and will be denied...

E-mail from Richard McConache to Robert Fine, dated June 29, 2010.

Such a position is in direct conflict with the statutes above. The Building Official's determination is based squarely upon the provisions of the FBC that were created pursuant to Fla. Stat. 553.80(1), Fla. Stat. 514.021. Because the FBC is an administrative rule, *see* Fla. Stat. § 553.73(1)(a), it cannot be allowed to supersede the express requirements of the statutes that authorize it. *McLaughlin*, 2 So. 3d at 992. The statutes above plainly authorize the DOH and not the Building Official to regulate the FBC's pool regulations related to the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers).

Notably, the Department of Administrative Hearings has already determined that both of the provisions for which variances were granted by DOH's final order relate to the health, safety and welfare of swimmers and bathers and are subject to the DOH's authority to grant variances. *See City of Sunrise v. Department of Health*, DOAH Case No. 05-2944 (2006) (DOAH recommends that DOH grant a variance from the requirement that wading pools have a minimum 10 foot deck around at least 50% of their perimeter with the remainder at least four feet wide.); *Flamingo Inn of Grassy Key v. Dept. of Health*, DOAH Case No. 88-4561 (1989) (DOAH recommends that DOH grant a variance from the DOH's regulations requiring light colored surfaces in pools.).

The Building Officials' argument that DOH and his office have concurrent jurisdiction over the aspects of the pool for which the variance in question was granted and that he has the authority to not abide by DOH's variance is equally unavailing.

This second interpretation again contradicts the clear intent of the Florida Statutes. Section 514.021 of the Florida Statutes tightly defines the jurisdiction of DOH in regard to the construction of public swimming pools and bathing places and acknowledges that these provisions may be placed in the FBC. Section 514.0115(5) then provides that DOH may grant variances from any rule adopted under Chapter 514 pursuant to procedures adopted by department (DOH) rule. It would lead to an absurd result (and a result that would render the variance powers given to DOH useless) to provide an agency the authority to grant variances from certain of its rules, allow an affected party to invest the time and resources to apply for,

**STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65**

make its case, and attain such a variance, and then allow a different agency to summarily reject (or not accept) the variance. The rules of statutory construction prevent such a result: ¹

It is axiomatic, however, that the courts must presume that statutes are passed with knowledge of prior existing statutes and where possible, it is the duty of the courts to favor a construction that gives a field of operation to all rather than construe one statute as being meaningless or repealed by implication. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978); *Woodgate Dev. Corp. v. Hamilton Invest. Trust*, 351 So. 2d 14, 16 (Fla. 1977). Therefore, whenever possible, courts must attempt to harmonize and reconcile two different statutes to preserve the force and effect of each. *See Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (stating that “[t]his follows the general rule that the legislature does not intend ‘to enact purposeless and therefore useless legislation.’”) (citation omitted).

Agency for Healthcare Administration v. Estate of Johnson, 743 So. 2d 83, 86 (Fla. 3d DCA 1999). Therefore, the building official cannot have the authority or jurisdiction to reject a variance from DOH so long as the subject matter of the variance falls within the authority of DOH regarding the construction of public swimming pools and bathing places in DOH's enabling statute and does not venture into areas expressly preempted to the Florida Building Commission. *Id.*; see also Fla. Stat. §§ 553.80(1), 514.0115(5), 514.021.

Conclusion

Because the provisions that DOH's variance final order fall within the jurisdiction of DOH and are not preempted to the Florida Building Commission, and the jurisdiction of DOH is authorized by Sections 553.80(1) and 514.021 of the Florida Statutes (and allowing the building official to reject the DOH variance order would violate the rules of statutory construction), the DOH variance order should be found to be valid and enforceable, and may not be rejected by the local government/building official.

¹ These rules apply to FBC as well as the applicable statutes. *See Brown v. State of Florida*, 715 So. 2d 241, 243 (Fla. 1998) (“Our courts have long recognized that the rules of construction applicable to statutes also apply to rules.”)

Exhibit F

EXHIBIT "F"

* Required fields

Form #: 9B-3.055(1)

Petition # 65
 County* Miami-Dade
 Jurisdiction* City of Miami Beach
 Get existing or register new Jurisdiction

Building Official Last Name* Richard
 Building Official First Name* McConachie
 Address* 1700 Convention Center
 City* Miami Beach
 State* Florida
 Zip Code* 33139
 Phone* 3056737000 Ext.
 Fax
 Email* richardmconachie@mie

Petitioner Name* 940 Ocean Drive, LLC
 Address* c/o Robert S. Fine
 1221 Brickell Ave.
 City* Miami
 State* Florida
 Zip Code* 33131
 Phone* 3055790826 Ext.
 Email* finer@gtlaw.com

Petitioner Representative's Name (if any) Robert Fine, Esq.
 Address Greenberg Traurig
 1221 Brickell Avenue
 City Miami
 State Florida
 Zip Code 33131
 Phone 3055790826 Ext.
 Email finer@gtlaw.com

Building Code Version* 2007
 Sub Code* Building
 Chapter & Topic* Chapter 4 - Special Detailed Requirements Based on Use and Occupancy

AUG 2 2 48 PM '10
 City of Miami Beach Building Dept.

Section* (Ex: 312.9)

424.1

If permitted, date of permit application

(mm/dd/yyyy)

Enter explanation of how the Petitioner's substantial interests are being affected by the local interpretation of the Florida Building Code*

Petitioner owns the Breakwater/Edison Hotel (the "Hotel") located at 940 Ocean Drive, Miami Beach, Florida. The Hotel is an historic building located in the south Miami Beach historic Art Deco District. The Hotel is undergoing renovations that include preservation activities as well as "updating" of some of the hotel amenities. Part of this work includes the construction of a small

Enter statement of the interpretation given to provisions of the Florida Building Code by the local building official and the manner in which the interpretation was rendered*

(If information from the final order or interpretation signed by the Building Official on letterhead is entered, it must be exactly as it appears in the hardcopy)

DOH granted variances from two of its pool construction regulations included in The FBC's Special Occupancy section (Chapter Four). In short, the Building Official interprets the FBC as granting both local building officials and DOH concurrent jurisdiction to interpret and enforce the FBC. He argues that both building officials and DOH must review a permit application for compliance with

| Select | Date | Attached File |
|--------------------------|------------|--|
| <input type="checkbox"/> | 08/02/2010 | Pet ID 65 BGD Interp Email dated June 29, 2010 from Building Official to Petitioner's Representative.pdf |
| <input type="checkbox"/> | 08/02/2010 | Pet ID 65 BGD Interp Local Board Hearing Transcript for July 22, 2010.pdf |

[Remove](#)

Enter statement of the interpretation that the petitioner contends should be given to the provisions of the Florida Building Code and a statement supporting the petitioner's interpretation*

See attached.

| Select | Date | Attached File |
|--------------------------|------------|--|
| <input type="checkbox"/> | 08/02/2010 | Pet ID 65 PET Interp Statement in Support of Petitioner's Interpretation for Petition 65.pdf |

[Remove](#)

[Save in Progress](#)

STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION

1. **Petitioner's proposed interpretation.**

Petitioner seeks a binding interpretation, solely in regard to public swimming pools (and bathing places including spa pools), as defined in Sections 514.011(2), Florida Statutes, and Section 424.1, Florida Building Code (the "FBC"), that holds:

- (1) The provisions in the Section 424 of the FBC that are intended to protect the health, safety and welfare of persons using public swimming pools and bathing places including measures to ensure the safety of bathers, and which are found in the special occupancy provisions of the FBC, are subject to enforcement by DOH, which authority includes conducting plan reviews, issuing approvals and conducting inspections.
- (2) Regulations governing the design, alteration, modification, or repair of public swimming pools or bathing places which have no impact on the health, safety and welfare of persons using public swimming pools or bathing places, including those governing the construction, erection or demolition of public swimming pools or bathing places, are preempted to the Florida Building Commission and as such, are enforced by local governments (building officials).
- (3) As a result of the above, when DOH grants a variance from the provisions in Chapter 424 of the FBC that are intended to protect the health, safety and welfare of persons using public swimming pools and bathing places including measures to ensure the safety of bathers, the building officials may not circumvent that variance by conducting a second independent plan review for compliance with the provisions for which the variance was granted and then withholding approval or denying the plan (unless the denial is based upon provisions of the FBC that govern the construction, erection or demolition of public swimming pools or bathing places). An interpretation of the Florida Statutes and Rules (including DOH regulations and the FBC) that would allow the building official to reject such a variance would be an absurd result that is prohibited by the rules of statutory construction.
- (4) The variance final order issued by DOH to the Breakwater/Edison Hotel for its pool is valid and may not be rejected by the building official. The building official must adopt and recognize the variance and cannot deny the permit on the basis of noncompliance with the FBC provisions from which DOH granted the Breakwater/Edison Hotel variances.

STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65

2. Statement in support of Petitioner's interpretation.

Brief synopsis of the local government/building official's interpretation

The local building official and staff of the Miami-Dade County Building Code Compliance Office (collectively, the "Building Official") have stated two positions. First, the Building Official originally argued that *any* requirement set forth in the FBC is under the exclusive jurisdiction of the building official for permitting and enforcement purposes. As such, the Building Official argues, a variance issued in a final order by DOH regarding a public swimming or bathing facility from provisions in the FBC need not be recognized and accepted by the Building Official. *See* e-mail from Richard McConache (Building Official) to Robert Fine, dated June 29, 2010, Subject: Breakwater Hotel Spa Pool.

The Building Official's second position was stated by counsel for the Building Official at hearing before the Miami-Dade County Board of Rules and Appeals (the "Local Board"). The Building Official's counsel argued that both local building officials and DOH have *independent* authority to interpret the FBC and that the Building Official is not required to recognize or adopt variances granted by the DOH. *See* Transcript of Local Board Hearing dated July 22, 2010, p. 20, ln. 18-21.

Discussion of Petitioner's Interpretation

The Building Official's position violates the clear and binding directives of the Florida legislature and should therefore be overruled and replaced by the binding interpretation requested here. When a conflict arises between statutes and administrative rules, the conflict must be decided in favor of the statute. *McLaughlin v. Dept. of Highway Safety and Motor Vehicles*, 2 So. 3d 988, 992 (Fla. 2d DCA 2008). The FBC is an administrative rule enacted pursuant to the express mandate of Florida Statute. Fla. Stat. § 553.73(1)(a); Rule 9N-1.001, F.A.C. (2010). The Building Official's interpretation, which relies upon the provisions of the FBC, disregards Florida Statutes that provide (1) that DOH is responsible for developing and enforcing regulations and FBC provisions regarding the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers); (2) that the Building Official is not responsible for such provisions; and (3) that DOH can delegate its authority to the Building Official by formal agreement (but has not done so). As such, the Building Commission should overrule the Building Official's interpretation as upheld by the Local Board and replace it with the binding interpretation requested here.

The legislature has stated its clear intent that the FBC be "enforced by authorized state and local government enforcement agencies." Fla. Stat. § 553.73(3). Accordingly, Section 553.80(1) of the Florida statutes provides that each authorized state agency "shall regulate building construction and, where authorized in the state agency's enabling legislation, each state agency shall enforce the Florida Building Code required by this part on all public or private buildings, structures, and facilities, unless such responsibility has been delegated to another unit of government pursuant to s. 553.79(9)." Fla. Stat. § 553.80(1) (emphasis added). Section 553.79(9) of the Florida Statutes allows state agencies to delegate their authority to enforce the FBC to the Building Official through a written agreement. No such written delegation

**STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65**

agreement between DOH and the Building Official has been produced by the Building Official or found in our research.

DOH has been authorized to enact and enforce regulations and FBC provisions regarding the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers). The pertinent enabling legislation provides:

514.021 Department authorization.--

(1) The department may adopt and enforce rules, which may include definitions of terms, to protect the health, safety, or welfare of persons using public swimming pools and bathing places. The department shall review and revise such rules as necessary, but not less than biennially. Sanitation and *safety standards shall include, but not be limited to, matters relating to structure; appurtenances; operation; source of water supply; bacteriological, chemical, and physical quality of water in the pool or bathing area; method of water purification, treatment, and disinfection; lifesaving apparatus; measures to ensure safety of bathers; and measures to ensure the personal cleanliness of bathers.*

(2) The department may not establish by rule any regulation governing the design, alteration, modification, or repair of public swimming pools and bathing places which has no impact on the health, safety, and welfare of persons using public swimming pools and bathing places. Further, the department may not adopt by rule any regulation governing the construction, erection, or demolition of public swimming pools and bathing places. It is the intent of the Legislature to preempt those functions to the Florida Building Commission through adoption and maintenance of the Florida Building Code...Further, *the department is authorized to conduct plan reviews, to issue approvals, and to enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places* in conducting any inspections authorized by this chapter. This subsection does not abrogate the authority of the department to adopt and enforce appropriate sanitary regulations and requirements as authorized in subsection (1).

(Emphasis added) In addition, Section 514.0115(5) of the Florida Statutes authorizes DOH to "grant variances from *any* rule adopted under this chapter pursuant to procedures adopted by department rule."

In short, the above Florida Statutes plainly demonstrate the legislature's intent that DOH develop, enforce and grant variances from FBC provisions related to the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers), and that Building Officials' review be confined to other matters unless DOH delegates the responsibility to the Building Official.

**STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65**

The Building Official takes the position that DOH may grant a variance if it wants, but that under his jurisdiction enforcing the FBC, he should not, and will not, accept it. The building official argues that DOH cannot waive a(ny) requirement for a pool in the FBC:

Robert,

I was in contact with Bob Vincent with the DOH and it is still my determination that the DOH cannot waive the requirement of the deck as per the FBC. The plans submitted do not comply with the FBC and will be denied...

E-mail from Richard McConache to Robert Fine, dated June 29, 2010.

Such a position is in direct conflict with the statutes above. The Building Official's determination is based squarely upon the provisions of the FBC that were created pursuant to Fla. Stat. 553.80(1), Fla. Stat. 514.021. Because the FBC is an administrative rule, *see* Fla. Stat. § 553.73(1)(a), it cannot be allowed to supersede the express requirements of the statutes that authorize it. *McLaughlin*, 2 So. 3d at 992. The statutes above plainly authorize the DOH and not the Building Official to regulate the FBC's pool regulations related to the health, safety and welfare of swimmers and bathers in public pools (including measures to ensure the safety of bathers).

Notably, the Department of Administrative Hearings has already determined that both of the provisions for which variances were granted by DOH's final order relate to the health, safety and welfare of swimmers and bathers and are subject to the DOH's authority to grant variances. *See City of Sunrise v. Department of Health*, DOAH Case No. 05-2944 (2006) (DOAH recommends that DOH grant a variance from the requirement that wading pools have a minimum 10 foot deck around at least 50% of their perimeter with the remainder at least four feet wide.); *Flamingo Inn of Grassy Key v. Dept. of Health*, DOAH Case No. 88-4561 (1989) (DOAH recommends that DOH grant a variance from the DOH's regulations requiring light colored surfaces in pools.).

The Building Officials' argument that DOH and his office have concurrent jurisdiction over the aspects of the pool for which the variance in question was granted and that he has the authority to not abide by DOH's variance is equally unavailing.

This second interpretation again contradicts the clear intent of the Florida Statutes. Section 514.021 of the Florida Statutes tightly defines the jurisdiction of DOH in regard to the construction of public swimming pools and bathing places and acknowledges that these provisions may be placed in the FBC. Section 514.0115(5) then provides that DOH may grant variances from any rule adopted under Chapter 514 pursuant to procedures adopted by department (DOH) rule. It would lead to an absurd result (and a result that would render the variance powers given to DOH useless) to provide an agency the authority to grant variances from certain of its rules, allow an affected party to invest the time and resources to apply for,

STATEMENT IN SUPPORT OF PETITIONER'S INTERPRETATION
PETITION 65

make its case, and attain such a variance, and then allow a different agency to summarily reject (or not accept) the variance. The rules of statutory construction prevent such a result.¹

It is axiomatic, however, that the courts must presume that statutes are passed with knowledge of prior existing statutes and where possible, it is the duty of the courts to favor a construction that gives a field of operation to all rather than construe one statute as being meaningless or repealed by implication. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978); *Woodgate Dev. Corp. v. Hamilton Invest. Trust*, 351 So. 2d 14, 16 (Fla. 1977). Therefore, whenever possible, courts must attempt to harmonize and reconcile two different statutes to preserve the force and effect of each. *See Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (stating that “[t]his follows the general rule that the legislature does not intend ‘to enact purposeless and therefore useless legislation.’ ”) (citation omitted).

Agency for Healthcare Administration v. Estate of Johnson, 743 So. 2d 83, 86 (Fla. 3d DCA 1999). Therefore, the building official cannot have the authority or jurisdiction to reject a variance from DOH so long as the subject matter of the variance falls within the authority of DOH regarding the construction of public swimming pools and bathing places in DOH's enabling statute and does not venture into areas expressly preempted to the Florida Building Commission. *Id.*; see also Fla. Stat. §§ 553.80(1), 514.0115(5), 514.021.

Conclusion

Because the provisions that DOH's variance final order fall within the jurisdiction of DOH and are not preempted to the Florida Building Commission, and the jurisdiction of DOH is authorized by Sections 553.80(1) and 514.021 of the Florida Statutes (and allowing the building official to reject the DOH variance order would violate the rules of statutory construction), the DOH variance order should be found to be valid and enforceable, and may not be rejected by the local government/building official.

¹ These rules apply to FBC as well as the applicable statutes. *See Brown v. State of Florida*, 715 So. 2d 241, 243 (Fla. 1998) (“Our courts have long recognized that the rules of construction applicable to statutes also apply to rules.”)



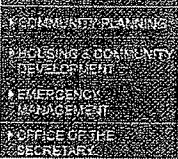
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Florida Building Codes
USER: Robert Fine, Greenberg Traurig, Petitioner

[Binding Interpretations Menu](#) > Receipt



Thank you Robert Fine, your Petition fee has been accepted. Please print this receipt for your records.

The system will also send a copy of your receipt to your Email Address on file.

The petitioner shall submit the petition to the local building official, who shall place the date of receipt on the petition. Print the petition and deliver two copies to the local building official. The local building official will date/timestamp your petition. After that time, you will need to come back in the system and enter the date/timestamp of the local building official receipt.

| | |
|------------------------|---------------------|
| Petition # | 65 |
| Payment Number | 74754 |
| Payment Total | \$250.00 |
| Date of Payment | 08/02/2010 04:02 PM |
| Payment Method | American Express |

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Department of Community Affairs
Florida Building Code Online
Codes and Standards
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100
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Robert S. Fine, Esq., AIA
Tel: (305) 579-0826
Fax: (305) 961-5826
E-Mail: finer@gtlaw.com

July 1, 2010

Mr. Herminio Gonzalez, P.E.
Secretary, Board of Rules and Appeals
140 West Flagler Street
Suite 1603
Miami, Florida 33130

Re: Appeal from Decision of the Building Official to not recognize and accept a variance final order issued by the Florida Department of Health for the spa pool at the Breakwater/Edison Hotel at 940 Ocean Drive, Miami Beach, Florida 33139.

Dear Mr. Gonzalez:

We represent 940 Ocean Drive, LLC, the owners of the Breakwater/Edison Hotel in regard to building and zoning code issues. Please consider this letter to be our request that you place the Project on the July 22, 2010 agenda of the Board of Rules and Appeals ("the Board" or "BORA") to appeal a decision of the Building Official. This appeal involves the Building Official's refusal to recognize and accept a final order variance from the Florida Department of Health ("DOH") regarding the spa pool at the Breakwater/Edison Hotel (the "Hotel").

Jurisdiction

The Board has jurisdiction to hear this appeal pursuant to Section 8-4(d) of the Miami-Dade County Code (the "County Code") regarding the Building Official's interpretation and application of the Florida Building Code ("FBC") and Florida Existing Building Code ("FEBC") as they are applicable and relate to the Project.

Issue on Appeal

Renovations are being made to the Hotel. As part of planning for a permitting those renovations, the owners of the Hotel applied for, and was granted by DOH a variance (a final order) from two of the requirements in the Florida Administrative Code ("F.A.C.") for swimming/spa pools. The variance was presented to the Building Official who refuses to recognize and accept the final order. This appeal seeks a determination from BORA that (1) a variance from DOH is valid and

Mr. Herminio Gonzalez
Secretary, Board of Rules and Appeals
July 1, 2010
Page 2

must be recognized by the building official when the subject matter of the variance falls within that authorized by Florida Statutes and the F.A.C.; and (2) the issues that the variance order affects are items which originate from the swimming/spa pool requirements of the DOH section of the F.A.C. and therefore the variance is valid and must be recognized by the building official.

Attachments

- (1) Copy of Variance, application #2114, issued by DOH on April 2, 2009.
- (2) Memorandum from Robert S. Fine, Esq., AIA to Richard McConache, Building Official, dated June 15, 2010 explaining the bases for why the variance order is valid and should be accepted by the building official.
- (3) E-mail from Richard McConache to Robert Fine, dated June 29, 2010, informing him that the building department will not accept the variance.

Based on the information in this appeal including the memorandum attached hereto and any additional information that may be provided to the Board prior to or at the hearing, we respectfully request that the Board reverse the decision of the Building Official and direct him to recognize and accept the variance final order issued by DOH.

If you have any questions regarding the above, please do not hesitate to call me.

Very truly yours,



Robert S. Fine, Esq., A.I.A.

cc: Richard McConache
Rhonda Montoya-Hasan
Charles Benson





Charlie Crist
Governor

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General

April 2, 2009

Certified No.

7005 1820 0003 1856 3614

940 Ocean Drive, LLC
1400 Broadway, 15th Floor
New York, NY 10018

RE: Swimming Pool/Bathing Place Variance Request
Application #2114
Breakwater/Edison Hotel Spa

Dear Sir or Madam:

Please be advised that the Advisory Review Board for Swimming Pools and Bathing Places reviewed your application for variance on March 11, 2009. Where variance is requested, the board considers whether the hardship was caused intentionally, whether a reasonable alternative exists, and whether the health and safety of pool patrons are at risk. The board recommended approval of your application for variance regarding:

1. Chapter 64E-9.010(5), Florida Administrative Code (F.A.C.) (If the spa water area is 120 square feet or larger the spa shall have 4 feet wide deck around the entire spa perimeter).
2. Chapter 64E-9.006(1), F.A.C. (Acrylic wall color-slip resistant. Pool shall be white or light pastel in color and be slip resistant).

After reviewing your application and considering the board's recommendation, I hereby approve your request for variance with the following provisos:

1. Pool shall be permitted as a spa.
2. Provide contrasting color around acrylic panels.

Fact: Chapter 64E-9.010(5), F.A.C., requires that If the spa water area is 120 square feet or larger the spa shall have a four feet wide deck around the entire spa perimeter and Chapter 64E-9.006(1), F.A.C., requires that acrylic color shall be slip resistant. Pool shall be white or light pastel in color and be slip resistant. You indicate that these requirements have not been met.

940 Ocean Drive, LLC
Breakwater/Edison Hotel Spa
April 2, 2009
Page 2

Conclusion: The requirements of Chapter 64E-9.010(5), F.A.C., and Chapter 64E-9.006(1), F.A.C., have not been met. With the above proviso met, it is not likely that significant impact on the health and safety of bathers will occur.

This variance, as approved, applies only to that section of the Florida Administrative Code for which the variance was requested. This variance in no way exempts compliance with other state and local regulations.

A party who is adversely affected by this action may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Attached is the Notice of Rights to Appeal procedure.

If you have any questions concerning this matter, please call Robert Pryor at (850) 245-4444, extension *2369.

Sincerely,



Patti Anderson, P.E.
Chief, Bureau of Water Programs

PA/phd
Attachments
cc: Miami-Dade County Health Department

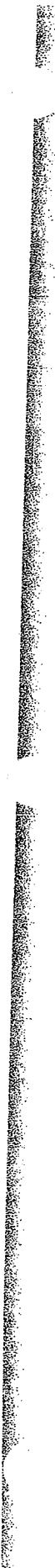
NOTICE OF RIGHT TO APPEAL

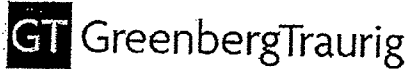
A party whose substantial interest is affected by this Order may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Chapter 28-106, Florida Administrative Code, governs such proceedings. A petition for hearing must be in writing and must be received by the Agency Clerk for the Department within twenty-one (21) days from receipt of this Order. The address for the Agency Clerk is: 4052 Bald Cypress Way, BIN #A02, Tallahassee, Florida 32399-1703. The Agency Clerk's facsimile is (850) 410-1448.

Mediation is not available as an alternative remedy.

Your failure to submit a petition for hearing within 21 days from receipt of this Order will constitute a waiver of your right to administrative hearing, and this Order shall become a "Final Order."

Should this Order become a "Final Order," a party who is adversely affected by it 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 may be commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Department of Health and a second copy, accompanied by the filing fees required by law, with the Court of Appeal in the appropriate District Court. The notice must be filed within (thirty) 30 days of the rendition of the Final Order.





Memorandum

TO: Richard McConache, Building Official

CC: Rhonda Montoya-Hasan, Esq.
Alfredo Gonzalez, Esq.
Charles Benson

FROM: Robert S. Fine, Esq., AIA

DATE: June 15, 2010

RE: Breakwater/Edison Hotel Spa: Department of Health Variance.
Process No. B1002333

Question presented:

Does a variance granted by the Florida Department of Health preempt the requirements of the Florida Building Code for those aspects of public swimming pools that the variance is granted for?

Short answer:

Yes. But only when the variance implicates the special-occupancy requirements of public swimming pools which may be found in the Florida Building Code ("FBC") but have their origin in the Department of Health's administrative rules. The Department of Health may not vary regulations governing the construction, erection or demolition of public swimming pools. Those requirements are within the purview of the Florida Building Commission.

Discussion:

The requirements for the construction of public swimming pools are found in Chapter 514, Florida Statutes (F.S.), Chapter 64E-9 of the Florida Administrative Code (F.A.C.), and Section 424.1 of the FBC. There are two categories of requirements for public swimming pools: (1) rules to protect the health, safety or welfare of persons using public swimming pools and bathing places; and (2) rules governing the construction, erection, or demolition of public swimming pools and bathing places. § 514.021, F.S. The rules to protect the health safety or welfare of persons using such pools are adopted and enforced by the Department of Health. § 514.021(1), F.S. The rules governing the construction, erection, or demolition of such pools are

To: Richard McConache, Building Official
From: Robert S. Fine
Date: June 15, 2010
Re: Breakwater/Edison Hotel Spa: Department of Health Variance

Page 2

preempted from the Department of Health to the Florida Building Commission through adoption and maintenance of the FBC. § 514.021(2).

The rules to protect the health, safety and welfare of persons using public swimming pools and bathing places are codified in Chapter 64E-9 of the F.A.C. For spa pools such as the Breakwater's, the rules are found in Rule 64E-9.010 of the F.A.C. which incorporates Rule 64E-9.006. *See* § 64E-9.010(1), F.A.C. These rules cover such issues as color, pattern or finish of pool interior, water depths, steps and handrails, minimum width of deck around pool perimeter, etc., *see*, § 64E-9.010(1)-(5), F.A.C., and the colors of floors and walls, *see* § 64E-9.006 (1)(a), F.A.C. These rules are special-occupancy rules in the FBC because they are promulgated by a state agency for incorporation into the FBC.

On the contrary, the rules for the construction, erection or demolition of public swimming pools and bathing places cover traditional building code disciplines such as structural (compressive strength of concrete, electrical grounding, plumbing, etc.) and are likewise found in the FBC. For these issues, the Department of Health is preempted.

By statute, the Department of Health may not establish by rule any regulation governing the design, alteration, modification or repair of public swimming pools and bathing places which has no impact on health, safety and welfare of persons using public swimming pools and bathing places. § 514.021(2), F.S. Further, the Department may not adopt by rule any regulation governing the construction, erection or demolition of public swimming pools and bathing places. *Id.* Therefore, the only reasonable construction is that the standards set forth in Rules 64E-9.010 and 64E-9.006 are not rules governing the construction, erection or demolition of public swimming pools and bathing places. As a result, "the Department [of Health] is authorized to conduct plan reviews, to issue approvals, and to enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places in conducting any inspections authorized by this chapter [64E-9]." *Id.*

Since the Department of Health has statutory authorization to enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places, the Building Commission and Building Official are not authorized to reject a variance issued by the Department of Health (regarding only the special occupancy provisions,

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i.e., those found in Rules 64E-9.006 and 64E-9.010 of the F.A.C.). At the same time, of course, the Department of Health does not have statutory authorization to vary the "construction, erection and demolition" requirements (e.g., compressive strength of concrete, electrical grounding, plumbing) in the FBC.

Conclusion:

Because the Department of Health is authorized to conduct plan reviews, to issue approvals, and to enforce the special occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places; and the issues involved in the variances in question (involving Rules 64E-9.010(5) and 64E-9.006(1), F.A.C.) are special-occupancy provisions which originated in the Florida Administrative Code rules for public swimming pools and bathing places under the Department of Health regulations, the variance issued by the Department of Health has statutory authority, is not preempted by Florida Building Code's approval and enforcement provisions, and is in effect.

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Florida Statutes- relevant provisions

514.011 Definitions.--As used in this chapter:

(1) "Department" means the Department of Health.

(2) "Public swimming pool" or "public pool" means a watertight structure of concrete, masonry, or other approved materials which is located either indoors or outdoors, used for bathing or swimming by humans, and filled with a filtered and disinfected water supply, together with buildings, appurtenances, and equipment used in connection therewith. A public swimming pool or public pool shall mean a conventional pool, spa-type pool, wading pool, special purpose pool, or water recreation attraction, to which admission may be gained with or without payment of a fee and includes, but is not limited to, pools operated by or serving camps, churches, cities, counties, day care centers, group home facilities for eight or more clients, health spas, institutions, parks, state agencies, schools, subdivisions, or the cooperative living-type projects of five or more living units, such as apartments, boardinghouses, hotels, mobile home parks, motels, recreational vehicle parks, and townhouses.

(3) "Private pool" means a facility used only by an individual, family, or living unit members and their guests which does not serve any type of cooperative housing or joint tenancy of five or more living units.

(4) "Public bathing place" means a body of water, natural or modified by humans, for swimming, diving, and recreational bathing, together with adjacent shoreline or land area, buildings, equipment, and appurtenances pertaining thereto, used by consent of the owner or owners and held out to the public by any person or public body, irrespective of whether a fee is charged for the use thereof. The bathing water areas of public bathing places include, but are not limited to, lakes, ponds, rivers, streams, artificial impoundments, and waters along the coastal and intracoastal beaches and shores of the state.

(5) "Portable pool" means a pool or spa, and related equipment systems of any kind, which is designed or intended to be movable from location to location.

History.--ss. 1, 14, ch. 85-173; s. 4, ch. 91-429; s. 676, ch. 97-103; s. 77, ch. 97-237; s. 45, ch. 98-151; s. 1, ch. 2000-309.

514.0115 Exemptions from supervision or regulation; variances.--

(1) Private pools and water therapy facilities connected with facilities connected with hospitals, medical doctors' offices, and licensed physical therapy establishments shall be exempt from supervision under this chapter.

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(2)(a) Pools serving no more than 32 condominium or cooperative units which are not operated as a public lodging establishment shall be exempt from supervision under this chapter, except for water quality.

(b) Pools serving condominium or cooperative associations of more than 32 units and whose recorded documents prohibit the rental or sublease of the units for periods of less than 60 days are exempt from supervision under this chapter, except that the condominium or cooperative owner or association must file applications with the department and obtain construction plans approval and receive an initial operating permit. The department shall inspect the swimming pools at such places annually, at the fee set forth in s. 514.033(3), or upon request by a unit owner, to determine compliance with department rules relating to water quality and lifesaving equipment. The department may not require compliance with rules relating to swimming pool lifeguard standards.

(3) A private pool used for instructional purposes in swimming shall not be regulated as a public pool.

(4) Any pool serving a residential child care agency registered and exempt from licensure pursuant to s. 409.176 shall be exempt from supervision or regulation under this chapter related to construction standards if the pool is used exclusively by the facility's residents and if admission may not be gained by the public.

(5) The department may grant variances from any rule adopted under this chapter pursuant to procedures adopted by department rule.

History.--ss. 1, 14, ch. 85-173; s. 2, ch. 87-117; s. 46, ch. 98-151; s. 1, ch. 99-182.

514.021 Department authorization.--

(1) The department may adopt and enforce rules, which may include definitions of terms, to protect the health, safety, or welfare of persons using public swimming pools and bathing places. The department shall review and revise such rules as necessary, but not less than biennially. Sanitation and safety standards shall include, but not be limited to, matters relating to structure; appurtenances; operation; source of water supply; bacteriological, chemical, and physical quality of water in the pool or bathing area; method of water purification, treatment, and disinfection; lifesaving apparatus; measures to ensure safety of bathers; and measures to ensure the personal cleanliness of bathers.

(2) The department may not establish by rule any regulation governing the design, alteration, modification, or repair of public swimming pools and bathing places which has no impact on the health, safety, and welfare of persons using public swimming pools and bathing places. Further, the department may not adopt by rule any regulation governing the construction, erection, or demolition of public swimming pools and bathing places. It is the intent of the Legislature to preempt those functions to the Florida Building Commission through adoption and maintenance of the Florida Building Code. The department shall provide technical assistance to the commission in updating the construction standards of the Florida Building Code which govern public swimming pools and bathing places. Further, the department is

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authorized to conduct plan reviews, to issue approvals, and to enforce the special occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places in conducting any inspections authorized by this chapter. This subsection does not abrogate the authority of the department to adopt and enforce appropriate sanitary regulations and requirements as authorized in subsection (1).

History.--ss. 2, 14, ch. 85-173; s. 65, ch. 87-225; s. 4, ch. 91-429; s. 49, ch. 2000-141; s. 48, ch. 2000-242; s. 27, ch. 2000-367; s. 34, ch. 2001-186; s. 3, ch. 2001-372.

514.03 Construction plans approval necessary to construct, develop, or modify public swimming pools or bathing places.--It is unlawful for any person or public body to construct, develop, or modify any public swimming pool or bathing place, other than coastal or intracoastal beaches, without a valid construction plans approval from the department. This section does not preempt the authority of local governments or local enforcement districts to conduct plan reviews and inspections of public swimming pools and bathing places for compliance with the general construction standards of the Florida Building Code, pursuant to s. 553.80.

(1) Any person or public body desiring to construct, develop, or modify any public swimming pool or bathing place shall file an application for a construction plans approval with the department on application forms provided by the department and shall accompany such application with:

(a) Engineering drawings, specifications, descriptions, and detailed maps of the structure, its appurtenances, and its intended operation.

(b) A description of the source or sources of water supply and amount and quality of water available and intended to be used.

(c) A description of the method and manner of water purification, treatment, disinfection, and heating.

(d) Other applicable information deemed necessary by the department to fulfill the requirements of this chapter.

(2) If the proposed construction of, development of, or modification of a public swimming pool or bathing place meets standards of public health and safety as defined in this chapter and rules adopted hereunder, the department shall grant the application for the construction plans approval within 30 days after receipt of a complete submittal. If engineering plans submitted are in substantial compliance with the standards aforementioned, the department may approve the plans with provisions for corrective action to be completed prior to issuance of the operating permit.

(3) If the proposed construction, development, or modification of a public swimming pool or bathing place fails to meet standards of public health and safety as defined in this chapter and rules adopted hereunder, the department shall deny the application for construction plans approval pursuant to the provisions of chapter 120. Such denial shall be issued in writing

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within 30 days and shall list the circumstances for denial. Upon correction of such circumstances, an applicant previously denied permission to construct, develop, or modify a public swimming pool or bathing place may reapply for construction plans approval.

(4) An approval of construction plans issued by the department under this section becomes void 1 year after the date the approval was issued if the construction is not commenced within 1 year after the date of issuance.

History.--s. 2, ch. 7825, 1919; CGL 3769; ss. 19, 35, ch. 69-106; s. 3, ch. 76-168; s. 447, ch. 77-147; s. 1, ch. 77-457; ss. 2, 9, ch. 78-356; s. 2, ch. 81-318; ss. 4, 13, 14, ch. 85-173; s. 4, ch. 91-429; s. 47, ch. 98-151; s. 50, ch. 2000-141; s. 3, ch. 2000-309.

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Florida Administrative Code- relevant provisions

64E-9.001 General.

(1) Regulation of public swimming pools and bathing places is considered by the department as significant in the prevention of disease, sanitary nuisances, and accidents by which the health or safety of an individual(s) may be threatened or impaired.

(a) Any modification resulting in the operation of the pool in a manner unsanitary or dangerous to public health or safety shall subject the state operating permit to suspension or revocation.

(b) Failure to comply with any of the requirements of these rules shall constitute a public nuisance dangerous to health.

(2) This chapter prescribes minimum design, construction, and operation requirements.

(a) The department will accept dimensional standards for competition type pools as published by the National Collegiate Athletic Association, 2008; Federation Internationale de Natation Amateur (FINA), 2005-2009 Handbook; 2006-2007 Official Rules and Code of USA Diving with 2007 Amendments by USA Diving, Inc.; 2008 USA Swimming Rules and Regulations, and National Federation of State High School Associations, Swimming and Diving and Water Polo Rules Book, 2008-2009, which are incorporated by reference in these rules and can be obtained from: NCAA.org, fina.org, usadiving.org, usaswimming.org, and nfhs.org, respectively.

(b) Where adequate standards do not exist and these rules do not provide sufficient guidance for consideration of innovations in design, construction, and operation of proposed swimming pools or water recreation attractions, the department will establish requirements necessary to protect the health and safety of the pool patrons.

(3) All pools which do not meet the definition of private pools are public pools.

(4) The Americans with Disabilities Act of 1990 may relate to public pools and should be reviewed by the design engineer and the pool owner. Chapter 11 and Section 424.1 of the Florida Building Code (2007, with 2009 amendments) also have application to public pools.

Rulemaking Authority 381.006, 514.021 FS. Law Implemented 381.006, 514.021, 514.03, 514.031, 514.05, 514.06 FS. History--New 10-5-93, Formerly 10D-5.130, Amended 12-27-98, 5-27-04, 5-24-09.

64E-9.002 Definitions.

(1) "Advanced Level Swimmer" – A person able to swim unassisted for five minutes or more.

(2) "Bathing Load" – The maximum number of persons allowed in the pool or bathing place at one time.

(3) "Closed Pool" – A pool which is not to be used by bathers and is posted with a pool closed sign visible from the pool deck or is inaccessible.

(4) "Collector Tank" – A reservoir, with a minimum of 2.25 square feet water surface area open to the atmosphere, from which the recirculation or feature pump takes suction, which receives the gravity flow from the main drain line, surface overflow system or feature water source line, and that is cleanable.

(5) "D.E." – is the Diatomaceous Earth that is used as a filter aid in D.E. type filters. For the purpose of this rule, it also includes alternative filter aids that have been approved under NSF/ANSI Standard 50-2007, and accepted by the filter manufacturer.

(6) "Department" – The Department of Health (DOH), specifically, Division of Environmental Health and county health departments unless specified otherwise.

(7) "Effective Barrier" – A barrier which consists of a building, or equivalent structure, plus a 48 inch minimum height fence on the remaining sides or a continuous 48 inch minimum height fence. All access through the barrier must have one or more of the following safety features: alarm, key lock or self-locking

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doors and gates. Safety covers that comply with the American Society for Testing Materials standard F1346-91 (2003) may also be considered as an effective barrier.

(8) "Flow Through" – Continuous verifiable inflow and outflow or in the case of spring fed lakes shall be verifiable by continuous outflow.

(9) "Inaccessible" – Enclosed by an effective barrier.

(10) Interactive Water Features – A structure designed to allow for recreational activities with recirculated, filtered, and treated water; but having minimal standing water. Water from the interactive fountain type features is collected by gravity below grade in a collector tank or sump. The water is filtered, disinfected and then pumped to the feature spray discharge heads.

(11) "Lifeguard" – Person responsible for the safety of the users of a public swimming pool.

(12) "Living Unit" – Room(s) or spaces capable of being occupied by an individual or group for temporary or permanent lodging purposes. This includes motel and hotel rooms, apartment units, boarding house rooms, condominium units, travel trailers, recreational vehicles, mobile homes, single family homes, and individual units in multiple unit housing complexes.

(13) "Marking" or "Markings" – Refers to the placement and installation of visual marking cues to help patrons identify step, bench and swimout outlines, slope break location, depth designations, and NO ENTRY and NO DIVING warnings. When markings are specified by code to be dark the term dark shall mean a Munsell Color Value from zero to four.

(14) "Modification" – Any act which changes or alters the original characteristics of the pool as approved. For example, changes in the recirculation systems, decking, treatment systems, disinfection system, and pool shape are modifications.

(15) "NTU" – Nephelometric Turbidity Unit which is a means of measuring water clarity.

(16) "Perimeter Overflow Gutter" – A level trough or ledge around the inside perimeter of the pool containing drains to clean the pool water surface.

(17) "Plunge Pool" – The receiving body of water located at the terminus of a recreational water slide.

(18) "Pool Floor" – The interior pool bottom surface which consists of that area from a horizontal plane up to a maximum of a 45 degree slope.

(19) "Pool Wall" – The interior pool side surfaces which consist of that area from a vertical plane to a 45 degree slope.

(20) "Pool Turnover" – The circulation of the entire pool volume through the filter system. Pool volume shall be determined from the design water level which is the normal operating water level; for gutter type pools is the horizontal plane of the upper lip of the gutter and for skimmer pools is the centerline of the skimmer opening.

(21) "Precoat Pot" – A container with a valved connection to the suction side of the recirculation pump of a pressure diatomaceous earth (D.E.) type filter system used for coating the filter with D.E. powder or NSF/ANSI Standard 50-2007 and manufacturer approved substitute filter aid.

(22) "Private Pool" – See Section 514.011(3), F.S.

(23) "Public Bathing Place" – See Section 514.011(4), F.S. The bathing water areas of public bathing places include lakes, ponds, rivers, springs, streams, and artificial impoundments.

(24) "Public Swimming Pool" or "Public Pool" – See Section 514.011(2), F.S.

(25) "Recirculation System" – The system of piping and mechanics designed to remove the water from the pool then filter, disinfect and return it to the pool.

(26) "River Ride" – A water recreation attraction designed to convey bathers around a relatively flat course using an artificially created current.

(27) "Sanitary Survey" – A professional assessment of any existing and potential sources of pollution of a specific land or water area.

(28) "Slip Resistant" – Having a textured surface which is not conducive to slipping under contact of

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bare feet unlike glazed tile or masonry terrazzo and non-textured plastic materials. Manufactured surface products shall be designated by the manufacturer as suitable for walking surfaces in wet areas.

(29) "Spa Pool" – A pool used in conjunction with high velocity air or water.

(30) "Special Purpose Pool" – A public pool used exclusively for a specific, supervised purpose, including springboard or platform diving training, SCUBA diving instruction, and aquatic programs for handicapped individuals, pre-school or kindergarten children.

(31) "Swimming Instructor" – Person who offers progressive swimming instruction.

(32) "Swimming Pool Slide" a slide designed by its manufacturer to discharge over the sidewall of a swimming pool.

(33) "Swim Spa" – A pool used in conjunction with a directional flow of water against which one swims.

(34) "Wading Pool" – A shallow pool designed to be used by children.

(35) "Water Recreation Attraction" – A facility with design and operational features that provide patron recreational activity and purposefully involves immersion of the body partially or totally in the water. Water recreation attractions include water slides, river rides, water course rides, water activity pools, interactive water features, wave pools and any additional pool within the boundaries of the attraction.

(36) "Water Activity Pool" – A water recreation attraction which has water related activities such as rope ladders, rope swings, cargo nets and other similar activities.

(37) "Water Slides" – A water recreation attraction ride which is characterized by having trough-like or tubular flumes or chutes.

(38) "Water Theme Park" – Means a complex with controlled access, fenced and gated attraction where guests enter through a limited number of entrances upon purchase of a ticket. These facilities are permanent and consist of multiple water recreation attractions. Lifeguards are present during all operating hours.

(39) "Water Therapy Facilities" as that term is used in Section 514.0115(1), F.S., are pools used exclusively for water therapy to treat a diagnosed injury, illness, or medical condition, wherein the therapy is provided under the direct supervision of a Florida licensed physical therapist, occupational therapist, or athletic trainer; pursuant to a prescription by a physician or a physician's assistant (PA) licensed pursuant to Chapter 458 or 459, F.S., a podiatrist licensed pursuant to Chapter 461, F.S., or an advanced registered nurse practitioner (ARNP) licensed pursuant to Chapter 464, F.S.; and the prescribing physician, PA, podiatrist or ARNP, authorizes a plan of treatment justifying use of the pool for health care purposes.

(40) "Wave Pool" – A water recreation attraction that is characterized by wave action.

(41) "Wet Deck Area" – The four foot wide unobstructed pool deck area around the outside of the pool water perimeter, curb, ladders, handrails, diving boards, diving towers, pool slides, waterfalls, water features, starting blocks, planters, or lifeguard chairs.

(42) "Zero Depth Entry Pool" – A pool where the pool floor continues to slope upward to a point where it meets the surface of the water and the pool deck.

Rulemaking Authority 381.006, 514.021 FS. Law Implemented 514.021, 514.03, 514.031, 514.05, 514.06, 514.071 FS. History—New 10-5-93, Formerly 10D-5.131, Amended 12-27-98, 5-27-04, 5-24-09.

64E-9.006 Construction Plan Approval Standards.

(1) Pool Structure – Pools shall be constructed of concrete or other impervious and structurally rigid material. All pools shall be watertight, free from structural cracks and shall have a nontoxic smooth and slip resistant finish. All materials shall be installed in accordance with manufacturer's specifications unless such specifications violate Chapter 64E-9, F.A.C., rule requirements or the approval criteria of NSF/ANSI

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Standard 50-2007 or NSF/ANSI Standard 60-2005.

(a) Floors and walls shall be white or light pastel in color and shall have the characteristic of reflecting rather than absorbing light. A minimum 4 inch tile line, each tile a minimum size of one inch on all sides, shall be installed at the water line, but shall not exceed 12 inches in height if a dark color is used. Gutter type pools may substitute 2-inch tile, each a minimum size of one inch on all sides, along the pool wall edge of the gutter lip.

1. Any design or logo on the pool floor or walls shall be such that it will not hinder the detection of a human in distress, algae, sediment, or other objects in the pool and written approval must be obtained from the department prior to installation.

2. Pools that are not intended to be utilized for officially sanctioned competition may install lap lane markings provided they meet the following criteria: The markings must be 2 to 6 inches wide, they must terminate five feet from the end wall in a "T" with the "T" bar at least 18 inches long, they must be placed at 7 foot intervals on center and be no closer than 4 feet from any side wall, steps or other obstructions. A 2 to 6 inch wide 18 inch x 18 inch target (+) may be installed on the pool wall. Tile used in less than 5 feet of water must be slip resistant. Floating rope lines associated with lap lanes must not obstruct the entrance or exit from the pool and are prohibited when the pool is open for general use.

3. One inch square tile may be used if the licensed contractor provides a signed written certification to the approving department engineer that the adhesive used on the one inch square tile has a manufacturer's tested shear strength of at least 250 psi and the manufacturer has specified the adhesive for use underwater to adhere the type of tile used (vitreous (glass) or ceramic). Tiles shall not have sharp edges exposed that could cause bather injury.

(b) Sizing – The bathing load for conventional swimming pools, wading pools, interactive water features, water activity pools less than 24" deep, and special purpose pools shall be computed on the basis of one person per five gallons per minute (gpm) of recirculation flow. The bathing load for spa type pools shall be based on one person per each 10 square feet of surface area. The filtration system for swimming pools shall be capable of meeting all other requirements of these rules while providing a flowrate of at least one gallon per minute for each living unit at transient facilities and three-fourths gallon per minute at non-transient facilities. Recreational vehicle sites, campsites and boat slips designated for live-aboards shall be considered a transient living unit. For properties with multiple pools, this requirement includes the cumulative total GPM of all swimming pools, excluding spas, wading pools and interactive water features. All other types of projects shall be sized according to the anticipated bathing load and proposed uses. For the purpose of determining minimum pool size only, the pool turnover period used cannot be less than three hours.

(c) Dimensions.

1. Walls and corners – All pool walls shall have a clearance of 15 feet perpendicular to the wall (as measured at design water level from gutter lip to gutter lip, or on skimmer pools, from vertical wall to vertical wall). Offset steps, spa coves, spa pools and wading pools are exempt from this clearance requirement. Where interior steps protrude into the pool resulting in less than 15 feet of clearance from any wall such protrusion shall not exceed six feet on any perpendicular line from a tangent to any pool wall from which the steps emanate. The upper part of pool walls in areas five feet deep or less shall be within five degrees of vertical for a minimum depth of two and one-half feet from which point the wall may join the floor with a maximum radius equal to the difference between the pool depth and two and one-half feet. The upper part of pool walls in areas over five feet deep shall be within five degrees of vertical for a minimum depth equal to the pool water depth minus two and one-half feet from which point the wall may join the floor with a maximum radius of two and one-half feet. Corners shall be a minimum 90 degree angle. The corner intersections of walls which protrude or angle into the pool water area shall be rounded with a minimum radius of two inches. This radius shall be continued through the top of the gutter edge;

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chamfering is allowed. Pool coping shall not overhang into the pool more than one and a half inches.

2. Pool Floor Slope and Slope Transition – The radius of curvature between the floor and walls is excluded from these requirements. Multiple floor levels in pools are prohibited.

a. Floor slope shall be uniform. The floor slope shall be a maximum one foot vertical in ten feet horizontal and a minimum of one foot vertical in forty feet horizontal in areas five feet deep or less. The floor slope shall be a maximum one foot vertical in three feet horizontal in areas more than five feet deep.

b. Any transition in floor slope shall occur at a minimum of five feet of water depth. A slope transition must have a 2 to 6 inch wide dark contrasting tile marking across the bottom and must extend up both sides of the pool at the transition point. The marking shall be continuous except for necessary grouting. A slope transition must have a safety line mounted by use of recessed cup anchors, two feet before the contrasting marking, towards the shallow end. The safety line shall have visible floats at maximum seven foot intervals.

3. Depths and Markings – The minimum water depth shall be three feet in shallow areas and four feet in deep areas.

a. Permanent depth markings followed by the appropriate full or abbreviated words "FEET", "FT" or "INCHES", "IN", shall be installed in minimum four inch high numbers and letters on a contrasting background. Depth markers shall indicate the actual pool depth, within three inches, at normal operating water level when measured three feet from the pool wall. Symmetrical pool designs with the deep point at the center may be allowed provided a dual marking system is used which indicates the depth at the wall and at the deep point.

b. At a minimum, the markings shall be located on both sides of the pool at the shallow end, slope break, deep end wall and deep point (if located more than five feet from the deep end wall). Depth markings shall be legible from inside the pool and also from the pool deck. The maximum perimeter distance between depth markings is 25 feet. Pool size and geometry may necessitate additional depth marking placements about all sides of the pool to meet this requirement. When a curb is provided, the depth markings shall be installed on the inside and outside or top of the pool curb. When a pool curb is not provided, the depth markings shall be located on the inside vertical wall at or above the water level and on the edge of the deck within 2 feet of the pool water. When open type gutter designs are utilized, depth markers shall be located on the back of the gutter wall.

c. When deck level perimeter overflow systems are utilized, additional depth marking signs shall be posted nearby or placed on adjacent fencing or walls and the size shall be increased so they are recognizable from inside the swimming pool. Alternatively tile depth markers may be placed at the top of the pool wall just under the water level. Depth markers placed on the pool deck shall be within 3 feet of the water.

d. Those areas of the pool that are not part of an approved diving bowl shall have dark contrasting tile four inch high "NO DIVING" markings installed along the perimeter of the pool on the top of the pool curb or deck within 2 feet of the pool water with a maximum perimeter distance of 25 feet between markings. A 6-inch tile with a 4-inch or larger red, international "NO DIVING" symbol may be substituted for the "NO DIVING" markings.

e. All markings shall be tile, except that pools constructed of fiberglass, thermoplastic or stainless steel may substitute other type markings when it can be shown that said markings are permanent and will not fade over time. This exemption does not extend to concrete pools that are coated with fiberglass. Tile alternative examples include stone or manufactured plaques with engraved or sandblasted numbers and characters with permanent paint. Permanent appliques may be used for fiberglass, thermoplastic or stainless steel pools. All markings installed on horizontal surfaces shall have a slip resistant finish. Markings shall be flush with the surrounding area where placed and recessed if necessary to provide a smooth finish that will avoid creation of an injury hazard to bathers. Pools that are not conducive to tile

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can employ other equivalent markings as stated above.

(d) Access – All pools shall have a means of access every 75 feet of pool perimeter with a minimum of two, located so as to serve both ends of the pool. In addition, an access point shall be provided at the deep portion, if the deep portion is not at one end of the pool. When the deep portion of the pool is over 30 feet wide both sides of this area shall have a means of access. Access shall consist of ladders, stairs, recessed treads or swimouts and may be used in combination. All treads shall have a slip resistant surface.

1. Ladders – Ladders shall be of the cross-braced type and shall be constructed of corrosion resistant materials and be securely anchored into the pool deck. Clearance between the ladder and pool wall shall be between three to six inches. Ladders shall extend at least 28 inches and no more than 40 inches above the pool deck. Ladder bottom braces shall have intact end caps or bumpers that rest firmly against the pool wall. The top rung of the ladder shall be at or below the water level on open gutter pools and not more than 12 inches below the deck or curb top on all other type pools.

2. Recessed Treads – Recessed treads shall be installed flush with the wall and shall be a minimum five inches wide, 10 inches long, with a maximum vertical distance of 12 inches between treads.

3. Stairs – Stairs shall have a minimum tread width of 10 inches and a maximum width of 48 inches for a minimum tread length of 24 inches and a maximum riser height of 10 inches. Treads and risers between the top and bottom treads shall be uniform to within 1/2 inch in width and height. The riser heights shall be measured at the marked step edges and the differences in elevation shall be considered the riser heights. The front 3/4 to 2 inches of the tread and the top 2 inches of the riser shall be tile, dark in color, contrasting with the interior of the pool. Tile shall be slip resistant. Bullnose tile that is slip resistant may be used when the 3/4 inch segment is placed on the tread or horizontal surface and the 2 inch segment is placed on the riser or vertical surface. Where the gutter is used as the top step, the tile on the gutter for the width of the steps shall be slip resistant. Vinyl liner and fiberglass pools may use other material for the step edge marking, provided the material is permanent, permanently secured, dark in color, non-fading, and slip resistant.

4. Swimouts – Swimouts shall extend 18 to 24 inches back from the pool wall, shall be 4 to 5 feet wide, shall be a maximum of 12 inches below the deck, unless stairs are provided in the swimout, and shall be located only in areas of the pool greater than 5 feet deep. Pools that do not utilize a continuous perimeter overflow system must provide a wall return inlet in the swimout for circulation. A permanent dark contrasting colored band of tile shall be installed at the intersection of the pool wall and the swimout and must extend two inches on the horizontal and vertical surfaces. Tile must be slip resistant. Bullnose tile may be substituted and installed in accordance with subparagraph 64E-9.006(1)(d)3., F.A.C., above.

5. Handrails and Grabrails – Handrails shall be provided for all stairs, shall be anchored in the bottom step and the deck. Where "figure 4" deck mounted type handrails are used, they shall be anchored in the deck and extend laterally to any point vertically above the bottom step. Grabrails must be mounted in the pool deck at each side of recessed steps. Handrails and grabrails shall extend between 28 and 40 inches above the step edge and deck.

6. Permanent or portable steps, ramps, handrails, lifts, or other devices designed to accommodate handicapped individuals in swimming pools may be provided. Lifts mounted into the pool deck shall have a minimum four foot wide deck behind the lift mount.

(e) The pool water area shall be unobstructed by any type structure unless justified by engineering design as a part of the recirculation system. Engineering design and material specifications shall show that such structures will not endanger the pool patron, can be maintained in a sanitary condition and will not create a problem for sanitary maintenance of any part of the pool, pool water, or pool facilities. Structures in accord with the above shall not be located in a diving bowl area or within 15 feet of any pool wall.

To: Richard McConache, Building Official
From: Robert S. Fine
Date: June 15, 2010
Re: Breakwater/Edison Hotel Spa: Department of Health Variance

1. Stairs, ladders and ramps, necessary for entrance/exit from the pool are not considered obstructions.

2. Underwater seat benches may be installed in areas less than five feet deep. Bench seats must be 14 to 18 inches wide and must have a dark contrasting tile marking on the seat edge extending two inches on the horizontal and vertical surface. Tile shall be slip resistant. Bullnose tile may be substituted and installed in accordance with subparagraph 64E-9.006(1)(d)3., F.A.C. Vinyl liner, stainless steel, and fiberglass pools may use other material for the bench edge marking as detailed in sub-subparagraph 64E-9.006(1)(c)3.e., F.A.C., above, provided the material is permanently secured, dark in color, non-fading, and slip resistant. Benches shall not protrude into the 15 foot clearance requirement of subparagraph 64E-9.006(1)(c)1., F.A.C.

(f) The vertical clearance above the pool deck shall be at least seven feet.

(g) Diving Areas – Diving facilities shall meet the minimum requirements of the FINA dimensions for diving facilities in accordance with the 2005-2009 FINA Handbook.

1. Diving boards or platforms with heights of less than the established standard shall meet the dimensional requirements of the next greater height.

2. Diving boards, platforms and ladders shall have a nonabsorbent, slip resistant finish and be of sufficient strength to safely carry the anticipated loads. Diving equipment one meter and greater shall have guard rails which extend to the edge of the pool wall. All diving boards over 21 inches from the deck shall be provided with a ladder. Diving boards or platforms shall not be installed on curved walls where the wall enters into the defined rectangular diving area specified in this section. Adjacent platform and diving boards shall be parallel.

3. The location of pool ladders shall be such that the distance from the ladder to any point on a diving board or platform centerline is not less than the plummet to side wall dimension (b) indicated in the FINA standards. Trampoline type diving facilities are prohibited.

4. Diving targets may be installed in accordance with FINA standards.

* * * * *

64E-9.010 Spa Pools.

(1) Spa pools shall meet the requirements of Rules 64E-9.001 through 64E-9.008, F.A.C., unless specifically indicated otherwise.

(2) The color, pattern or finish of the pool interior shall not obscure the existence or presence of objects or surfaces within the pool.

(3) Water depths – Spa type pools shall have a minimum water depth of 2 1/2 feet and a maximum water depth of 4 feet, except that swim spa pools may have a maximum water depth of 5 feet. Depth markers and NO DIVING markers are not required on spa type pools with 200 or less square feet of water surface area.

(4) Steps and handrails – Steps or ladders shall be provided and shall be located to provide adequate entrance to and exit from the pool. The number of sets of steps or ladders required shall be on the basis of one for each 75 feet, or major fraction thereof, of pool perimeter. Step sets for spa type pools with more than 200 square feet of pool water surface area shall comply with subparagraph 64E-9.006(1)(d)3., F.A.C. Step sets for spa type pools with 200 square feet or less of pool water surface area shall comply with the following: Step treads shall have a minimum width of 10 inches for a minimum continuous tread length of 12 inches. Step riser heights shall not exceed 12 inches. Intermediate treads and risers between the top and bottom treads and risers shall be uniform in width and height, respectively. Contrasting markings on the leading edges of the submerged benches and the intersections of the treads and risers are required to be installed in accordance with subparagraph 64E-9.006(1)(d)3., F.A.C.

(a) Handrails shall be provided for all sets of steps and shall be anchored in the bottom step and in

To: Richard McConache, Building Official

From: Robert S. Fine

Date: June 15, 2010

Re: Breakwater/Edison Hotel Spa: Department of Health Variance

Page 15

the deck. Handrails shall be located to provide maximum access to the steps and handrails shall extend 28 inches above the pool deck.

(b) Where "figure four" handrails are used, they shall be anchored in the deck and shall extend laterally to any point vertically above the bottom step. Handrails shall be located to provide maximum access to the steps and handrails shall extend 28 inches above the pool deck.

(5) Decks – Decks shall have a minimum four foot wide unobstructed width around the entire pool perimeter except that pools of less than 120 square feet of pool water surface area shall have a minimum four foot wide unobstructed continuous deck around a minimum of 50 percent of the pool perimeter. Decks less than four feet wide shall have barriers to prevent their use. Decks shall not be more than 10 inches below the top of the pool. For pools of 120 square feet or greater, ten percent of the deck along the pool perimeter may be obstructed.

(6) Therapy or jet systems –

(a) The return lines of spa type therapy or jet systems shall be independent of the recirculation-filtration and heating systems.

(b) Therapy or jet pumps shall take suction from the collector tank. Collector tank sizing shall take this additional gallonage into consideration.

(c) Cold plunge spas do not require a therapy or jet system, but do require the installation of a chiller.

(d) Heated systems shall incorporate a 15 minute patron activated timer on the therapy pump circuit.

(7) Filtration system inlets – Spa type pools with less than 20 feet of perimeter shall have a minimum of two equally spaced adjustable inlets.

(8) Filtration recirculation – Spa type pools shall have a minimum of one turnover every 30 minutes. The piping, fittings, and hydraulic requirements shall be in accordance with Rule 64E-9.007, F.A.C. All recirculation lines to and from the pool shall be individually valved with proportional flow type valves in order to control the recirculation flow.

(9) Vacuuming – Spa type pools of over 200 square feet of pool water surface area shall have provisions for vacuuming.

(10) Oils, body lotions, and minerals – Oils, body lotions, and minerals or materials not associated with chemicals used for water chemistry balance, algae control, and disinfection of the water are prohibited in the spa pool.

(11) Bench seat edges shall be marked in accordance with subparagraph 64E-9.006(1)(e)2., F.A.C. When spa pools are part of a conventional swimming pool, the spa pool area shall be offset from the main pool area with the same water depth as the main pool area. The spa pool shall meet all the spa pool requirements of this chapter, and the deck area at the spa shall be protected by connected 30 inch high stanchions or other impediment acceptable to the department. The deck perimeter at the offset spa area shall not exceed 15 percent of the entire swimming pool perimeter.

(12) Portable and wooden type spa pools are prohibited.

(13) Automated Controllers – Automated Oxidation Reduction Potential (ORP) and pH controllers with sensing probes shall be provided on spa pools to assist in maintaining proper disinfection and pH levels.

(14) In addition to the requirements of subsection 64E-9.008(7), F.A.C., spa pool signs shall include the following:

(a) Maximum water temperature 104° F.

(b) Children under twelve must have adult supervision.

(c) Pregnant women, small children, people with health problems and people using alcohol, narcotics or other drugs that cause drowsiness should not use spa pools without first consulting a doctor.

(d) Maximum use 15 minutes.

(15) A clock shall be visible from the spa pool to assist the patron in meeting the requirement of paragraph 64E-9.010(14)(d), F.A.C., above.

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Re: Breakwater/Edison Hotel Spa: Department of Health Variance

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(16) If a spa is equipped with an emergency cut-off or kill switch, provisions for a minimum 80 decibel audible alarm near the spa to sound continuously until deactivated when such device is triggered shall be incorporated. This is to alert pool patrons and operators of a potential public health situation or to indicate that the spa filtration and treatment system may be off. The following additional rule sign shall be visible by the spa which reads "ALARM INDICATES SPA PUMPS OFF. DO NOT USE SPA WHEN ALARM SOUNDS UNTIL ADVISED OTHERWISE." Where emergency cut-off switches are provided on existing or new spa pools, the alarm and signage specified in subsection 64E-9.010(16), F.A.C., above shall be provided within 180 days of effective date of this rule.

(17) Should a fecal accident occur, the requirements of subsection 64E-9.004(14), F.A.C., shall be met or the pool may be drained and both the pool and the filter system and all plumbing shall be properly disinfected.

Rulemaking Authority 381.006, 514.021 FS. Law Implemented 381.006, 386.01, 386.02, 386.03, 386.041, 386.051, 514.011, 514.021, 514.03, 514.031, 514.05, 514.06 FS. History—New 10-5-93, Formerly 10D-5.139, Amended 12-27-98, 5-27-04, 5-24-09.

64E-9.016 Variances.

A variance from requirements of these rules may be requested by the pool owner or their representative to relieve or prevent hardship only in cases involving deviations from the rule, when it is shown that the hardship was not caused intentionally by the action of the applicant, where no reasonable alternative exists and the health and safety of the pool patrons is not at risk. Application for variance shall be submitted through the county health department utilizing DOH Form 4080. Each application can be accompanied by supportive materials such as drawings, pictures or manufacturer's specifications. Applications must be received at least 30 days prior to the scheduled meeting of the Governor's Swimming Pool Advisory Board, which normally meets on the second Wednesday of each odd-numbered month.

Rulemaking Authority 381.006, 514.0115, 514.021 FS. Law Implemented 514.0115, 514.021, 514.028, 514.051, 514.06 FS. History—New 10-5-93, Formerly 10D-5.145, Amended 12-27-98, 5-24-09.



Fine, Robert (Shld-Mia-ADA/Env)

From: McConachie, Richard [RichardMcConachie@miamibeachfl.gov]
Sent: Tuesday, June 29, 2010 1:00 PM
To: Fine, Robert (Shld-Mia-ADA/Env)
Cc: Montoya, Rhonda; Gonzalez, Alfredo J. (Shld-Mia-Env); Medrano, Leonel; Anderson, Miguel; Salas, Gladys; Zeigler, James
Subject: RE: Breakwater Hotel Spa Pool

Robert,

I was in contact with Bob Vincent with the DOH and it is still my determination that the DOH cannot waive the requirement of the deck as per the FBC. The plans submitted do not comply with the FBC and will remain denied. Please check all comments as I believe you may have other comments that need to be addressed.

Rich

MIAMIBEACH

Richard McConachie, Building Official
BUILDING DEPARTMENT
1700 Convention Center Drive, 2nd Floor, Miami Beach, FL 33139
Tel: 305-673-7610, Ext. 6806 / Fax: 786-394-4073 / www.miamibeachfl.gov

We are committed to providing excellent public service and safety to all who live, work and play in our vibrant, tropical, historic community.

From: FineR@gtlaw.com [mailto:FineR@gtlaw.com]
Sent: Tuesday, June 29, 2010 12:23 PM
To: McConachie, Richard
Cc: Montoya, Rhonda; gonzalezaj@gtlaw.com
Subject: Breakwater Hotel Spa Pool

Richard:

I know the issue of jurisdiction between the building department and DOH is not an easy one and that you are working on it. I wanted to let you know that on Thursday, if you have not resolved the issue by then that I will be filing an appeal letter with BORA. Please know that my telling you now that I am going to do this, or the fact that I do do this, is not intended to be any sort of a threat, shot across the bow, etc. It is just that if I don't file by Thursday, I miss the agenda cutoff and my client will lose a month.

Even if I file on Thursday, it is really being done in an abundance of caution and with the hope that I can withdraw the letter and appeal within a few days after I file it. Again, this is not intended to push or pressure you, just to make sure that I don't miss an agenda deadline just in case you ultimately don't agree with my analysis and position. I am hopeful that after you have had time to fully consider my materials, you will agree with my position.

Thanks and best regards,

Robert

Robert S. Fine, Esq., AIA
Environmental, Land Development, Accessibility,
Building and Life Safety Codes Law
Board Certified in Construction Law
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7/2/2010

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Vice-Chairperson
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July 28th, 2010

Robert Fine, Esq.
Greenberg Traurig PA
1221 Brickell Avenue
Miami, FL 33131

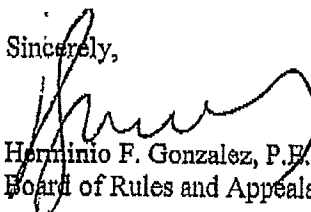
Re: Appeal of Building Official
City of Miami Beach
Breakwater/Edison Hotel Spa
940 Ocean Drive
Process No. B1002333
Swimming Pool/Bathing Place
2007 FBC Section 424.1.8.5
Variance Recognition

Dear Mr. Fine:

On July 22nd, 2010, the Board of Rules and Appeals (BORA) considered an appeal regarding the decision of the City of Miami Beach Building Official's refusal to accept the State of Florida Department of Health variance and require the installation of a four foot wide wet deck around the entire perimeter of the pool/spa. The Board determined that the requirements contained in the 2007 edition of the Florida Building Code, Building Section 424.1.8 were clear and specific. In doing so, the Board denied the appeal and affirmed the decision of the Building Official.

Please contact our Office at the above listing, if you require additional information.

Sincerely,


Hermínio F. Gonzalez, P.E., M.S., Secretary
Board of Rules and Appeals

cc: William Derrer, Chairperson, Board of Rules and Appeals
Richard McConachie, Building Official, City of Miami Beach
Rhonda Montoya-Hasan, Attorney, City of Miami Beach

Pursuant to Section 8-4 of the Code of Miami Dade, Appeals of decisions of the Board within the review jurisdiction of the Florida Building Commission shall be to the Florida Building Commission in the manner prescribed by law. Review of other decisions of the Board shall be to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules and Appellate Procedure for the review of rulings of any commission or board.

Fine, Robert (Shld-Mia-ADA/Env)

From: McConachie, Richard [RichardMcConachie@miamibeachfl.gov]
Sent: Tuesday, June 29, 2010 1:00 PM
To: Fine, Robert (Shld-Mia-ADA/Env)
Cc: Montoya, Rhonda; Gonzalez, Alfredo J. (Shld-Mia-Env); Medrano, Leonel; Anderson, Miguel; Salas, Gladys; Zeigler, James
Subject: RE: Breakwater Hotel Spa Pool

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Thanks and best regards,

Robert

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BOARD OF RULES AND APPEALS

140 WEST FLAGLER STREET
SUITE 1603
MIAMI, FLORIDA 33130-1563
(305) 375-2901

COPY

BOARD OF RULES AND APPEALS

Meeting of:
Thursday, July 22, 2010
1:20 p.m. to 1:50 p.m.

E X C E R P T

regarding:
AP-1007.1/B

Held at:
140 West Flagler Street
Conference Room 1605
Miami, Florida 33130

P R E S E N T

1
2
3 WILLIAM DERRER, Chairperson

4 RICHARD HORTON, Vice-Chairperson

5 THOMAS UTTERBACK, Sergeant at Arms

6 J. ROBERT BARNES, R.A.

7 MICHAEL GOOLSBY

8 JOHN KURZMAN

9 HERBERT M. GOPMAN

10 GREGORY PIERCE

11 PAUL SMITH, Fire Department

12 NELLY NIEVES, Recording Secretary

13 CANDICE GILMORE, Recording Secretary

14
15 LUCIA DOUGHERTY, ESQUIRE

Representing Edison Hotel

16
17 EDWARD MARTOS, ESQUIRE

Representing Edison Hotel

18 RHONDA MONTOYA HASSAN, ESQUIRE

City of Miami Beach, Building Dept. Legal Advisor

19
20 KENNETH PFEIFFER

Pfeiffer Engineering

21 RICHARD McCONACHIE

City of Miami Beach, Building Official

22
23 EDMUNDO ALDREY

Miami-Dade County, Building Code Compliance Office

24 EMZON SHUNG

Edison Hotel owner representative

1 **CHAIRPERSON DERRER:** Good afternoon, ladies
2 and gentlemen.

3 This is the meeting of the Board of Rules and
4 Appeals, July 22, 2010.

5 (Discussion had regarding other agenda
6 matters, continuing with the requested agenda item
7 as follows:)

8 **CHAIRPERSON DERRER:** First item up is Appeals
9 Number 1, Robert Fine, Appeal of Building Official City
10 of Miami Beach.

11 Would the parties come forward, please?

12 **MS. DOUGHERTY:** Good afternoon, Mr. Chairman,
13 members of the --

14 **CHAIRPERSON DERRER:** It's not working very
15 well. We can hear you. Go ahead.

16 **MS. DOUGHERTY:** -- members of the board.
17 Lucia Dougherty and Edward Martos, with
18 offices at 1221 Brickell Avenue.

19 I am not Robert Fine. He's having an
20 operation on his shoulder, but I'm substituting for him
21 today.

22 Joining me this afternoon is our client,
23 Emzon Shung.

24 And this involves a piece of property on
25 Ocean Drive, 9th and Ocean Drive, that is a historic

1 property that we have put a spa in that -- and the
2 issue really is --

3 And I think I'm going to put this up here.

4 Can you hear me better now?

5 **CHAIRPERSON DERRER:** Yeah.

6 **MS. DOUGHERTY:** And the issue is really the
7 Florida Statutes, both -- directing both the building
8 official -- or the Building Code official as well as
9 the Health Department to enforce the Building Code.

10 And the building officials are responsible
11 for structural issues, and the Department of Health is
12 responsible for health-and-safety issues.

13 And DOH, the Department of Health, has
14 granted us two variances for a spa which is over
15 120 feet. Therefore, they consider -- it could be
16 considered a swimming pool.

17 And the building official doesn't believe it
18 has the jurisdiction to honor the variances that we
19 secured from the Department of Health.

20 And BORA's responsibility, your
21 responsibility, is to resolve those two jurisdictions
22 and those two competing jurisdictional issues.

23 I'm going to just point out the Florida
24 Statutes which gives the Department of Health the right
25 to enforce sanitation issues and health issues, as they

1 relate to swimming pools. And it says here:

2 "Further, the department is authorized
3 to conduct plan reviews, to issue approvals,
4 and to enforce the special-occupancy
5 provisions of the South Florida Building Code
6 which governs swimming pools and bathing
7 places," which they have done.

8 And our view is that we have a statute that
9 gives both the building officials jurisdiction and the
10 Health Department jurisdiction when it comes to
11 health-and-safety issues.

12 And -- and the -- and the fact that we are
13 able to get a variance -- and I think we have those
14 Department of Health rules here, which allow them to
15 grant variances -- and to not honor them would be kind
16 of an absurd result of the State statute, which gives
17 both departments jurisdiction.

18 So I'm going to give you a little bit of the
19 facts first.

20 Let me have the photographs -- oh, here we
21 are. Sorry.

22 So the swimming pool is 7 feet wide and --
23 tell me the length of it again -- 40 feet long. And if
24 it was -- and it has how many square feet total?
25 280 -- 280 square feet.

1 If it was 120 feet, this -- and it was a spa,
2 you could have 50 percent of the area not have a 4-foot
3 walkway around it. If it's over 120 feet, they
4 consider it to be a swimming pool, and therefore you
5 have to have 100 percent 4-foot walkway around it.

6 In this case, the spa is literally 3 feet
7 deep. It is really a spa. It just happens to be a
8 bigger spa.

9 And what the variance really did was give
10 us -- basically it says: If it's a spa, even though
11 it's 120 feet long -- and from a health-and-safety
12 purpose, it really doesn't -- it doesn't harm the
13 health and safety of the people who are swimming.

14 And let me just give you the variances. One
15 is requiring a 4-foot deck around the perimeter of the
16 pool, and that eases the ability of somebody to grab
17 somebody out of this 3-foot spa. That's the reason you
18 have a 4-foot.

19 And since it's only 3 feet deep --

20 And we have our engineer, Mr. Pfeiffer, who's
21 here. And he says, from a safety standpoint, this is
22 every bit as good as having a spa that's 120 feet with
23 4 feet around, because you're literally stepping in
24 3 feet away. It's 7-foot wide, and it's 3 feet deep.
25 But somebody could literally just stand up.

1 The other regulation is for a surface that is
2 pastel in color, meaning not clear. And so what this
3 is a clear wall alongside. So you can see it here.
4 This is actually a glass wall instead of pastel color.

5 And the pastel colors are -- the purpose of
6 those is to make sure that there's no algae growing in
7 the pool and that you can see the people. Again,
8 another health-and-safety provision, which we believe
9 the Department of Health has the right to grant a
10 variance for.

11 Mr. Pfeiffer, would you like to come up and
12 talk about the alternatives that you were suggesting?
13 Equal alternative, actually.

14 **MR. PFEIFFER:** Thank you. My name is Ken
15 Pfeiffer, Pfeiffer Engineering.

16 I've been designing swimming pools for over
17 40 years now.

18 **MS. DOUGHERTY:** Talk louder.

19 **MR. PFEIFFER:** I've been designing swimming
20 pools for over 40 years. I used to be employed by the
21 Florida State Board of Health and the Department of
22 Health and Rehabilitative Services, so I'm quite
23 familiar with the codes.

24 As far as what she was alluding to, the
25 safety aspect, if we were to take a swimming pool that

1 met -- or I should say a spa/pool that meets the code
2 requirement of 120 square feet or less, with a
3 50 percent walkway, you theoretically could have a
4 swimming pool that is 7-foot wide by 18 feet long and
5 meet the requirements for an obstructed deck around
6 50 percent of the pool.

7 This would mean, on a rectangular-type pool,
8 the closest distance you could get to a person in
9 distress would be 8 feet, half the length of the pool,
10 because the other half is obstructed.

11 Their pool is 7 feet wide and 40 feet long,
12 and the closest they can get to a person in distress is
13 7 feet, which means, in reality, a person in distress
14 in an approved pool -- spa/pool would be in more
15 distress -- or actually in more danger, if you wish to
16 look at it that way, than a person in this pool that
17 they are -- that they were granted the request for.

18 And this is possibly one of the reasons it
19 went through the minds of the individuals at the
20 advisory board hearing. And they merely make a
21 recommendation to the Department of Health. Is it not
22 official until the Health official signs it off. And,
23 of course, that was done.

24 So it's a two-point review possess as far as
25 the DOH is concerned. It is approved by the advisory

1 board, and then it is approved by the secretary.

2 The secretary oftentimes denies these
3 applications that are made by the advisory board.

4 In this case --

5 **MS. HASSAN:** Mr. Chairman, I'm just going to
6 object to the extent that he's not here representing
7 DOH, and I think it's improper hearsay. He's
8 testifying on behalf of the DOH as to its process,
9 which I don't think he has the authority to do that.

10 **MR. PFEIFFER:** Very well. I believe I've
11 answered the question as to the safety of this
12 particular spa versus an approved spa.

13 **MS. DOUGHERTY:** Thank you.

14 And, lastly, I wanted to point out the
15 Department of Administrative Hearing cases.

16 The first one is Flamingo Inn of Grassy Key
17 versus Department of Health, in which case DOH
18 recommended that the Department of Health grant a
19 variance from the Department of Health's regulations
20 concerning light-colored surfaces in pools.

21 And another was City of Sunrise versus
22 Department of Health, in which case the DOH again
23 recommended that the Department of Health grant a
24 variance from the requirements that wading pools have a
25 minimum of 10-foot decks surrounding at least

1 50 percent of their perimeter.

2 So our point is: This is really a spa. It's
3 only 3 feet deep. And the fact that we have over
4 120 feet of swimming area doesn't make it less of a
5 spa, and that we should be -- and the variances that
6 were granted by the Department of Health should be
7 honored by the building official, although I don't
8 believe they think they have the jurisdiction to do so.

9 Thank you.

10 **CHAIRPERSON DERRER:** Miami Beach?

11 Well, first, are there questions from the
12 board?

13 **MR. McCONACHIE:** Yes. Good afternoon. My
14 name is Richard McConachie, building official, City of
15 Miami Beach.

16 In reference to the swimming pool that is
17 being discussed, I believe you all may have a copy of
18 the letter from the Department of Health dated April 2,
19 2009, where it says, on the second page of that letter:

20 "This variance, as approved, applies
21 only to that section of the Florida
22 Administrative Code for which the variance
23 was requested. This variance in no way
24 exempts compliance with other state and local
25 regulations."

1 The review took place from my department, one
2 of my building plan reviewers, back in April, and the
3 comments, of course, were:

4 "According to Section 424.1.8.5 about
5 the decks, the requirement that the deck
6 shall be around the entire perimeter of the
7 pool" -- pool -- sorry. I did say "pool --
8 "decks shall have a minimum 4-foot wide, in
9 this section, unobstructed width around the
10 entire pool perimeter, except when that pool
11 is of less than 120 square feet."

12 I think this was all discussed by Counsel.

13 And the only other thing that I may add is
14 that the -- the architect of record, which I don't see
15 him in the audience right now, has recently submitted a
16 alternate, making this pool smaller, in the event I
17 guess that they're not --

18 **MR. KURZMAN:** Are you about ready to have a
19 meeting of the minds and conclude this --

20 **MR. McCONACHIE:** I'm sorry. But I don't
21 think what they're -- I can't speak for them. I
22 believe that they're going to see how this all comes
23 out today with the size of this pool.

24 And I would like to --

25 **MR. KURZMAN:** Would you be willing to table

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1 this at this time and try to resolve these differences
2 with the City as opposed to --

3 **MS. DOUGHERTY:** I think what he means is
4 there is a way -- there is a possibility of doing it,
5 but this is not what the client nor the architect wants
6 to do. They really would like to have this one.

7 **MR. KURZMAN:** I'm certain you will agree, if
8 I may, Mr. Shung, there's no question that what the
9 building official is stating is accurate and correct,
10 and as well as the fact that the variance that you were
11 granted still has to go to the next round, so to speak,
12 in order to be approved by the City. Okay?

13 I understand your point of view, and I concur
14 completely. And, to me, it's almost ludicrous to the
15 extent of what they're requiring, but the code is code,
16 nevertheless.

17 You can, needless to say, apply for a
18 variance with the City of Miami Beach, who has that
19 power to grant that, or take it up with the building
20 official, who also has within his ways and means to
21 grant you that particular decision.

22 But if you guys are close to coming to a
23 consensus between the two of you, why not try to work
24 it out that way, before you get any kind of approval
25 from this board.

1 **MS. DOUGHERTY:** I don't believe that the
2 building official is -- would grant us a variance or --

3 **MR. McCONACHIE:** I can speak for that.

4 I mean, basically, no -- I mean, the way it
5 is right now designed, submitted to the department, it
6 doesn't meet Florida Building Code. And, no, I would
7 not.

8 As far as what was proposed is possible in
9 making this pool smaller so that it would be in
10 compliance, that's the only thing that's sort of been
11 on the table. It's not really on the table. It was
12 proposed in a conversation.

13 **CHAIRPERSON DERRER:** It's your Honor's
14 understanding that there's a drawing out there that --

15 **MR. McCONACHIE:** Yes, sir.

16 **CHAIRPERSON DERRER:** What would happen if
17 they put a divider dividing it in to two pieces?

18 **MS. DOUGHERTY:** Exactly.

19 **MR. McCONACHIE:** Making it smaller?

20 I mean, that --

21 **CHAIRPERSON DERRER:** Both sides --

22 **MS. DOUGHERTY:** I think both sides --

23 **CHAIRPERSON DERRER:** -- with a divider in the
24 middle?

25 **MS. DOUGHERTY:** That would make it legal, but

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1 we think that that would make it more dangerous,
2 actually.

3 CHAIRPERSON DERRER: Well, okay.

4 MR. McCONACHIE: I would like for --

5 CHAIRPERSON DERRER: But in that case --

6 MR. McCONACHIE: Yes, sir.

7 CHAIRPERSON DERRER: -- if you put a divider
8 in it, there would be no problem with the Building Code
9 for that?

10 MR. McCONACHIE: If it has -- yeah, if it
11 meets -- what is presented me. --

12 Yes, it would be in compliance.

13 CHAIRPERSON DERRER: But the plan the
14 architect has, does it put a divider or --

15 MS. DOUGHERTY: It doesn't have a divider.

16 Can you --

17 CHAIRPERSON DERRER: -- is it the whole
18 thing?

19 MS. DOUGHERTY: I'm not sure --

20 MR. McCONACHIE: One -- that one has not been
21 presented to us yet.

22 CHAIRPERSON DERRER: Okay.

23 MR. McCONACHIE: This is the proposal.

24 MS. DOUGHERTY: I'd like to address what he
25 suggested, though, is that we still have to get, you

1 know -- we -- the variance in no way exempts compliance
2 with other state and local regulations.

3 The point I'm trying to make is that the
4 State regulations allow us to go to DOH with respect to
5 these health-and-safety issues. So it does comply with
6 the State regulations and the local regulations.

7 But I would like our client to discuss the --

8 **MS. HASSAN:** We're not saying it's the
9 solution.

10 **MS. DOUGHERTY:** I know that.

11 **MS. HASSAN:** Okay. But --

12 **MS. DOUGHERTY:** He was asking about whether
13 or not the client --

14 **MS. HASSAN:** Right.

15 **MS. DOUGHERTY:** I get it.

16 **MS. HASSAN:** Right. But the city --

17 **MS. DOUGHERTY:** All right.

18 **CHAIRPERSON DERRER:** We're not finished
19 talking --

20 **MS. DOUGHERTY:** Would you answer the question
21 whether or not you would like to -- if you put
22 something in the middle, what would happen?

23 **MR. SHUNG:** I'll just explain.

24 Hi, everyone.

25 My name is Emzon Shung. I represent the

1 ownership of the property at 940 and 960 Ocean Drive.

2 The pool is in the courtyard of the 960 Ocean
3 Drive building, the Edison Hotel.

4 The reason why we were looking to have one
5 continuous pool there is because there is a -- there's
6 a mezzanine area, and it just runs the -- the whole
7 width of that mezzanine area. And aesthetically it's
8 far more appealing to have one, you know, sweeping view
9 of a clear pool.

10 The only reason we tried to submit a
11 alternative design was because the Building Department
12 indicated that they were not likely to approve what we
13 had originally submitted and what we had gone through
14 great lengths to get approved through the State and the
15 County and all of that. So that's the reason why we
16 had submitted it.

17 And what it does is it does indeed put a
18 divider in there. But we also feel that that makes it
19 even less safe, because then people can go up on the
20 divider, and then they can come up to the glass, which
21 is -- which is, you know, protecting people from going
22 over, because if they are in the pool, they are much
23 deeper in and they can't come over the glass. So, you
24 know, we just felt it was much safer.

25 And the other thing is you can reach anybody

1 in that pool, even if they weren't able to stand up in
2 3 feet of water. There's really no issue of safety
3 there. It's -- you know, you could reach out a hand
4 and grab anybody in that pool. And in the worst case,
5 you could walk into there and pick anybody out.

6 I understand the issues with the code, but,
7 you know, that's why we went to great lengths to go to
8 Orlando to get the approval.

9 It's only recently we've found out we weren't
10 able to have the City approve it.

11 So, you know, I think this is a case of the
12 code is the code, but, you know, the intent of the code
13 is really to provide safety for people that were to go
14 into this, you know, rather shallow body of water and
15 allow them to be rescued, if they were to be in
16 distress and not be able to stand up in 3 feet of
17 water. And I think, by our design, we've accomplished
18 that.

19 And that's what I would like you to consider,
20 if you could.

21 **MR. McCONACHIE:** I just may add, though, I
22 mean, I know you said that recently you may have found
23 it wouldn't, but back in April this was reviewed, and
24 it was told then that -- the code requirements.

25 So maybe the architect hasn't given you that

1 information, back in April.

2 MR. SHUNG: That may be true.

3 MS. HASSAN: Thank you, Mr. Chair.

4 For the record, Rhonda Montoya Hassan,
5 Building Department legal advisor for the City of Miami
6 Beach.

7 I just wanted to walk the board, really
8 briefly, through a couple of legal issues in terms of
9 the jurisdiction.

10 This is sort of a unique circumstance.

11 And actually this isn't the first time that
12 the City has issues that overlap with the Department of
13 Health. We've visited this issue with the City on a
14 City project as well.

15 If you look in the Florida Building Code,
16 you'll notice many of the referenced standards,
17 including parts of 64E, are made a part of the Building
18 Code.

19 This particular provision of the Florida
20 Administrative Code, as it relates to DOH's
21 jurisdiction and its requirements for water features,
22 swimming pools, and such, is not a referenced code
23 standard in the Building Code.

24 I have a copy of Chapter 35, and it does
25 address 64E, but then it only limits the incorporation

1 of 64E as a standard as it relates to sewage disposal.

2 There's nothing in Florida Statutes nor in
3 the Administrative Code nor in the Building Code that
4 point us to say that the DOH and its process has
5 superior jurisdiction or somehow those rules and
6 regulations are more binding than the Florida Building
7 Code.

8 So, as such, they do overlap, not only in
9 this circumstance, but in other circumstances as well.

10 The jurisdiction of the building code as it
11 relates to swimming pools is not just structural.
12 There are other certainly numerous issues within the
13 construction of a swimming pool that overlap between
14 DOH and the Florida Building Code, you know, certain
15 plumbing issues, drainage issues. Those rules and
16 regulations that are found in DOH's rules and regs are
17 also in the Florida Building Code.

18 So kind of what Mr. Kurzman said, there are
19 two processes that go on in tandem, but that is not to
20 say that the DOH variance precludes enforcement of the
21 Building Code, nor can we ignore the Building Code.

22 When you look at Section 424 of the Florida
23 Building Code, the beginning statement in 424.1 states
24 that:

25 "Public swimming pools and bathing

1 places shall comply with the design and
2 construction standards of this section."

3 The issue of the 4-foot radius around the
4 pool -- and it's been determined to be a pool -- is
5 found in this section. Therefore, by the preliminary
6 section, it is a design-and-construction standard.

7 I also think, if we're discussing the intent
8 of this section, I don't think we can just limit
9 ourselves to say that it's just purely a safety
10 feature, which would be more appropriate to be reserved
11 and reviewed by DOH.

12 There could be issues, again, why this is a
13 design-and-construction standard, that it's found in
14 the Building Code could be for egress reasons. It
15 could be for accessibility reasons, to make sure that
16 you've got, you know, proper egress and accessibility
17 issues around a water feature, a water structure, in
18 this case a swimming pool.

19 There's nothing -- and when you -- we talk
20 about the ability of the Board of Rules and Appeals,
21 their -- the role is limited, as I'm sure Counsel will
22 tell you and more appropriately address, that there's
23 no authority to waive a clear code requirement. And in
24 this case, it's a prescriptive code requirement.

25 The letter of the variance, as the building

1 official indicated, clearly states that it only is
2 issuing a variance pursuant to its rules and
3 regulations. There may be others that are applicable.

4 In this case, it's not a referenced standard
5 to the Florida Building Code.

6 So, therefore, based upon the -- the
7 concurrent jurisdiction of both the Building Code,
8 through the building official, and the Administrative
9 Code, through DOH, we would respectfully request that
10 you deny the appeal.

11 **CHAIRPERSON DERRER:** Questions?
12 Mr. Utterback?

13 **MR. UTTERBACK:** I'm going to put a motion on
14 the floor for discussion on -- unfortunately, I think
15 the code -- for their sake, the appellant, the code is
16 pretty clear.

17 I don't think we can really get around the
18 fact this spa, which requires a 4-foot perimeter
19 walkway, and the fact, as the State -- Department of
20 Health says, "This variance in no way exempts
21 compliance with other State regulations."

22 So I think that's clear.

23 Consequently, I'll make a motion to deny the
24 appeal.

25 **CHAIRPERSON DERRER:** Is there a second?

1 **MR. BARNES:** Second.

2 **MR. KURZMAN:** Does the 4-foot walkway
3 primarily consist to be there for health-safety
4 factors, which the variance would absolutely cover --
5 you know, if -- if it was a structural nature, other
6 than the health-safety -- if it was a discussion as to
7 the direct Building Code and the type of materials that
8 are being used and et cetera, et cetera, I would agree
9 with your statement.

10 But where does that separation come to
11 pass --

12 And I welcome anybody's input who might be
13 able to even answer this question.

14 Where does the separation come between the
15 Building Department's direct input or the structural
16 aspect versus the rule of health and safety that plays
17 a role with the variances before us?

18 And that's where I'm having such great
19 difficult in this.

20 If there's anybody who can offer input, I'd
21 like to hear it, because I --

22 **MR. UTTERBACK:** Well, first of all, we're not
23 allowed to grant variances.

24 We're allowed to --

25 **MR. KURZMAN:** No. We're not granting a

1 variance.

2 **MR. UTTERBACK:** We're here to determine the
3 jurisdiction of the building official only in this
4 circumstance.

5 **MR. KURZMAN:** Okay.

6 **MR. UTTERBACK:** And I'm making a motion to --
7 even though I may not like it, because Rick and I
8 discussed the -- the shape of the pool relative to this
9 4-foot walkway could be taken into consideration, but
10 it isn't in the code.

11 The code, I think, is clear, and we're not
12 here to make determinations relative to the way the
13 code shows it.

14 **CHAIRPERSON DERRER:** Well, two things:
15 Number 1, it's not our responsibility to
16 resolve conflict as far as responsibility either of the
17 code -- building officials --

18 **MR. UTTERBACK:** That's correct.

19 **CHAIRPERSON DERRER:** -- or overturn it or
20 suggest an alternate, which we've done that.

21 But before -- as part of the discussion, I
22 would like to hear from the staff.

23 **MR. ALDREY:** Yeah. My name is Aldrey. I'm
24 an architect, code specialist with BCCO.

25 The fact here is that it could be less than

1 120 feet. It could be all these things that they say.
2 But that's not the fact. The fact is that it doesn't
3 comply with those requirements.

4 The Building Code does same thing that the
5 Department of Health does as far as safety. We, as
6 plan examiner -- if you are plan examiner, are never
7 instructed, like, "Look at the pool without taking care
8 of the life-safety issue because the Department of
9 Health will do that."

10 We do that on Chapter 4. We do that on
11 Chapter 10. So we do life-safety, both from the
12 Florida Building Code, as well as they do on the other
13 side.

14 As a courtesy, we never approve a plan until
15 it has an approval from the Department of Health or, if
16 it is a hospital, if they have that approval from
17 Department of AHCA.

18 But both department -- they review the exact
19 same thing on both department.

20 **CHAIRPERSON DERRER:** But what weight do you
21 give the Department of Health's approval if it doesn't
22 comply with the code?

23 **MR. ALDREY:** To me, it's irrelevant.

24 We would not give the final approval on a
25 pool unless it's final approved by the Department of

1 Health.

2 But if they objected, you could have this --
3 you could be here on the opposite case. Like --

4 **CHAIRPERSON DERRER:** The opposite, that's
5 right.

6 **MR. ALDREY:** Like the building official give
7 an alternate method, and the Department of Health
8 approve -- doesn't want to approve the plan.

9 So you'll be here at this board and trying to
10 do legal matter, which is not the case at this point.

11 This is just a technical issue.

12 If they feel that somebody doesn't drown in
13 3 feet of water, they could go back to the County
14 record and see how many kids drown, unless in a
15 bathtub.

16 So the 3 feet of water deep, that's not a
17 problem.

18 If they feel that this is almost 120, but
19 it's not, their architect, you know, should do it
20 according to the code, less 120 square feet.

21 But this is the fact. This is not 120.

22 Now, whether it's 3 feet or 5 feet or -- all
23 those are, you know -- maybe they could be that, but
24 they're not. The fact is that this needs to comply
25 clearly with 4 feet around.

1 If they put a divider in the middle, they
2 will creating another problem, because they would have
3 to have that 4 feet between the two pools.

4 So if -- if -- I think that you need to
5 comply. It's black and white. It's in the code.

6 And everything they say that it could be,
7 yeah, they could -- they could implement it in the
8 plan, and then they would not have this big pool.

9 **MR. KURZMAN:** What you're saying is, if I
10 understand you, if they were hypothetically to make two
11 pools, if they have a demarcation between the two
12 pools --

13 **MR. ALDREY:** You cannot do that, sir, because
14 if you have two pools and put, let's say, an acrylic --

15 **MR. KURZMAN:** It has to be 4 feet wide?

16 **MR. ALDREY:** Yes. Because you have two
17 pools.

18 **MR. KURZMAN:** Then it would be okay?

19 **MR. ALDREY:** Yes.

20 But then you need to divide that in two pool
21 and have the 50 percent or 75 percent or whatever
22 percent of perimeter area around that pool.

23 But you going to have two continuous pool.

24 **MR. KURZMAN:** So if it was divided, and then
25 there was a walkway in the center, then --

1 **MR. ALDREY:** Then we wouldn't be here,
2 because it would be no case.

3 **CHAIRPERSON DERRER:** Any further discussions
4 or comments?

5 If not, I'll ask the board for a decision.

6 **MS. DOUGHERTY:** I'm just going to read a
7 provision of the Florida Statutes and the Florida
8 Statutes as it relates to what the Department of
9 Health's jurisdiction is. And it says here:

10 "The private pools and water therapy
11 facilities connected with facilities
12 connected with hospitals, medical offices,
13 licensed therapy establishments are exempt
14 from the chapter.

15 "Pools which serve condominiums and
16 pools which serve -- swimming pools which
17 serve hotels are within the jurisdiction of
18 the Department of Health."

19 And it says that:

20 "The department, "meaning the Health
21 Department, "may not establish any rule or
22 regulation governing the design, alteration,
23 modification, or repair of swimming pools and
24 bathing places which have no impact on
25 health, safety, and welfare of the persons in

1 the swimming pool and bathing places."

2 By implication, if it does have to do with
3 health, safety, and welfare, such as whether or not you
4 have a walkway around it, they're allowed to grant
5 variances pursuant to Florida Statutes -- sorry.
6 You're going to hand this to me -- 514.0115,
7 Subsection 5, which says:

8 "The department may grant variances from
9 any rule adopted under this chapter pursuant
10 to the procedures adopted by the department
11 and rule."

12 And the Florida Statutes gives both of them
13 jurisdiction.

14 And when we get a variance from one
15 department under a health-and-safety issue, it seems
16 that a Florida Statute's not going to say, "That's
17 irrelevant," because somebody else can say, "You don't
18 have it."

19 So that's our argument, and we hope you
20 support it.

21 **CHAIRPERSON DERRER:** The question is: This
22 facility has not been constructed?

23 **MS. DOUGHERTY:** No. No.

24 **CHAIRPERSON DERRER:** Mr. McConachie, do you
25 issue the permits for the pool?

CERTIFICATE

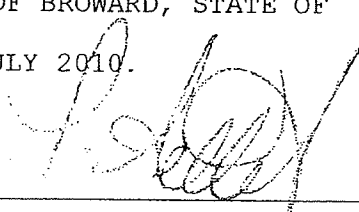
STATE OF FLORIDA)
) SS.
COUNTY OF BROWARD)

I, TANYA SETTEL, CERTIFY THAT I WAS
AUTHORIZED TO AND DID REPORT THE FOREGOING PROCEEDINGS.

I DO FURTHER CERTIFY THAT THE FOREGOING IS A
TRUE AND ACCURATE TRANSCRIPT OF THE TESTIMONY AS
REPORTED BY ME AND BEFORE ME AT THE TIME, PLACE, AND
THE DATE HEREINABOVE SET FORTH.

I DO FURTHER CERTIFY THAT I AM NEITHER A
RELATIVE NOR EMPLOYEE, NOR ATTORNEY NOR COUNSEL OF ANY
OF THE PARTIES TO THIS ACTION, AND THAT I AM NEITHER A
RELATIVE NOR EMPLOYEE OF SUCH ATTORNEY OR COUNSEL, AND
THAT I AM NOT FINANCIALLY INTERESTED IN THE ACTION.

WITNESS MY HAND AND OFFICIAL SEAL IN THE CITY
OF FORT LAUDERDALE, COUNTY OF BROWARD, STATE OF
FLORIDA, THIS 26TH DAY OF JULY 2010.

BY: 
TANYA SETTEL, REPORTER

JM

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