

BEFORE THE STATE OF FLORIDA  
BUILDING COMMISSION

BEACHLEN DEVELOPMENT COMPANY, LLC

Petitioner,

vs.

Re: Florida Building Code  
Binding Interpretation  
Report # 91

FLORIDA BUILDING COMMISSION,

Respondent.

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PETITION FOR FORMAL ADMINISTRATIVE HEARING

Petitioner, BEACHLEN DEVELOPMENT COMPANY, LLC, pursuant to Sections 553.775, 120.569 and 120.57, Florida Statutes, files this petition for formal administrative hearing concerning Florida Building Code Binding Interpretation Report #91, which is considered an interpretation of the Florida Building Commission, and states:

Affected Agency

1. The affected agency is the Florida Building Commission (“Commission”), whose physical address is 2555 Shumard Oak Blvd. Tallahassee, FL 32399. The Commission is a state agency within the meaning of Section 120.52, Florida Statutes, and is responsible for the development, maintenance and interpretation of the Florida Building Code (“FBC”) under Sections 553.76 and 553.77, Florida Statutes, and Rule Chapter 61G-20, Florida Administrative Code. As discussed in detail below, the agency action in this case is the Florida Building Code Binding Interpretation Report #91 (“Report #91”). Although Report #91 was written by unidentified person(s) associated with the Building Officials Association of Florida (“BOAF”), the interpretations

in Report #91 shall be considered interpretations issued by the Commission. Section 553.775(3)(c)(5), Florida Statutes.

#### Petitioner

2. Petitioner is Beachlen Development Company, LLC, whose address is 211 Beachside Drive, Vero Beach, Florida 32960. For the purposes of this proceeding, the Petitioner's address is that of undersigned counsel.

#### Notice

3. On December 3, 2012, via electronic mail, counsel for Petitioner received a "Binding Interpretation Issued Notice for Interpretation #91. By logging onto the FBC Information System, and accessing its Inbox, counsel for Petitioner were able to obtain a copy of Report# 91, dated November 26, 2012. (A copy of Report # 91 is attached to this Petition as Exhibit "A"; copy of the electronic notice is attached to this Petition as Exhibit "B".) The Commission posted Report # 91 on the Building Code Information System on December 4, 2012. Under Rule 61G20-2.007(5), "appeals to interpretations shall be filed within 30 days of issuance of an interpretation and shall be conducted in accordance with Chapter 120, F.S., and the uniform rules of procedure". Likewise, under Section 553.775(c)7, F.S., any substantially affected person, such as Petitioner, may appeal an interpretation by filing a petition with the Commission within 30 days after publication of the interpretation on the Building Code Information System. The interpretations rendered in Report # 91 were issued and published on December 4, 2012. Therefore, this Petition is timely.

#### Background/Petitioner's Substantial Interests

4. Petitioner, Beachlen Development Company, LLC, is the fee simple owner of real property in Indian River County. The street address of the property is 2460 South Highway A1A,

Vero Beach, Florida 32960 (“Property”). Petitioner has constructed a single family dwelling (“Residence”) on the Property, which is seaward of the Coastal Construction Control Line (“CCCL”) for Indian River County, established under Section 161.053, F.S. The Residence was constructed in compliance with Section 3109, Building of the FBC, which governs the construction of structures seaward of the CCCLs. More specifically, as required by Section 3109, Building, of the FBC, the Residence is elevated on and securely anchored to an adequate pile foundation designed and constructed to withstand all anticipated erosion, scour and loads resulting from a 100-year storm, including wind, wave, hydrostatic and hydrodynamic forces acting simultaneously with typical structural (live and dead) loads. Likewise, the lowest horizontal structural member of the Residence is located above the 100-year storm elevation as required by Section 3109.3, Building of the FBC. Furthermore, as allowed by the exceptions found in Section 3109.4.2, Building of the FBC, the entire portion of Residence located below the 100-year storm elevation (with the exception of a double and single garage door) is enclosed with break-away or frangible walls as defined in Section 3109.2, Building of the FBC. This enclosed area is referred to as the “Basement.” Moreover, beach compatible sand fill material has been placed around the entire Basement (with the exception of a double and single garage door) and completely covers the enclosed Basement up to the level of the first floor of the Residence above the Basement. The Residence was also authorized by the Florida Department of Environmental Protection, under Section 161.053, Florida Statutes and Chapter 62B-33, Florida Administrative Code, by coastal construction control line permit number IR-841, issued on December 17, 2101. Furthermore, the floor of the Basement is located above the FEMA base flood elevation.

5. Petitioner intends to market the Property and Residence. To make the Residence more

marketable and profitable, Petitioner wishes to use a portion of the Basement as an exercise area and media lounge. However, in a letter dated August 30, 2012, which was apparently signed at a later date and then provided in final form to the Petitioner, Mr. Jose Guanch, the Indian River County Building Official, denied the Petitioners request to use a portion of the fully constructed Basement for exercise and media purposed uses on the basis that under the FBC “there can be no habitable spaces below the 100-year storm elevation”. As discussed below, this interpretation, as a matter of law, is incorrect because Section 3109, Building of the FBC does not restrict or otherwise disallow habitable spaces in areas enclosed by breakaway walls, which are below the 100 year storm elevation and above the base flood elevation for residences seaward of the CCCL. Indeed, the issue of habitable space is irrelevant and outside the authority of the Commission under Section 3109, Building of the FBC. On information and belief, the Building Official’s denial was based solely on informal interpretations, both written an oral, of person(s) associated with BOAF.

6. On November 2, 2012, Petitioner, pursuant to Section 553.775(3), Florida Statutes, electronically filed a Petition (on a form adopted by the Commission) on the Florida Building Commission web page with the Commission requesting review of the decision of the Indian River County Building Official. On November 5, 2012, Petitioner was advised electronically by the Florida Building Code Information System that is review Petition was accepted and was submitted to the BOAF.

7. Report# 91, issued in response to the Petitioner’s petition for review of the Indian River County Building Official’s interpretation of the FBC, concludes the uses in Basement proposed by Petitioner are not allowed by the FBC. Thus, Report #91 would preclude the uses Petitioner wishes to include in the Basement. Therefore, the Petitioner is substantially and adversely

affected by the interpretations in Report #91.

8. It appears Report #91 was prepared by an unidentified person(s) somehow associated with the BOAF. Nevertheless, the interpretations in Report#91 “shall be considered an interpretation entered by the [C]ommission”. Section 553.775(3)(c)(5), Florida Statutes. Therefore, the agency action at issue in this proceeding is Report#91.

#### Disputed Issues of Fact

9. The disputed issues of fact, and the mixed issues of fact and law presented in this case by the Commission’s interpretations of the FBC in Binding Interpretation Report#91, are:

a. Whether the proposed uses of the Basement for exercise and media constitute habitable structures under Section 3109, Building of the FBC;

b. Whether Report# 91 impermissibly restricts the use of structures otherwise constructed in compliance with all structural requirements of Section 3109, Building of the FBC;

c. Whether the proposed media and exercise uses of the Basement constitute “structures designed primarily for human occupancy and are potential locations for shelter from storms”;

d. Whether the interpretations in Report # 91 are inconsistent with past consistent interpretations of the Florida Department of Environmental Protection, and its predecessor agency, the Florida Department of Natural Resources, regarding application of the same regulatory language set forth in Section 3109, Building of the FBC;

e. Whether Report #91 is inconsistent with Declaratory Statement, Florida Building Commission, Case # DCA07-DEC-179(March 19, 2008); Declaratory Statement, Florida Building Commission, Case # DCA09-DEC-347(March 11, 2010); and all similar declaratory

statements.

f. Whether the Petitioner’s petition was provided to a panel, and considered by the panel as required by Section 553.775(3), F.S.;

g. Whether the interpretations contained in Report #91 are the specific interpretations of the panel, as required by Section 553.775(3), Florida Statutes; and

h. Whether Binding Interpretation #91 exceeds and mischaracterizes the issues presented in the Petitioner’s Petition requesting review of the decision of the Indian River County Building Official.

#### Ultimate Facts Warranting Reversal

10. The ultimate facts, and the mixed issues of fact and law warranting reversal of the Commission’s interpretations of the FBC in Binding Interpretation Report#91, are:

a. The proposed uses of the Basement for exercise and media do not constitute and are not habitable structures under Section 3109, Building of the FBC;

b. Report# 91 impermissibly restricts the use of structures otherwise constructed in exacting compliance with all structural requirements of Section 3109, Building of the FBC;

c. The proposed media and exercise uses of the Basement do not constitute and are not “structures designed primarily for human occupancy and are potential locations for shelter from storms”;

d. The interpretations in Report # 91 are inconsistent with past consistent interpretations of the Florida Department of Environmental Protection, and its predecessor agency, the Florida Department of Natural Resources, regarding application of the same regulatory language set forth in Section 3109, Building of the FBC;

e. Report #91 is inconsistent with Declaratory Statement, Florida Building Commission, Case # DCA07-DEC-179(March 19, 2008); Declaratory Statement, Florida Building Commission, Case # DCA09-DEC-347(March 11, 2010); and all similar declaratory statements.

f. There is no evidence the Petitioner's petition was provided to a panel, and considered by the panel as required by Section 553.775(3), F.S.;

g. The interpretations contained in Report #91 are not the specific interpretations of the panel, as required by Section 553.775(3), Florida Statutes; and

h. Report #91 exceeds and mischaracterizes the issues presented in the Petitioner's Petition requesting review of the decision of the Indian River County Building Official.

Specific Rules and Law Requiring Reversal or Modification  
of the Agency's Proposed Action

11. The specific rules and law requiring reversal are: Section 3109, Building of the FBC; Sections 553.73 & 553.775, Florida Statutes; Chapter 120, Florida Statutes; Chapter 62B-33, Florida Administrative Code; Chapter 28-106, Florida Administrative Code; Declaratory Statement, Florida Building Commission, Case # DCA07-DEC-179(March 19, 2008); Declaratory Statement, Florida Building Commission, Case # DCA09-DEC-347(March 11, 2010); and all similar declaratory statements.

12. More specifically:

a. Section 3109, Building of the FBC is the sole provision of the FBC governing the design of structures constructed seaward of the CCCL;

b. Section 3109, Building of the FBC does not allow the Commission to impose

limitations on how areas within residences designed and constructed in compliance with Section 3109 are used; therefore, Report #91 is invalid because it imposes such use limitations;

c. Section 3109, Building of the FBC is directed solely to structural design issues relating to the 100 year storm surge elevation and, as long as the structural requirements are satisfied, does not prohibit any uses of the structure below the first floor, therefore, Section 3109, Building of the FBC does not prohibit the uses of the Basement proposed by the Petitioner;

d. Chapter 553, Florida Statutes does not give the Commission the authority to depart from agency precedent established by the State agencies charged with original developing, interpreting, and implementing the requirements for construction seaward of the CCCL and possessing specialized expertise in this area, and engage in new and fundamentally different regulation of the use of structures otherwise already constructed in compliance with the structural requirements of Section 3109, Building of the FBC.

e. The Commission does not have the authority to interpret floodplain management requirements or ordinances in a manner that extends such requirements as restrictions under Section 3109, Building of the FBC and the CCCL regulatory program.

f. The interpretations in Report #91 improperly expand the issues and questions presented in the Petitioner's initial petition for review to include matters not raised in the Petition that are both irrelevant and, even if relevant, are of a technical nature that requires specialized expertise to address.

g. Report #91 clearly and impermissibly departs from precedent and interpretation established by the agencies originally charged with developing and implementing the CCCL construction standards and possessing expertise in this area of regulation.



h. Report #91 is inconsistent with Declaratory Statement, Florida Building Commission, Case # DCA07-DEC-179(March 19, 2008); Declaratory Statement, Florida Building Commission, Case # DCA09-DEC-347(March 11, 2010); and all similar declaratory statements.

By declaratory statements, the Commission has determined the uses of the Basement proposed by the Petitioner are allowable under the FBC. The Commission is bound by those statements.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request the following relief:

a. The Commission forward this matter to the State of Florida, Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct a formal administrative proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes;

b. The Administrative Law Judge conduct a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes;

c. A recommended order and a final order be issued overturning the interpretations set forth in Report# 91, which are adverse to Petitioner; and

d. The Administrative Law Judge grant such other and further relief as may be deemed just and proper.

Respectfully submitted this 26<sup>th</sup> day of December, 2012,



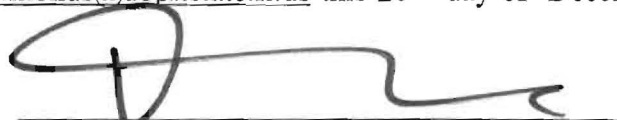
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Attorneys for PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed via electronic mail with Rhonda Bryan, Agency Clerk, Department of Business and Professional Regulation, 1940 North Monroe Street, Suite 92, Tallahassee, Florida 32399 at: [agc.filing@dbpr.state.fl.us](mailto:agc.filing@dbpr.state.fl.us), and a copy was sent to April Hammonds, squire, Office of the General Counsel, Department of Business and Professional Regulation via electronic mail at: [april.hammonds@dbpr.state.fl.us](mailto:april.hammonds@dbpr.state.fl.us) this 26<sup>th</sup> day of December, 2012.

  
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Attorney



## FLORIDA BUILDING CODE BINDING INTERPRETATION

Date: November 26, 2012

Report #: 91

Petitioner: Beachlen Development Company, LLC

Year: 2007

Code: Building

Section: 3109

Question: In accordance with the 2007 Edition, Florida Building Code – Building, Section 3109, as it applies to a building that is being constructed forward of the Coastal Construction Control Line (CCCL), please answer the following questions:

1. Is the lowest horizontal structural member supporting the building, other than pilings, required to meet the minimum requirements of the Flood Insurance Rate Map (FIRM) as well as the elevation required by the Florida Department of Environmental Protection (DEP) Coastal Construction Control Line (CCCL) elevation, that requirement being the higher of the two, and each of the two agency elevation requirements are independent of each other?
2. Is the area below the lowest horizontal structural member permitted to be enclosed?
3. If the answer to #2 above is yes, may the area be used as habitable (living) space and/or enclosed by walls which include media rooms, bars, bathrooms and other areas potentially with chairs, couches, seats and equipment?

Answer: 1. Yes, Florida Building Code R323.2 refers to Section 3109 of Florida Building Code, Building for residential structures seaward of the Coastal Construction Control Line. This structure is within the CCCL, both the building department and the petitioner appear to agree on this, so the DEP requirements would be required to be enforced. It should be noted that buildings located seaward of the CCCL that are also located in special flood hazard areas shown on FIRMs are required to meet the more

EXHIBIT "A"

DBPR

restrictive requirements of Section 3109 and local floodplain management requirements. At the time the building in question was permitted, under the 2007 FBC, the floodplain management requirements were in the County's local regulation.

2. Yes, FBC Section 3109.3 requires habitable spaces as defined in 3109.2 to be elevated at or above an elevation which places the lowest horizontal structural member above the 100 year storm elevation as determined by Florida Department of Environmental Protection. The area below the lowest horizontal structural member is permitted per FBC 3109.4.2(9) to have break-away or frangible walls, which would not preclude enclosing this space with the same.

3. No, areas below the lowest horizontal structural member cannot be considered habitable spaces and are subject to storm surge from a 100 year storm event. FBC 3109.3 addresses habitable structures, the entire house is a habitable structure. The Florida building code, section 202 defines Habitable Space, this definition does not specifically address media rooms, media lounges or exercise rooms, it does address living space and the proposed rooms are considered living space because their uses are more closely related to living space than to any other use. Note in reference to 44CFR Section 60.3(e)(1) and (c)(5), these regulations, when applicable, require enclosed areas below the lowest floor (lowest horizontal member in V zones) to be limited to utilization solely for parking of vehicles, building access, or storage. No other uses are permitted. This restriction applies in all SFHAs.

Comment: The applicant is correct on page 3 of their filing, the Florida Building Code does not delineate or specify which portions of habitable structures may be used for what purpose, therefore the entire structure is considered habitable and the area below is a part of the structure, albeit, frangible. By definition, a Habitable Structure is designed primarily for human occupancy and all areas are potential locations for shelter from storms. Areas below the lowest horizontal structural member are not to be considered as habitable spaces and are subject to storm surge from a 100 year storm event. Therefore, this area cannot be designed primarily for human occupancy and is not a safe haven for shelter from storms. Further, FBC section 3109.4.2 states that no substantial walls or partitions shall be constructed below the level of first finished floor of habitable structures with limited exceptions to stairways for access, properly designed shearwalls, fiber or wire mesh sand screens, light open lattice, elevator shafts, small mechanical and electrical rooms and breakaway walls; all of which are either necessary for access to the structure and/or designed to break away without causing structural damage to the primary structure. Finished areas within break away walls that contain furniture, equipment,

toilet rooms and appliances are not consistent with the intent of the code which is to keep this area open and free of obstructions that could cause damage to the primary structure or other properties in a storm surge event.

Additional Comment: The previous DEC statement was based on historical interpretation of the CCCL program that allowed some development below the CCCL and above the BFE. In that particular area, there is a large Boardwalk on the beach and a lot of little shops that people have frequented for years. Regarding the building in question for that DEC statement, all furniture, counters, equipment etc. had to be on wheels or small enough to be portable. All permanent fixtures, kitchen etc. had to be elevated. The code commentary speaks to this same situation but is limited to large multifamily, commercial and public structures.

**Tom Tomasello**

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**From:** codes@floridabuilding.org  
**Sent:** Monday, December 03, 2012 12:28 PM  
**To:** tgtpa@comcast.net  
**Subject:** Binding Interpretation Issued

**Tom Tomasello**, you have received a Binding Interpretation Issued Notice for Interpretation #91.

Please Visit the [Florida Building Code Information System](#) and login to access your Inbox for the Petition for Binding Interpretation process.

Florida Department of Business and Professional Regulations  
Building Codes and Standards  
<http://www.floridabuilding.org>

EXHIBIT "B"