

Lower Tribunal No.: Petition 243 (before Panel)

FLORIDA BUILDING COMMISSION

CITY OF MIAMI,

Petitioner,

vs.

DELIA HOSPITALITY, LLC,

Respondent.

**CITY OF MIAMI'S AMENDED PETITION FOR
REVIEW OF BINDING INTERPRETATION**

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AMENDED PETITION FOR REVIEW OF BINDING INTERPRETATION¹

The Petitioner, City of Miami (the “City”), pursuant to Section 553.775(3)(c)(7), Florida Statutes, and by and through its undersigned counsel, hereby files this Amended Petition for Review of Binding Interpretation issued by the lower panel in Petition 243, and in support thereof states as follows:

INTRODUCTION

This petition involves a binding interpretation issued by the lower panel of the meaning of the term “lack of progress” found in Section 105.4.1.1 of the Florida Building Code. The City Building Official, per the discretionary authority invested in him by the both the Florida Building Code and the Miami-Dade County Code, revoked a building permit issued to Respondent, Delia Hospitality, LLC, based on a lack of progress and, frankly, an abuse of the inspection process that was occurring in order for the Respondent to continuously receive extensions on their permit despite having failed to even complete the full foundation work within three years of the issuance of the Permit. The Respondent’s actions had resulted in a steady stream of complaints to the City by neighboring property owners and a slew of code citations by the City, all related to the dangerous and disorderly

¹ The City files this amended petition because the version of the binding interpretation included with its original petition was a draft, which had been inadvertently uploaded to the BCIS for a short time, during which the City accessed and downloaded it. The final version of the binding interpretation was subsequently provided to the City and this amended petition follows.

condition of the property at issue that resulted from Respondent's lack of progress under the permit. Respondent appealed the permit revocation to the Miami-Dade Board of Rules and Appeals ("BORA"), which upheld the decision of the Building Official. The Respondent then petitioned for review of the BORA decision to a lower panel of the Florida Building Commission. Following written submissions by both parties and a hearing on the matter, the panel issued its binding interpretation of the Florida Building Code, which actually does very little in the way of interpreting anything. Because the panel decision fails to define or interpret the term "lack of progress" found in Section 105.4.1.1 of the Florida Building Code—instead, expressly noting that the term "was not sufficiently defined in the Building Code," and yet determined that there had not been a "lack of progress" based on the "the existence of some progress," noted in the question presented as "minimal amounts of progress," the City of Miami respectfully files this petition for review to the Florida Building Commission.

FACTS & PROCEDURAL BACKGROUND

The Florida Building Code & The City's Enforcement of the Same

Under the City Code, the Florida Building Code applies within the City, as follows:

All plans submitted after the Florida Building Code was implemented shall be governed by the "Florida Building Code, as amended" and Chapter 8 of the Code of Ordinances of Miami-Dade County, Florida, as amended (hereinafter referred to as "Chapter 8 of the County Code"). Following implementation of the "Florida Building Code," the

“Florida Building Code, as amended” and “Chapter 8 of the County Code” shall be enforced in the city.

§ 10-3(a), City of Miami Code. Under Chapter 8 of the Miami-Dade County Code, the “appointing authority” is defined as:

any and all municipal governments within geographic Miami-Dade County, and with respect to unincorporated Miami-Dade County, the Board of County Commissioners of Miami-Dade County, acting through its appointed officers.

§ 8-3(a), Miami-Dade County Code. The County Code further provides that “[t]he appointing authority shall appoint a Building Official” who “is hereby authorized and directed to interpret and enforce all of the provisions of this Chapter subject to the powers vested in the Board of Rules and Appeals [“BORA”] as set forth in Section 8-4 herein.” § 8-21.1(a), Miami-Dade County Code.

Building Permits

Under the Florida Building Code, a permit is required from the building official prior to the undertaking of any construction or renovation work:

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

§ 105.1, Florida Building Code – Building (6th Ed. 2017). Section 105.4.1.3, Florida Building Code (“FBC”), states, “*If work has commenced and the permit is revoked, becomes null and void, or expires because of lack of progress or abandonment, a new permit covering the proposed construction shall be obtained before proceeding with the work.*” (emphasis added). Pursuant to Section

105.4.1.3, FBC, “[w]ork shall be considered to be in active progress when the permit has received an *approved inspection* within 180 days.”

Available Administrative & Judicial Remedies

The revocation of a building permit is a discretionary decision of the building official, pursuant to the Florida Building Code. § 105.4.1.3, Florida Building Code. As such, under the Miami-Dade County Code, any such revocation is subject to appeal to BORA, as follows:

The Board of Rules and Appeals shall be the board of appeals for decisions of building officials throughout the incorporated and unincorporated areas of Miami-Dade County. The Board shall hear all appeals from the decisions of the Building Official wherein such decision is on matters regulated by the Building Code from any person aggrieved thereby. Application for appeal shall be in writing and addressed to the Secretary of the Board. The Board shall have the power to affirm, modify or reverse the decision of the Building Official wherein such decision is on matters regulated by the Building Official.

§ 8-4(d)(1), Miami-Dade County Code. The County Code also provides for further review of decisions of BORA, as follows:

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 Miami-Dade County, Florida, as provided in the Florida Rules of Appellate Procedure for judicial review of administrative action.

§ 8-4(g), Miami-Dade County Code.

The Permit

The Property is located at 1265 SW 22nd Street (“the Property”). (A.7).² On January 17, 2019, the City issued building permit BD15-009792-001 (“the Permit”), which was for the construction of a new building at the Property. (A.12). Over the course of the following three years, Respondent repeatedly waited until close to the 180-day expiration date of the permit and then would conduct minimal foundation work, before calling for an inspection to extend the Permit. (A.12-13). During this time period, the Permit was also extended several times via statutory extensions because of emergency orders issued by the Governor. *Id.* On March 9, 2022, an inspector from the City went out to the Property and entered the following remark:

Field Walkthrough Inspection. I informed the owner and contractor in September of 2021, under FBC 105.4.1.1 that I was not going to extend permit anymore unless I see extensive progress on the jobsite. All that’s been done in the last 6 months is another row of 7 new foundation pads only. It third time they do that to extend the permit. Furthermore all the work is performed a couple of weeks before the permit is to expire.

(A.14). Following this inspection, on June 22, 2022, the Building Official exercised his *discretion* under Section 105.4.1.1, FBC to revoke the permit for lack of progress.

² Citations to the consecutively paginated appendix submitted with this petition will be made as “A.#”, with the # corresponding to the pertinent page number(s).

The Appeal to BORA

Respondent appealed the Building Official's revocation of the Permit to BORA. (A.3-6). The City filed a response to Respondent's appeal. (A.7-82). Following a hearing before the board, BORA issued a decision upholding the decision of the Building Official. (A.83).

The Petition for Binding Interpretation

Respondent subsequently filed a petition for binding interpretation, pursuant to Section 553.775, Florida Statutes. The City filed a response. The panel held a hearing on the matter. Following the hearing, on January 12, 2023, the panel published a "Florida Building Code Binding Interpretation." (A.1-2). The Binding Interpretation presented two questions: (1) "Whether the building official has the ability to revoke a permit due to a 'lack of progress' on the project"; and (2) "Whether a 'lack of progress' was intended to encompass minimal amounts of progress." (A1). The panel answered the first question in the affirmative, finding that "the building official has the ability to revoke a permit due to a "lack of progress." *Id.* The panel, however, answered the second question in the negative, reasoning:

No; the existence of some progress on the project means there is not a "lack of progress."

Id. (emphasis supplied). The Binding Interpretation went on to note, however, that

The Panel felt that the term “lack of progress” was not sufficiently defined in the Building Code, and the use of the term [lack of] “extensive progress” by the building inspector is subjective and not a term found in the Building Code.

Id.

This amended petition follows.

ARGUMENT

The “binding interpretation” of the panel below should be reversed for two reasons: (1) the interpretation’s analysis is internally inconsistent and fails to interpret what the panel essentially deemed to be an ambiguous phrase in the Florida Building Code; and (2) the binding interpretation fails to determine that the *discretionary* decision of the Building Official at issue constituted an abuse of discretion or was arbitrary and capricious.

I. The Panel Erred in Issuing an Internally Inconsistent Binding Interpretation, Which Failed to Interpret a Term the Panel Found “Was Not Sufficiently Defined” in the Florida Building Code, Yet Determined that the Respondent Had Satisfied that Term, Based on the Facts Presented

The panel’s binding interpretation should be reversed because it fails to define the key statutory term at issue, yet goes on to determine that the Respondent’s actions here satisfied that undefined standard. The panel’s “binding interpretation” notes that “the term ‘lack of progress’ was not sufficiently defined in the Building Code.” The decision goes on however to state that the Respondent satisfied that *undefined* standard because “the existence of some progress on the

project means there is not a ‘lack of progress.’” Given that the term “lack of progress,” by the panel’s admission, is “not sufficiently defined in the Building Code,” it is difficult to discern what criteria or definition the panel used in making its ultimate conclusion that the Respondent’s actions did not fall within that term’s meaning. Based on this internal inconsistency alone, the panel decision should be reversed.

II. The Panel Erred in Issuing a Binding Interpretation Which Reviewed a Discretionary Decision by the Building Official, Yet Failed to Determine That Action Constituted an Abuse of Discretion

Section 105.4.1.1, Florida Building Code, states:

If work has commenced and the permit *is revoked*, becomes null and void, or expires *because of lack of progress* or abandonment, a new permit covering the proposed construction shall be obtained before proceeding with the work.

Under Section 105.4.1.3, Florida Building Code:

Work shall be in active progress when the permit has *received an approved inspection* within 180 days.

(emphasis added). Pursuant to these two sections, the Building Official is given discretion to revoke a permit “because of lack of progress.” This decision is discretionary because the Florida Building Code does not mandate the revocation of a permit in such circumstances, nor does it define “lack of progress.” As such, the panel erred in issuing a binding interpretation concluding that the Building

Official erred here in exercising his discretionary authority to revoke the Permit for lack of progress.

The Building Official is imbued with broad discretionary authority with regards to certain decisions delegated to the building official, by law. *See* § 8-21.1(a), Miami-Dade County Code (“[t]he appointing authority shall appoint a Building Official” who “is hereby authorized and directed to interpret and enforce all of the provisions of this Chapter subject to the powers vested in the Board of Rules and Appeals [“BORA”] as set forth in Section 8-4 herein.”). As such, the Building Official’s decision to revoke a permit for “lack of progress” is subject to the Building Official’s interpretation of that term, within the context of the facts presented with respect to the progress on any given permit.

So long as any such decision is not arbitrary and capricious or constitutes an abuse of discretion, the Building Official’s revocation of a permit on this basis should be upheld by any reviewing authority. *See Okaloosa Asphalt Enterprises, Inc. v. Okaloosa Cnty. Gas Dist.*, 524 So. 2d 1095, 1097 (Fla. 1st DCA 1988) (“We agree with the trial court that the Gas District is an independent public agency whose discretionary decisions, if not arbitrary, capricious or an abuse of the discretion so conferred, must be upheld by the courts.”)

The panel decision did not even address whether the decision at issue was arbitrary and capricious or constituted an abuse of discretion, instead admitting that

the term "lack of progress" is "not sufficiently defined," yet still finding that the Respondent had satisfied that *undefined* standard. For this additional reason, the decision of the panel should be reversed here.

CONCLUSION

Based on the foregoing, the City respectfully requests that this petition be granted and the binding interpretation of the panel be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to those individuals on the attached Service List by e-mail this 23th day of August, 2023.

By: *s/Kerri L. McNulty*
Kerri L. McNulty, Assistant City Attorney
Florida Bar No. 16171

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