Adapted from Petitioner's appeal to and presentation before at the Sanibel City Council siting as the City's Construction Board of Adjustment and Appeals on December 2, 2025:

Re: Whitecaps South Condominium Association, Inc. Build Back
2907 West Gulf Drive, Sanibel FL 33957
Building Permit Nos. BLDR-2024-017219. BLDR-2024-017228, BLDR-2024-017232 and BLDR-2024-017233
Change Order Denial

This is Whitecaps South Condominium Association's ("Whitecaps") appeal, on behalf of its individual unit owners, regarding the decision and interpretation of the Florida Building Code[1] by the City's Building Official, Craig Molé, relative to the Association's permit applications listed above.

To achieve approval of its buildback permits[2], Mr. Molé has required each of the proposed four duplex buildings[3], and each of the nine individual condominium units in Whitecaps[4] to comply with accessibility and mobility features, including elevators, in each building (vertical accessibility), andaccessibility requirements in the interior of each unit. The interior features alone will require extensive remodeling of the interior of the new modular units to be shipped to the site which will cost the unit owners hundreds of thousands of dollars. The features are:

General ADA Features :

- Installation of a vertical platform lift with a 36" ramp (3" rise) for accessible entry to the elevator threshold
- Elevator
- Concrete paving for designated handicap parking space

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[1] The Florida Building Code is adopted by reference in Section 14-2 of the Sanibel Code, being part of Chapter 14, titled the *"Sanibel Building Code."* Section 14-53 provides for appeals of the City Building Official's decision by the owner of a building, or a duly authorized agent, when it is alleged the intent and meaning of Chapter 14 has been misconstrued or incorrectly interpreted.

[2] "Buildback" under the Sanibel land development code allows a nonconforming structures destroyed or substantially damaged by accidental fire or other natural and disastrous force to be may be built back or reconstructed, (i) within its pre-disaster footprint;(ii) within the three-dimensional outline of the lawfully existing habitable area of the pre-disaster building;(iii) up to its pre-disaster gross square footage;(iv) up to its lawfully existing number of dwelling units, but;(v) elevated above the base flood elevations required by federal flood regulations.

[3] The four permits referenced above are for the four duplex units comprising 8 of the 9 units of the condominium. The ninth building will be a free-standing single-family unit as previously existed.

[4] The eight condominium units in the four duplex buildings are each 598 square-foot, one bedroom units, one bathroom units. The nineth unit is three bedroom, 2 bath individual dwelling unit measuring 1,682 square feet.

- 12' wide clearance for accessible vehicle parking
- Stair risers limited to a maximum of 7"
- ADA-compliant turning spaces (60" diameter, T-shaped, or 36" x 48" clear floor area)
- ¼" beveled threshold at entry doors

Kitchen ADA Changes:

- 6" wide x 9" high toe clearance
- 27" high knee clearance at sink base
- 30" wide roll-under work surface
- 34" high countertops
- ADA-compliant pull-down wall cabinets (24" high)
- Electrical outlets installed at 48" A.F.F. and a minimum of 36" from corners

Bathroom ADA Changes:

- Roll-in shower
- ADA folding shower seat
- Grab bars at shower and toilet areas
- Wall-hung or pedestal sink
- ¼" beveled threshold for shower
- ADA-compliant toilet

Plans including these features were presented to finally determine the full extent of what was required. However we disagree that these units are required to have these accessibility features as they are not "places of lodging" under the ADA.

When the contractor assisting the Association sought to amend or correct the approved plans to remove these features, he was informed by Mr. Molé via the attached memo in the building permit record that the changes would not be approved.

Mr. Molé is requiring these accessibility features based on his position that Section 106.5 of the 2023 Florida Building Code, Accessibility properly defines a "place of public accommodation" as including

each of the Whitecaps units, under the category of "places of lodging." This position has been confirmed by the City Attorney.

Mr. Molé's interpretation is flawed because the only legal definition of a "place of public accommodation" under Florida law is in the regulations published by the Federal Justice Department in the federal Americans With Disabilities Accessibility Act ("ADA") Standards for Accessible Design, and related regulations in 28 C.F.R. Parts 35 and 36 and 49 C.F.R. Part 37. (C.F.R, being the "Code of Federal Regulations") These regulations were adopted as Florida law by the Florida Legislature in Section 553.503 of the Florida Americans With Disabilities Accessibility Implementation Act (the "State Accessibility Act"))(Sections 553.501 – 553.513, Florida Statutes). Section 553.503 states the CFR regulations are "adopted and incorporated by reference as the law of this state." The Legislature further required that the CFR regulations be "incorporated into the Florida Accessibility Code for Building Construction and adopted by the Florida Building Commission in accordance with Chapter 120."

Had Mr. Molé applied these CFR regulations to Whitecaps building permit applications, the Whitecaps units would not each be classified as a place of public accommodation, and the challenged accessibility features for a place of public accommodation would not apply. Therefore, in this appeal, we request that the Board require Mr. Molé to apply the definition of a " place of public accommodation" in CFR regulations to the Whitecaps building permit applications. If the Board declines our request, we will proceed with a Petition for a statewide panel review under Florida Statutes Section 553.775, this appeal being a prerequisite to that process.

Rather than applying the adopted CFR regulations to Whitecaps, Mr. Molé has utilized the definition of a "place of public accommodation" adopted by the Florida Building Commission in Chapter 12 of the 2023 Florida Building Code("FBC"), Accessibility (8th Edition, effective December 31, 2023). Chapter 12 of the FCB begins by citing Section 553.503, quoted above, stating: "The Department of Justice regulations 28 CFR, Part 35, and 28 CFR, Part 36 . . . and the requirements of Florida law, Part II, Chapter 553 F.S.[the State Accessibility Act], have been incorporated in this code."

This statement in the FBC is inaccurate. While seeming to track the CFR definition, the definition of a "place of public accommodation" in Section 106.5 of Chapter 12 of the Florida Building Code is materially different than the definition in 28 C.F.R. 36.104, adopted by the Florida Legislature. As relevant here, applicable to the category of a "place of lodging," 28 C.F.R. 36.104(1) states:

> ***Place of public accommodation*** **means** a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories –
>
> (1) **Place of lodging**, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a "place of lodging" if it is

(i) An inn, hotel, or motel; or

(ii) A facility that –

(A) Provides guest rooms for sleeping for stays that primarily are short- term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of his or her stay; **and**

(B) **Provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following –**

(1) On- or off-site management and reservations service;

(2) Rooms available on a walk-up or call-in basis;

(3) Availability of housekeeping or linen service; and

(4) Acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check-in, and without a prior lease or security deposit. (emphasis added)

The Florida Building Code definition, while containing this same language, adds the following unnumbered sentence at the end of the cited definition above:

> **Resort condominiums** are considered to be **public lodging establishments** pursuant to Section 509.242, F.S.

It is this unauthorized sentence that brings the Whitecaps units within the definition of a "place of public accommodation," with the buildings and each unit treated as "transient lodging" under the FBC for purposes of ADA requirements. This has led to incorrect requirements under Chapters 201 (vertical accessibility), and Chapters 224, and 806 (applicable to "transient lodging guest rooms") of the FBC cited in Mr. Molé's memo. However, Whitecaps never had and does not plan to provide guest rooms under conditions and with amenities similar to a motel, hotel or inn, and will have ***none of the items*** listed in 28 C.F.R. 36.104(1)(ii)(B)(1-4). There is no pool or other "resort" or hotel amenities, only a beach path. The reference to Section 509.242 of the Florida Statutes is remarkable because the term "resort condominiums" is no longer utilized in Section 509.242, which has not contained that term for more than 17 years. Also, Section 509 is a licensing statute, and has no relation to the State Accessibility Act or the ADA. The Florida Building Code then adds a definition of a "resort condominium"(again citing non-existent Section 509.242), as:

> **Resort Condominium,** (Section 509.242, F.S.). A *resort condominium* is any unit or group of units in a condominium, cooperative, or time-share plan which is rented more than three times a calendar year for periods of less than 30 days or one calendar month,

> whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or one calendar month, whichever is less.

The Florida Building Commission had no authority to adopt, and Mr Molé has no authority to apply a definition of "a place of public accommodation" that differs from the Federal ADA standards in the CFRs adopted "as the law of this state," which the Florida Legislature directed the Florida Building Commission to "incorporate it into the Florida Accessibility Code for Building Construction." This additional sentence, and the definition of resort housing runs contrary to the Federal standard, which requires an evaluation of features of the property in determining whether a property is a "place of lodging" for purposes of the ADA. In Section 553.506 of the State Accessibility Act, the Florida Legislature authorized the Florida Building Commission to "by rule, adopt revised and updated versions of the Americans with Disabilities Act Standards for Accessible Design in accordance with Chapter 120." Again, the revised and updated versions refer only to revisions to *Federal law and standards* , not a definition altered by the Florida Building Commission contrary to legislative direction. In Section 553.73 the Florida Legislature declared:

> Neither the commission nor any local government shall revise or amend any standard of the Florida Accessibility Code for Building Construction except as provided for in [the State Accessibility Act].

Therefore, neither the Commission nor the City of Sanibel can alter or expand the definition of a "place of public accommodation" under 28 C.F.R. 36.104, as adopted by the State Accessibility Act. "An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction." *Dep't of Revenue v. Graczyk,* 206 So. 3d 157, 160 (Fla. 1st DCA 2016);and *Subirats v. Fidelity Nat. Property,* 106 So. 3d 997, 1000 *(Fla. 3d DCA 2013)(*Where a statute does not contain a specific grant of legislative authority for a certain rule, any such rule is an invalid exercise of delegated legislative authority.).

Mr. Molé's interpretation also leads to an absurd result. The Florida Supreme Court. has held that a basic tenant of statutory construction compels a court to interpret a statute or rule to avoid a construction that would result in an unreasonable, harsh or absurd consequences. *Se, State v. Atkinson,* 831. So. 2d172, 174 (Fla. 2022). Under the federal standards. if Whitecaps were operated as a hotel or motel only 5% of its units, or one, would be required to have full ADA mobility accessible, but no roll-in shower would be required in any unit as the total number of units is less than 25. Under Florida law, motels and hotels are also required to have 5% of their guest rooms, minus the number of full ADA accessible rooms, equipped with certain accessibility so a second Whitecaps unit or 2 would be required to have some ADA features. As applied by Mr. Molé, *all* of Whitecaps' units are required to have full ADA mobility accessible features, including roll-in showers. Thus, if Whitecaps was a true place of public accommodation, i.e., a hotel or motel, or a facility with hotel or motel services and amenities operated similar to a motel, it would need only one unit to have all the challenged accessibility features, rather than all nine units, with one added unit having limited features (the "Florida 5%").

The Whitecaps unit owners are not and do not wish to be a motel or hotel. Whitecaps does not have the facilities, management or features to be a motel or hotel. Whitecaps unit owners simply have the option under their Declaration of Condominium to rent their units for a minimum period of seven days. Three unit owners did not rent their units before Hurricane Ian and do not plan to rent after completion, while others rent sporadically while they or family members are not occupying the units. The new Whitecaps units are designed to meet all Florida accessibility requirements that apply to new residential units under the State Accessibility Act, but the units should not be classified as a place of public accommodation contrary to the Florida Legislature's clear directive.

Based in the above, we request that this body direct the City of Sanibel Building Official to apply solely the Federal ADA definition of a "place of public accommodation and "place of lodging" as set forth in 28 CFR 36.104 when reviewing Whitecaps building permit applications for ADA compliance not the definition of those terms in the 2023 Florida Building Code or any other provision of the building code contrary to 28 CFR 36.104, or requiring accessibility based solely on the units being permitted to be rented for less than 30 days.

Respectfully submitted:

Mark A. Ebelini