

Lower Tribunal No.: Petition 243 (before Panel)

FLORIDA BUILDING COMMISSION

CITY OF MIAMI,

Petitioner,

v.

DELIA HOSPITALITY, LLC,

Respondent.

**RESPONSE TO CITY OF MIAMI'S AMENDED PETITION
FOR REVIEW OF REPORT**

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INTRODUCTION

The Respondent, DELIA HOSPITALITY, LLC (“Respondent”) hereby files this Response to the City of Miami’s (the “City”) Amended Petition for Review of Report (the “Petition”) issued by the Florida Building Commission Reports Panel (the “Panel”) in Report 243. The City filed an Amended Petition on August 23, 2023. In the Petition, the City requested review of the Florida Building Commission’s Binding Interpretation Report No. 243 (the “Report”). The Report found that while a building official has the ability to revoke a permit for “lack of progress,” in this instance, there was insufficient evidence to determine that the permit had to be revoked. The Report also noted that the building inspector’s use of the term “extensive progress” was not based upon language found in the Florida Building Code (“FBC”). The City Building Official’s decision to revoke the Respondent’s building permit was not in accordance with the FBC. The Building Official did not cite to any issue with the new foundation pads as a reason for not approving the inspection, and instead failed the inspection based on a manufactured standard of “extensive progress.” The failure of the inspection and subsequent revocation of the Respondent’s building permit was unjustified. Accordingly, the Report should be affirmed.

STATEMENT OF FACTS

The property is located at 1265 SW 22nd Street (the “Property”). In 2015, the Respondent applied for a building permit to construct the proposed hotel and townhomes. The City issued building permit BD15-009792-001 (the “Permit”) on January 17, 2019 for the construction of the building. On July 10, 2019, the Property passed a setback inspection. On April 13, 2020, the Property passed a building-grade beam inspection. Due to the COVID-19 State of Emergency, Governor DeSantis issued statutory extensions, which extended the Permit until September 10, 2021. Then, on September 10, 2021, the Property passed another inspection, the first foundation inspection. The first foundation inspection was for the construction of two (2) rows of seven (7) foundation pads on the Property.

On March 9, 2022, the Building Official’s designee, inspector Andre Perez, arrived at the Property to inspect two (2) more rows of seven (7) foundation pads on the Property. Despite multiple prior requests for inspections, the inspector conveniently arrived at the Property on the 180th day after the first foundation inspection. The inspector refused to pass the inspection of the new foundation pads and extend the permits without any indication that the new foundation pads had not been constructed in accordance with the FBC. In the inspection report, the Building Official stated, “I informed the owner and contractor in September of 2021, under FBC Section 105.4.1.1 that I was not going to extend permit anymore unless I see

extensive progress on the jobsite” (emphasis added). See Exhibit A. The inspector cited to FBC Section 105.4.1.1 as the basis for his decision. Section 105.4.1.1 provides that:

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).

Since the inspector refused to pass the inspection of the new foundation pads and extend the Permit on the 180th day, the Building Official deemed the permit abandoned. See Appendix to City’s Petition, Exhibit 3, Attachment 004. However, on June 22, 2022, apparently recognizing the City’s lack of basis for deeming the Permit abandoned, the Building Official administratively reactivated the Permit for the sole purpose of revoking the Permit. See Appendix to City’s Petition, Exhibit 3, Attachment 004. Following the unjustified failed March inspection, as well as the subsequent reactivation and revocation, Respondent appealed the Building Official’s decisions to the Board of Rules and Appeals (“BORA”) on June 27, 2022, pursuant to Miami-Dade County Code § 8-4(d)(1). After a hearing before BORA, BORA affirmed the Building Official’s decision. The Respondent then filed a Petition to the FBC Binding Interpretations Panel. Following the hearing on January 4, 2023, the Panel issued the Report. See Exhibit B. The Report answered 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 there was a “lack of progress” in this instance as presented by the petitioner.**

The Panel held that yes, a building official has the ability to revoke a permit due to a “lack of progress.” In response to the second question, the Panel stated:

No; based on the information and documentation presented by the petitioner and building official, and the criteria for “lack of progress” as outlined in the Building Code, insufficient evidence was presented to determine that the subject construction project permit must be revoked.

The Panel further noted in a comment, “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.” See Exhibit B. Following the issuance of the Report, the City filed the Petition for Review of Report, pursuant to Florida law. *See* Section 553.775(3)(c)(7), Florida Statutes.

STANDARD OF REVIEW

Florida law provides that the burden of proof of an appeal is on the party who initiated the appeal. Section 553.775(3)(c)(8), Florida Statutes. Accordingly, the decision of the Panel should only be reversed if the City proves, by a preponderance of the evidence, that the Panel’s Report was not correct.

ARGUMENT

1. The City did not follow required procedure for inspections under Section 110.3 of the Florida Building Code.

Section 110.3 of the FBC dictates that, “The building official upon notification from the permit holder or his or her agent *shall* make the following inspections, and *shall* either release that portion of the construction or *shall* notify the permit holder or his or her agent of any violations which must be corrected in order to comply with the technical codes. (emphasis added). Section 110.3, Florida Building Code.

Respondent requested an inspection of the property in March 2022. The inspector arrived and did inspect the property but did not properly identify any reason or any violation as to why the work did not comply with the FBC. The inspector’s remarks from March 9, 2022 note the construction of “another row of 7 *new* foundation pads.” See Exhibit A, Inspection Report. It follows, therefore, that new work had been completed that met the Code’s standards. The inspector should have either released that portion or provided formal notice of violations of the FBC with respect to the new foundations. He did not. As the Building Official did not follow the required procedure for failing an inspection under the plain and unambiguous language of the FBC, the failed March 9, 2022 cannot form the basis for revocation of the Permit.

2. The City did not follow the established procedure for revoking the Permit and the Panel correctly determined that the Building Official’s decision to fail the inspection and revoke the Permit was erroneous.

The City could not have possibly revoked a permit that was already allegedly abandoned **months before** a revocation took place.¹ The Building Official's decision to fail the inspection and later to revoke the Permit was improper, as the new construction performed under the Permit had previously been sufficient for the Building Official to deem that the work passed inspection. The construction of two rows of seven foundation pads passed inspection on September 10, 2021. Yet, when two more rows of seven foundation pads were constructed under the Permit for the inspection on March 9, 2022, the Building Official failed the inspection and later revoked the Permit without proper basis.

In order to revoke a permit, the Florida Building Code provides that the Building Official must "identify the specific plan or project features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the permit applicant." *See* Section 105.6, Florida Building Code (2023). The Building Officials neither cited to any issues with the new foundation pads as a reason for revoking the permit nor notified the Respondent of the specific project features that did not comply, despite the mandate in the FBC. The Building Official instead reinstated an

¹ The Building Official took the unusual step of reinstating the Permit solely so he could then revoke the expired Permit. A totally unnecessary act.

allegedly abandoned permit only to revoke the permit without any notice or justification to the Respondent.

3. The Building Official failed the inspection and revoked the Permit based upon a higher standard than found in the Florida Building Code.

The Building Official's decision to fail the Respondent's inspection and revoke the Permit was founded upon an entirely subjective, ad hoc determination, that is not supported by any provision of the FBC. The Panel made this clear in the Report: "the use of the term [lack of] "extensive progress" by the [City] is subjective and not a term found in the Building Code." See Exhibit B. The Building Official's use of a manufactured standard of extensive progress was clearly erroneous because the term is not found in the FBC. By using this fabricated term, the Building Official's decision was indisputably grounded in a subjective standard of progress that can vary from case to case based on factors entirely outside of the FBC, rather than the criteria and language laid out in the FBC. Accordingly, the Report that corrected the Building Official's erroneous determination should be affirmed.

4. The Panel's decision is not internally inconsistent.

The City argues in their Petition that the Report is inconsistent because it fails to define "lack of progress," but still concludes that the Respondent's actions meet the undefined standard. The City's reasoning is flawed, as the Panel found that progress was made. Florida law provides that "the panel shall render a determination

based upon the Florida Building Code... or if the code is ambiguous, the intent of the code.” *See* Section 553.775(5), Florida Statutes. While “lack of progress” was not clearly defined in the FBC, the Panel determined that progress had been made on the Permit. The Panel found that the intent of the FBC is that any advancement of construction under the Permit suffices as progress, and permits are only required to be revoked when a project makes absolutely no progress. In this case, progress was made on the Permit through the construction of the new foundation pads, and therefore the Permit should not have been revoked.

If the City felt that “lack of progress” was not stringent enough, then the City should have adopted an amendment. Under Florida law, local governments may adopt amendments that provide for more stringent requirements than those specified in the FBC. *See* Section 553.73(4), Florida Statutes. In this instance, the City had the ability to adopt amendments, but chose not to. Instead of adopting an amendment to create a more stringent standard than “lack of progress,” the Building Official elected to bypass the formal amendment process altogether, and concocted the phrase “extensive progress” as a new standard for determining when a permit should be revoked. Then, the Building Official unfairly applied this non-existent “standard” against the Respondent.² Since the term “extensive progress” did not originate in the

² The City provides no evidence that it has ever applied the “extensive progress” standard to any other construction project in the City. The City unfairly applied this fake “standard” to

FBC or in an amendment to the FBC initiated by the City, the Building Official erred in using the term to fail the inspection and revoke the Permit.

5. The language of the FBC does not provide the Building Official with discretion.

The City makes a second argument that the Panel erred because it did not determine that the Building Inspector's discretionary decision to revoke a permit constituted an abuse of discretion. This is inaccurate. On the contrary, the FBC states, "[w]ork *shall* be considered to be in active progress when the permit has received an approved inspection within 180 days." (emphasis added). *See* Section 105.4.1.3, Florida Building Code (2023).

The City argues in its Petition that the above Section of the FBC gives discretion to the Building Official to revoke permits even when progress was made under a permit. However, while the Panel stated "the Building Official has the ability to revoke a permit due to a 'lack of progress,'" the Building Official must extend the permit if there is any active progress sufficient to receive an improved inspection, as denoted by the use of the word "shall" in FBC Section 105.4.1.3. The term "shall" does not denote a discretionary decision; rather, "shall" is an imperative that mandates action. *Kelly v. State*, 795 So. 2d 135, 136 (Fla. 5th DCA 2001) (citing

Respondent's project only as a means to gain an advantage in related litigation between the City and Respondent that seeks to invalidate Respondent's prior zoning approvals.

S.R. v. State, 346 So. 2d 1018 (Fla. 1977); *Stanford v. State*, 706 So. 2d 900 (Fla. 1st DCA 1998)). If the Florida Building Commission wanted to give the Building Official discretion in this instance, they would have used the term “may” in this Section, as “may” denotes discretion. *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) (citing *Harper v. State*, 217 So. 2d 591, 592 (Fla. 4th DCA 1968)).

Since “shall” was used in Section 105.4.1.3 of the FBC, the Building Official does not have discretion to say that certain work counts and other work does not count towards progress. If work is done in accordance with the FBC, then the inspection must be approved and the permit must be deemed in active progress, as mandated by the FBC. Thus, the Panel did not err by issuing a Report that correctly identified that the revocation of the Permit is not discretionary when there is active progress under the Permit. Therefore, the Report should be affirmed.

CONCLUSION

The Report should be affirmed. The Building Official’s failure of the inspection and revocation of the Permit was improper because (1) the same construction had previously been approved in a prior inspection, and (2) it was based upon a higher, manufactured standard of “extensive progress” not found in the FBC. The City’s arguments in the Petition are flawed, because (1) progress was made on the Permit, and (2) the Building Official did not have discretion to revoke the permit

in this instance. Accordingly, the Report should be affirmed and the Permit should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished to those individuals on the attached Service List by email this 12th day of October, 2023.

/S/ Thomas H. Robertson
Thomas H. Robertson, Esq.

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EXHIBIT A

Insp. Date	Status	Result	Result Date	Updated By	Inspector Info	Remark
Mar/09/2022	Completed	NOK	Mar/09/2022	afperez	Name: Andre Perez Office Ph: Mobile Ph: (786)512-4210	019 FIELD WALKTHROUGH INSPECTION. I INFORMED THE OWNER AND CONTRACTOR IN SEPT 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 EXPIRES.



Florida Building Code Binding Interpretation

Report Number 243

Date: January 4, 2023

Report: 243

Code Edition: 6th Edition (2014) Florida Building Code – Building

Sections: 105.4.1.1, 105.4.1.3 & 105.6

Text of code provisions:

105.4.1.1

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.

105.4.1.3

Work shall be considered to be in active progress when the *permit* has received an approved inspection within 180 days. This provision shall not be applicable in case of civil commotion or strike or when the building work is halted due directly to judicial injunction, order or similar process.

105.6 Denial or revocation.

Whenever a *permit* required under this section is denied or revoked because the plan, or the construction, erection, alteration, modification, repair, or demolition of a building, is found by the local enforcing agency to be not in compliance with the *Florida Building Code*, the local enforcing agency shall identify the specific plan or project features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the *permit* applicant. If the local building code administrator or inspector finds that the plans are not in compliance with the *Florida Building Code*, the local building code administrator or inspector shall identify the specific plan features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the local enforcing agency. The local enforcing agency shall provide this information to the *permit* applicant

Appeal question requesting a response:

The applicant is challenging the revocation of a building permit by the local jurisdiction and requests the panel to determine:

- 1) Whether the building official has the ability to revoke a permit due to a “lack of progress” on the project, and
- 2) Whether there was a “lack of progress” in this instance as presented by the petitioner.

Answers:

- 1) Yes; the building official has the ability to revoke a permit due to a “lack of progress.”
- 2) No; based on the information and documentation presented by the petitioner and building official, and the criteria for “lack of progress” as outlined in the Building Code, insufficient evidence was presented to determine that the subject construction project permit must be revoked.

Comment:

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.

NOTICE:

The **Building Officials Association of Florida**, in cooperation with the Florida Building Commission, and the Florida Department of Business & Professional Regulation, provides this interpretation of the Florida Building Code in the interest of consistency and application of the Building Code statewide. This interpretation is binding and not subject to acceptance and approval by the local building official.