

FLORIDA BUILDING COMMISSION



FACILITATOR'S SUMMARY REPORT OF THE NOVEMBER 15, 2010 TELECONFERENCE MEETING *TALLAHASSEE, FLORIDA*

FACILITATION, MEETING AND PROCESS DESIGN BY



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FLORIDA BUILDING COMMISSION

NOVEMBER 15, 2010 TELECONFERENCE MEETING SUMMARY REPORT

MONDAY, NOVEMBER 15, 2010

Opening and Meeting Attendance

The meeting was opened at 10:30 AM, and the following Commissioners participated: Raul L. Rodriguez, AIA, (Chair), Hamid Bahadori, Bob Boyer, Ed Carson, Dale Greiner, Jeff Gross, Jon Hamrick, Scott Mollan, Nicholas Nicholson, John Scherer, Jim Schock, Chris Schulte, Jeff Stone, Tim Tolbert, and Randall Vann.

DCA Staff Present

Leslie Anderson-Adams, Rick Dixon, Ila Jones, Mo Madani, Marlita Peters, and Jim Richmond.

Meeting Facilitation

The meeting was facilitated by Jeff Blair from the FCRC Consensus center at Florida State University. Information at: <http://consensus.fsu.edu/>



Project Webpage

Information on the project, including agenda packets, meeting reports, and related documents may be found in downloadable formats at the project webpage below:

<http://consensus.fsu.edu/FBC/index.html>

Agenda Review and Approval

The Commission voted unanimously, 15 - 0 in favor, to approve the agenda as presented including the following objectives:

- To Consider Regular Procedural Issues: Approval of Agenda
- To Hear an Appeal of a Binding Interpretation
- To Consider 2010 Florida Building Code Adoption Procedural Issues

Appeal of Binding Interpretation #65, 940 Ocean Drive, LLC, Miami Beach, Florida

The Florida Building Commission (Commission) received an appeal of a binding interpretation of the Florida Building Code, pursuant to Section 553.775(3)(c)(7), Florida Statute. The Petitioner, 940 Ocean Drive LLC owner/developer of the Breakwater/Edison Hotel, appealed Binding Interpretation No. 65 issued by the Building Officials of Florida's (BOAF) ruling that the

Department of Health (DOH) cannot issue a variance to the Florida Building Code. The Department of Community Affairs (DCA) selected a “Presiding Officer” to review the appeal and provide the Florida Building Commission with conclusions of law regarding the appeal (Case No. DCA10-BC-184) in a “Recommended Order”. The “Presiding Officer”, Leslie Anderson-Adams, outlined two options to the Commission noting that both are legally supportable. Option 1’s conclusion is for the Commission to enter a Final Order upholding Florida Building Code Binding Interpretation No. 65. Option 2’s conclusion is for the Commission to enter a Final Order overturning Florida Building Code Binding Interpretation No. 65, and finding that the DOH was authorized to grant variances or waivers from provisions contained the Florida Building Code, which variances are binding upon the Building Official. The “Presiding Officer” opined that Option 1 contains the preferable interpretation of law since it is based on the plain language of the statute and the Florida Building Code.

The Petitioner’s attorney, Robert Fine, argued in favor of Option 2, and the “Intervener”, the City of Miami Beach, argued in favor of Option 1. Following an opportunity for public comment, questions and answers, and discussion the Commission took the following actions:

Commission Actions:

Motion—The Commission voted, 7 – 7*, in favor of “Option 2” to enter a Final Order overturning Florida Building Code Binding Interpretation No. 65, and finding that the DOH was authorized to grant variances or waivers from provisions contained the Florida Building Code, which variances are binding upon the Building Official. The motion failed since there was a tie vote.

Motion—The Commission voted, 14 – 0, to reconsider. The motion to reconsider was made by a Commissioner from the prevailing side of the first vote.

Motion—The Commission voted, 8 – 6**, in favor of “Option 2” to enter a Final Order overturning Florida Building Code Binding Interpretation No. 65, and finding that the DOH was authorized to grant variances or waivers from provisions contained the Florida Building Code, which variances are binding upon the Building Official.

(Attachment 1—Recommended Order on Binding Interpretation)

** Although there were 15 members at the start of the meeting, there were only 14 members participating when the votes were taken.*

*** The motion passed since the Commission’s legal processes (Accessibility Waivers, Declaratory Statements, Product Approvals and their respective appeals) operate on a simple majority for approval requirement and not the 75% threshold required for all other substantive Commission decisions.*

2010 Florida Building Code Procedural Issues Relating to Coordination of Chapter 120, F.S., Rule Adoption Requirements with Chapter 553 Code Development Process

Jim Richmond, FBC Attorney, indicated that due to Chapter 120 requirements for a draft of the proposed rule to be available during the rule adoption hearing, the Commission will consider the TAC’s recommendations on proposed Code amendments at the December 2010 meeting in a rule development workshop instead of a rule adoption hearing. The Commission will then formally adopt the approved code amendments in a rule adoption hearing conducted by teleconference in January of 2011.

Adjourn

Chairman Rodriguez adjourned the meeting at 11:45 AM.

ATTACHMENT 1

RECOMMENDED ORDER ON BINDING INTERPRETATION No. 65

**STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS**

IN RE:

940 OCEAN DRIVE, L.L.C.,

Case No. DCA10-BC-184

Petitioner/Appellant

RECOMMENDED ORDER

Procedural Statement

This is an appeal to the Florida Building Commission of a binding interpretation of the Florida Building Code, pursuant to § 553.775(3)(c)(7), Florida Statutes (Fla. Stat.).

Statement of Facts

The Petitioner, 940 OCEAN DRIVE L.L.C., is the owner/developer of the Breakwater/Edison Hotel, a historic property located in the south Miami Beach historic Art Deco District.

The Petitioner wishes to construct a spa pool as part of its renovation of the Breakwater/Edison Hotel. The proposed pool would have more than 120 square feet in pool water surface area.

The Intervenor, CITY OF MIAMI BEACH (“City”) is a municipality with a Building Department that is authorized to enforce the Florida Building Code.

The Petitioner submitted an application to the City’s Building Department for a swimming pool, under permit number B1002333, on March 25, 2010.

The City’s Building Department Plans reviewer rejected the Petitioner’s plans because

the plans did not comply with § 424.1.8.5., F.B.C., which states:

“Decks shall have a minimum 4-foot-wide (1219 mm) unobstructed width around the entire pool perimeter except that pools of less than 120 square feet (11 m²) of pool water surface area shall have a minimum 4-foot-wide (1219 mm) unobstructed continuous deck around a minimum of 50 percent of the pool perimeter. Decks less than 4 feet (1219 mm) wide shall have barriers to prevent their use. Decks shall not be more than 10 inches (254 mm) below the top of the pool. For pools of 120 square feet (11 m²) or greater, 10 percent of the deck along the pool perimeter may be obstructed.”

The Petitioner applied to the Department of Health (“DOH”) for a variance from the requirements for public swimming pools and bathing places that are codified in the DOH rules in Chapter 64E-9 of the Florida Administrative Code (“F.A.C.”) and restated in § 424.1.8 of the Special Occupancy Chapter of the 2007 edition of the Florida Building Code (“F.B.C.”). The Petitioner’s application was designated #2114. Specifically, the Petitioner asked for a variance from section 64E-9.010(5), F.A.C, which requires that if the spa water area is 120 square feet or larger the spa shall have a 4 feet wide deck around the entire spa perimeter.

The DOH granted the request for variance in application #2114 on April 2, 2009, with the provisos that the pool be permitted as a spa, and that the Petitioner provide a contrasting color around some acrylic panels that the Petitioner proposes to use in the pool. The variance states that if these provisos are met, it is unlikely that significant impact on the health and safety of bathers will occur.

The City’s Building Department Plans reviewer again rejected the Petitioner’s plans on April 6, 2010, because the plans did not comply with § 424.1.8.5., F.B.C., which states, in pertinent part “Decks shall have a minimum 4 foot wide (1219 mm) unobstructed width around the entire pool perimeter.”

The Petitioner appealed the decision of the City’s Building Official to the Miami-Dade

County Board of Rules and Appeals (“BORA”) which rejected the Petitioner’s appeal and upheld the City Building Official’s determination.

The Petitioner then sought a Florida Building Code Binding Interpretation pursuant to § 553.775, Fla. Stat. On September 6, 2010, The Building Officials Association of Florida (“BOAF”) issued Binding Interpretation No. 65, stating (in summary) that the Department of Health cannot issue a variance to the Florida Building Code which binds the Building Official to abide by such variance.

The Petitioner now appeals Binding Interpretation No. 65 to the Florida Building Commission.

Conclusions of Law

The Florida Building Commission is authorized under § 553.775(3)(c)7., Fla. Stat., to review binding interpretations of the F.B.C..

The DOH is authorized, under § 514.021(1), Fla. Stat., to adopt and enforce rules within the Florida Administrative Code to protect the health, safety, or welfare of persons using public swimming pools and bathing places.

The DOH is authorized, under § 514.0115(5), Fla. Stat., to grant variances from any *rule* adopted under chapter 514, Fla. Stat.

The rule provisions in the Florida Administrative Code from which the DOH granted variances in this case were also adopted into the special-occupancy section of the F.B.C..

The Presiding Officer is of the opinion that two alternative interpretations of existing law are legally supportable in this case. These interpretations are set forth below under the headings “Option 1” and “Option 2.”

Option 1:

While the DOH is authorized to enforce the special occupancy sections of the F.B.C. pursuant to § 514.021(2), Fla. Stat., nowhere in statute or in the F.B.C. is the DOH specifically authorized to grant variances or waivers from any provisions of the F.B.C.

Furthermore, the DOH is prohibited, under § 514.021(2), Fla. Stat., from establishing 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, or any regulation governing the *construction, erection, or demolition* of public swimming pools and bathing places. Section 514.021(2), Fla. Stat., specifically states that 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.

Section 514.021(2), Fla. Stat., directs the DOH to provide technical assistance to the commission in updating the construction standards of the Florida Building Code which govern public swimming pools and bathing places.

The DOH is authorized, under § 514.021(2), Fla. Stat., to conduct plan reviews, issue approvals, and enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places.

The provisions in the § 64E-9.010, F.A.C., from which Petitioner sought a variance clearly involve design and construction standards for public swimming pools and bathing places. They also are clearly related to the health, safety and welfare of persons using public pools and bathing places. Whether these provisions have any greater health, safety and welfare implications than do other portions of the F.B.C. is unclear to the Presiding Officer, as is whether the subject matter of the rule “belongs” more appropriately in the F.A.C. or in the F.B.C. But it

is not necessary to resolve those uncertainties in order to reach a legal conclusion in the matter at hand, nor is it within this Presiding Officer's jurisdiction to determine whether the DOH exceeded its subject matter authority in adopting the rule in question.

The plain language of section § 514.021, Fla. Stat., indicates that while the DOH may issue variances and waivers to rules that it adopts in the Florida Administrative Code, it is not authorized to grant variances or waivers from provisions contained in the Florida Building Code. Therefore, the Building Official was not bound to abide by the waiver granted in application #2114.

If the will of the Florida Building Commission is to adopt "Option 1," the Commission would enter a Final Order upholding Florida Building Code Binding Interpretation No. 65.

Option 2:

The language and legislative intent of § 514.021, Fla. Stat., are unclear.

The DOH is *prohibited*, under § 514.021(2), Fla. Stat., from establishing 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, or any regulation governing the *construction, erection, or demolition* of public swimming pools and bathing places. Section 514.021(2), Fla. Stat., specifically states that 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.*

Section 514.021(2), Fla. Stat., directs the DOH to provide technical assistance to the commission in updating the *construction* standards of the Florida Building Code which govern public swimming pools and bathing places.

The DOH is authorized, under § 514.021(2), Fla. Stat., to conduct plan reviews, issue approvals, and enforce the special-occupancy provisions of the Florida Building Code which apply to public swimming pools and bathing places.

The provisions in the § 64E-9.010, F.A.C., from which Petitioner sought a variance clearly involve both design and construction standards for public swimming pools and bathing places. They are also clearly related to the health, safety and welfare of persons using public pools and bathing places.

Section 514.021, Fla. Stat., does not specify how to distinguish between a regulation governing the *design, alteration, modification, or repair* of public swimming pools and bathing places that impacts the health, safety, and welfare of persons using public swimming pools and bathing places (which the DOH is authorized to adopt) and a regulation governing the *construction, erection, or demolition* of public swimming pools and bathing places that also impacts the health, safety, and welfare of person using said pools and bathing places (which the DOH is not authorized to adopt). Perhaps as a result of this statutory ambiguity, the DOH has continued to adopt rules that pertain to matters that are public health and safety related, but that are not easily classified as either related to design, alteration, modification, and/or repair, or to construction, erection, and/or demolition. The language of at least some of these rules has been reiterated in the special-occupancy provisions of the F.B.C.

Nowhere in statute or in the F.B.C. is the DOH specifically authorized to grant variances or waivers from any provisions of the F.B.C. However, the language in the applicable statutes can support an interpretation that includes the granting of variances and waivers. The language of § 514.021, Fla. Stat., is similar in some respects to the language in §§ 399.02(6) and (7), Fla. Stat., pertaining to elevators. Section 399.02 authorizes the Department of Business and

Professional Regulation to carry out all provisions in chapter 399 with regard to the inspection and regulation of elevators, to enforce the provisions of the Florida Building Code (pertaining to elevators), and to make recommendations to the Florida Building Commission regarding revisions to the Florida Building Code (pertaining to elevators) in order to protect the public health, safety, and welfare. Chapter 399 does not specifically authorize DBPR to grant variances and waivers of the F.B.C. But in the case of elevators, § 3001.2, F.B.C. Building Volume, (2007) includes language that does specifically authorize variances and waivers:

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

The Division of Hotels and Restaurants may grant exceptions, variances and waivers to the *Elevator Safety Code* as authorized by the *Elevator Safety Code* (ASME A 17.1, Section 1.2) and *Florida Statutes* (Chapter 120.)

In contrast, with regard to swimming pools, § 424.1, F.B.C. Building Volume, states:

Public swimming pools and bathing places. Public swimming pools and bathing places shall comply with the design and construction standards of this section.

NOTE: Other administrative and programmatic provisions may apply. See Department of Health (DOH) Rule 64E-9, *Florida Administrative Code* and Chapter 514, *Florida Statutes*.

Because the language of section § 514.021, Fla. Stat., authorizes the DOH to conduct plan reviews, issue approvals, and enforce the special-occupancy provisions of the F.B.C. which apply to public swimming pools and bathing places, and to issue variances and waivers to rules that it adopts, by implication the intent of the statute is to authorize the DOH to issue variances and waivers to its rules when they have been adopted into the F.B.C. Furthermore, by referring to

Rule 64E-9, F.A.C., within the F.B.C., by implication, the F.B.C. defers to the DOH's authority to grant variances and waivers from Rule 64E-9.

If the will of the Florida Building Commission is to adopt "Option 2," the Commission would enter a Final Order overturning Florida Building Code Binding Interpretation No. 65, and finding that the DOH was authorized to grant variances or waivers from provisions contained in the Florida Building Code, which variances and waivers are binding upon the Building Official.

Recommendation

In the Presiding Officers' opinion, while both Options are legally supportable, Option 1 contains the preferable interpretation of law because it is based upon the plain language of the statute and the F.B.C. The undersigned Presiding Officer recommends that the Florida Building Commission enter a Final Order adopting the conclusions of law set forth in "Option 1" and upholding Florida Building Code Binding Interpretation No. 65.

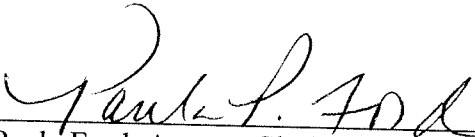
Entered this 5th day of November 2010, in Tallahassee, Florida.

Leslie O. Anderson-Adams

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Agency Clerk of the Department of Community Affairs, and that true and correct copies have been furnished to the persons listed below in the manner described, on this 5th day of November 2010.



Paula Ford, Agency Clerk

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