

**STATE OF FLORIDA
BUILDING COMMISSION**

FILED	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/7/2015
File #	

IN RE:

Belmar Development Associates, LLC

CASE NO.

DS 2015-055

**PETITION FOR DECLARATORY STATEMENT BEFORE
THE FLORIDA BUILDING COMMISSION**

A. INTRODUCTION

Petitioner, Belmar Development Associates, LLC (“Petitioner”), is a developer of high-rise residential properties (Group R Occupancies) in South Florida. At least one such property – the proposed site for the project at issue in this Petition – is being constructed on an oceanfront parcel where the site, and the proposed structure, is transected by the Coastal Construction Control Line. As part of amicable discussions between Petitioner and the building official who has jurisdiction over the project (the “Building Official”) regarding the applicability of certain provisions of Section 3109 of the 2010 edition of the Florida Building Code (“FBC”) to the project, as well as the proper interpretation of such provisions, the Building Official and Petitioner agreed that Petitioner should seek a declaratory statement as to the questions that are set forth in the Petition below. Petitioner notes that this Petition is not, and is not intended to be an appeal of a decision of

the Building Official. Petition seeks a declaratory statement only to help guide both Petitioner and the Building Official in determining the appropriate code requirements for Petitioner's current project and other subsequent projects that Petitioner, or other developers, may develop that contain the same or similar conditions and configurations as set forth in this Petition.

B. THE PETITIONER

Petitioner is Belmar Development Associates, LLC. Petitioner's address is 701 West Cypress Creek Road, Suite 301, Ft. Lauderdale, FL 33309. Petitioner's telephone number is (954) 771-6777, although Petitioner should be contacted through undersigned counsel.

C. COUNSEL FOR THE PETITIONERS

Petitioner is represented by: Robert S. Fine, Esq., AIA. Florida Bar Number 0155586. Greenberg Traurig, P.A., 333 Avenue of the Americas, Suite 4400, Miami, Florida 33131. Telephone: 305.579.0826. Facsimile: 305.961.5826. Email: FineR@gtlaw.com.

D. THE STATUTES, RULES AND CODE PROVISIONS AND THEIR EFFECT ON PETITIONER

(1) The Florida Building Code

- (a) The Florida Building Code provisions that are the subject of this Petition are:
- (i) FBC, 2010 Edition, Building Volume, Section 3109;
 - (ii) FBC, 2010 Edition, Building Volume, Section 1609.2;
 - (iii) FBC, 2004 Edition, Building Volume, Section 1609.2; and
 - (iv) FBC, 2001 Edition, Building Volume, Section 1606.1.5.

(2) Statutory Provisions

- (a) The statutory provisions that are the subject of, or are implicated by, this Petition are:
- (i) Section 553.73, Florida Statutes (the Florida Building Code); and
 - (ii) Section 553.775, Florida Statutes.

(3) Rule Provisions (of the Florida Administrative Code (“F.A.C.”))

- (a) The Rules provisions of the F.A.C. that are the subject of, or are implicated by, this Petition are:
- (i) Rule 61G20-1.001, F.A.C. (The Florida Building Code); and
 - (ii) Rule 62B-33.007, F.A.C. (2001, 2004).

(4) The effect of these statutory, regulatory and code provisions on Petitioner

Petitioner is a developer of real estate in South Florida. Among other things, Petitioner develops oceanfront properties in South Florida where, in some cases, the Coastal Construction Control Line (“CCCL”) transects the property and will transect structures already existing, or to be constructed, on the property. One such development project – the subject of this Petition – is known as the Paramount, located at 900 North Atlantic Boulevard, Fort Lauderdale, Florida. Paramount is a high-rise multifamily dwelling comprised of a seventeen story tower. The base of the tower is integral to, and extends the full depth of, the tower and continuing eastward to provide space for an elevated pool deck. Because the proposed Paramount project extends, in part, seaward of the CCCL, Section 3109 of the FBC is implicated.

In the course of certain amicable discussions between Petitioner and the Building Official, some questions have arisen about the proper interpretation of certain provisions of Section 3109 as applied to Paramount. Consequently, the Building Official has suggested that Petitioner seek clarification from the Commission. The answers to the questions posed in this Petition are necessary for Paramount to proceed as Petitioner needs to be able to provide direction to its designers and consultants on these issues and, at the time, the Building Official wishes to be confident that he is correct in the manner in which he reviews and approves those aspects of Paramount that are seaward of the CCCL (as well as the rest of the project, of course). The posture of this Petition is not adversarial, and

there has not been an appealable decision made by the Building Official as of the time of filing of this Petition. Because Petitioner cannot proceed with the permitting process without both it and the Building Official having an understanding as to the proper interpretation of Section 3109 of the FBC as applied to the Paramount, it is substantially affected by the issues being raised in this Petition.

E. NATURE OF DECLARATORY STATEMENT SOUGHT

For its Paramount development, Petitioner is proposing structural slabs, walls, and partitions below the 100- year storm event wave crest elevation (“wave crest elevation”) where portions of those walls, partitions and structural slabs are located partially seaward and partially landward of the CCCL.¹ There are intermediate structural slabs that are proposed below the wave crest elevation but above the design grade with the ground floor structural slabs below design grade.

The proposed uses below the wave crest elevation are considered non-habitable and the proposed location of the structures per FEMA’s FIRM maps are located in Flood Zone X. Petitioner also intends for there to be certain uses occurring at the (completed) Paramount project that are seaward of the CCCL and below the wave crest elevation.

¹ For structures subject to Section 3109, “[a]ll habitable structures shall be elevated at or above an elevation which places the lowest horizontal structural member above the 100-year storm elevation as determined by the Florida Department of Environmental Protection in the report titled ‘One-Hundred-Year Storm Elevation Requirements for Habitable Structures Located Seaward of a Coastal Construction Control Line.’” § 3109.3, 2010 FBC.

Question 1: May Petitioner (and the Building Official) rely on past consistent interpretations by the Florida Department of Environmental Protection (“DEP”) and the DEP’s predecessor agency, the Florida Department of Natural Resources (“DNR”), of identical regulatory language that is now set forth in Section 3109 to determine whether the Paramount is allowed to have intermediate structural slabs below the wave crest elevation? If yes, do the past consistent interpretations of DEP and DNR allow intermediate structural slabs below the wave crest elevation?

Question 2: Declaratory Statement DCA07-DEC-179 provides, for example, that a dining area located seaward of the CCCL is allowed at elevations in between base flood elevation and the elevation of the lowest horizontal structural member but the associated kitchen must either be above the lowest horizontal structural member or be located landward of the CCCL. Does this mean that only portions of the structure that are located seaward of the CCCL, but not the remaining portions of the structure landward of the CCCL, must comply with Section 3109 of the FBC?

Question 3: When any portion of the project structure falls seaward of the CCCL, does Section 3109.1.1 require that the entire structure comply with the requirements of Section 3109?

Question 4: For any major structure that falls within Exception 4 of Section 3109.4.2, are the slabs that are constructed below the level of the wave crest elevation required to be frangible, or may they be of more permanent construction?

Question 5: For the purposes of determining the applicability of Exception 4 to Section 3109.4.2, is the Paramount a low-rise building as that term is used in Exception 4?

F. PETITIONER'S PROPOSED ANSWER TO THE QUESTION POSED IN THE PETITION

Answer 1: Yes. As the Florida Building Commission (the "Commission") held in Declaratory Statement DCA07-DEC-179, "[t]he Petitioner is entitled to rely on past consistent interpretations of the DEP and DNR to the extent that the historical application of the regulation is consistent with the current context of the FBC." The provisions of Section 3109 of the FBC that are germane to the issues and questions set forth in the Petition are for all practical purposes identical to the corresponding provisions of Rule 62B-33.007, F.A.C. (2001 and 2004). As such, the contexts are consistent. Petitioner has provided evidence of consistent practice of the DEP and DNR in connection with allowing the presence of intermediate structural slabs located below the wave crest elevation in a manner comparable to how such slabs are located in the Paramount project, thereby demonstrating that the intermediate structural slab location is consistent with the historical application of DEP's (and DNR's) regulation.

Answer 2: The areas of a structure located seaward of the CCCL are subject to the requirements and limitations of Section 3109 and those areas of the

structure that are landward of the CCCL are not subject to Section 3109's requirements.

Answer 3: The areas of a structure located seaward of the CCCL are subject to the requirements and limitations of Section 3109 and that areas of the structure that are landward of the CCCL are not subject to Section 3109's requirements.

Answer 4: Walls and partitions that are constructed below the level of the wave crest elevation are required to be frangible as mandated by Section 3109.4.2 (*see* Exception 9). Structural slabs that are constructed below the wave crest elevation are not required by Section 3109.4.2 to be frangible or break-away. Section 3109.4.2 is a restatement of the Rule 62B-33.007(4)(f) of the DEP regulations. As demonstrated by the examples of permits issued by DEP that allowed for the presence of structural slabs below the wave crest elevation provided with the Petition, DEP's interpretations of its regulation allowed for the presence of such structural slabs. This interpretation is consistent with the language of Section 3109.4.2 and Rule 62B-33.007 which expressly either prohibit, or significantly limit, built elements with significant vertical dimension running parallel to the shoreline that would impede the flow of waves and dynamic storm surge. On the other hand, a slab, by its dimensional nature, would not impede or alter the flow of waves and storm surge significantly.

Answer 5:

Because the *mean roof height* at Paramount does not fall within the parameters contained in the definition of low-rise building, Paramount is not a low-rise building as that term is used in Exception 4 to Section 3109.4.2.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER’S PROPOSED ANSWERS TO THE QUESTIONS POSED IN THE PETITION

I. JURISDICTION AND SCOPE OF PETITION

A. “Upon written application by any substantially affected person or state agency or by a local enforcement agency, the commission shall issue declaratory statements pursuant to s. 120.565 relating to the enforcement or administration by local governments of the Florida Building Code or the Florida Accessibility Code for Building Construction.” § 553.775(3)(a), Fla. Stat.; Ch. 28-105, F.A.C.

B. “Local enforcement agencies, local building officials, state agencies, and the commission *shall* interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building *Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission...*” § 553.775(2), Fla. Stat. (emphasis added).

II. ARGUMENT

A. Background

In 2007, the City of Hollywood, Florida, petitioned the Florida Building Commission for a declaratory statement regarding the City's community redevelopment area's Broadwalk project. The petition asked the Commission for a determination that in interpreting the provisions of the coastal construction section of the FBC, Section 3109, it was appropriate to utilize the historic interpretations of the Florida Department of Environmental Protection ("DEP"), and its predecessor agency, the Florida Department of Natural Resources ("DNR"), regarding the same language that was transposed from Rule 62B-33.007, F.A.C. to Section 3109 of the FBC based on the principal of administrative *stare decisis*. The petition also asked the Commission to confirm that certain uses were allowed in the zone that falls between FEMA's base flood elevation and the elevation of the 100-year storm wave crest elevation ("wave crest elevation"). The Commission granted Hollywood's petition and issued Declaratory Statement DCA07-DEC-179 ("Hollywood Dec Statement"). In 2014, the building official of Miami Beach questioned whether the Hollywood Dec Statement was applicable to the pending Shore Club project because the Hollywood Dec Statement was issued under an earlier edition of the FBC (2004) than the Shore Club's permit application (2010 edition of the FBC) and in a different jurisdiction. In response, the Commission granted the developer of the Shore Club's petition and issued Declaratory Statement DS2014-116 holding that "[i]f the Building Official determines that the underlying material facts and conditions in the Declaratory Statement DCA07-

DEC-179 are consistent with the corresponding material facts and conditions in the Shore Club's project, he may apply the holding of Declaratory Statement DCA07-DEC-179 to the Project.”

Petitioner is in the process of permitting an oceanfront development, Paramount, where the site and part of the proposed structure are transected by the CCCL. In discussions with the Building Official about what requirements of Section 3109 of the FBC are applicable to Paramount and how and where should they be applied, Petitioner's coastal consultant provided the Building Official with the Hollywood Dec Statement. After reviewing the Hollywood Dec Statement and applying it to Paramount, the Building Official was left with certain questions which are now posed in this Petition.

For the sake of brevity, instead of discussing the history of coastal construction requirements from the time the DNR and then DEP had jurisdiction through the time that the legislature shifted jurisdiction over coastal construction requirements to local building officials by way of the FBC, to clarifications and interpretations set forth in Declaratory Statements DCA07-DEC-179 and DS2014-116, The Final Orders for Declaratory Statements DCA07-DEC-179 and DS2014-116 are attached as exhibits to this Petition as Exhibit A and Exhibit B, respectively.

B. Analysis

Question 1

When the City of Hollywood petitioned for its declaratory statement, it asserted that the principal of administrative *stare decisis* applied and submitted a

memorandum in support of its assertion. A copy of that memorandum prepared by Seann Frazier and Paul Savage addressed to Robert Fine is attached for your reference as Exhibit C. The principal of *stare decisis* is the doctrine whereby courts are generally required to follow the precedent of previous decisions. When applied to administrative agencies under the executive branch of state government, the principal is referred to as administrative *stare decisis*. In the matter of the Hollywood Dec Statement, the Commission found that the petitioner is entitled to rely on past consistent interpretations of the DEP and DNR to the extent that the historical application of the regulation is consistent with the current context of the FBC. Hollywood Dec Statement at 3. In its petition, the City of Hollywood provided evidence of numerous permits that were issued by DEP and DNR that indicated that the uses Hollywood sought to be approved seaward of the CCCL and below the “lowest structural member” were approved by DEP and DNR. Attached as Exhibit A is a spreadsheet which contains documentation of numerous permits that were issued by DEP and DNR where an intermediate structural slab was approved at an elevation below the wave crest elevation demonstrating consistent approval. This spreadsheet attached as Exhibit D. Because, based on the principal of administrative *stare decisis*, whose applicability to the coastal construction provisions of Section 3109 was confirmed in Declaratory Statement DCA07-DEC-179, Petitioner may rely on past consistent corresponding interpretations of DEP and DNR, and Petitioner has demonstrated that DEP’s and DNR’s past consistent interpretations allowed for intermediate slabs below the

wave crest elevation seaward of the CCCL, Paramount should be allowed to maintain intermediate structural slabs below the wave crest elevation.²

Question 2

The provisions of Section 3109 are intended to apply to those portions of the structure that are seaward of the CCCL. By definition, the CCCL is “established so as to define that portion of the beach-dune system which is subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions... *Special siting and design considerations shall be necessary seaward of established coastal construction control lines* to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access.” § 161.053, Fla. Stat. (emphasis added). It is those “special siting and design considerations” that were the underpinning of Rule 62B-33.007 which were ultimately transposed into the FBC as Chapter 3109. This is why Declaratory Statement DCA07-DEC-179 allows there to be a seating area for dining below the elevation of the wave crest elevation seaward of the CCCL but requires the kitchen (considered by DEP to be a “habitable space”) to be either above the elevation of the wave crest elevation

² The Hollywood Dec Statement refers to the “lowest horizontal structure” while this Petition uses the term 100-year wave crest elevation. While using different terms, the holdings of the Hollywood Dec Statement and this Petition are not inconsistent. As discussed in Footnote 1, the “lowest horizontal structural member” is a horizontal structural member that cannot be below the 100-year wave crest elevation and is typically built to the 100-year wave crest elevation. Accordingly, for most purposes, the terms “lowest horizontal structural member elevation” and “100-year wave crest elevation” are synonymous.

seaward of the CCCL or below the elevation of the wave crest elevation when landward of the CCCL.

Question 3

The analysis for Question 2 above provides the analysis for answer to Question 3.

Question 4

Exception 9, Section 3109.4.2 of the FBC mandates that walls and partitions that are constructed below the level of the wave crest elevation are required to be frangible or break-away. Structural slabs that are constructed below the wave crest elevation are not described in Section 3109.4.2 as elements that are required to be frangible or break-away. Section 3109.4.2 is a restatement of the Rule 62B-33.007(4)(f) of the DEP regulations. Exhibit D is a spreadsheet that documenting numerous permits issued by DEP or DNR for construction of structures that extend seaward of the CCCL. As demonstrated by the numerous examples of permits that allowed for the presence of structural slabs below the wave crest elevation provided with the Petition, DEP's interpretations of its regulation clearly allowed for the presence of such structural slabs. This interpretation is consistent with the language of Section 3109.4.2 and Rule 62B-33.007 which expressly either prohibit, or significantly limit, built elements with significant vertical dimension running parallel to the shoreline which would impede the flow of waves and dynamic storm surge. On the other hand, a slab, by its dimensional nature, would not impede or alter the flow of waves and storm surge significantly.

Question 5

For the purposes of Exception 4.d. to Section 3109.4.2, Paramount is not a low-rise building as defined in Section 1609.2. The 2010 edition of the FBC does not contain a definition for “low-rise building” in Section 1609.2. Rule 62B-33.007(4)(f) 4.d., the originating provision for Section 3109.4.2, Exception 4, mandates the use of the definition of “low-rise building” as found in Section 1606.1.5 of the 2001 edition of the FBC (which is the same definition adopted in Section 1609.2 of the 2004 FBC). That definition is as follows:

Building, Low-rise. Enclosed or partially enclosed buildings which comply with the following conditions:

1. mean roof height, h , less than or equal to 60 ft (18m);
2. mean roof height, h , does not exceed least horizontal dimension.

1609.2, 2004 FBC; 1606.1.5, 2001 FBC. The definition of “mean roof height” is as follows:

MEAN ROOF HEIGHT. The average of the roof eave height and the height to the highest point on the roof surface, except that eave height shall be used for roof angle of less than or equal to 10 degrees (0.1745 rad).

§ 1609.2, 2004 FBC; 1606.1.5, 2001 FBC.

As the Paramount’s drawings submitted with the Petition indicate, the height of the roof for the tower portion of the structure is approximately 218 feet high and the lower portion is approximately 27 feet. Therefore, the

mean roof height is approximately 122 feet $((218 + 27)/2)$.³ Accordingly, Paramount cannot be a low-rise building as that term is used in Exception 4 to Section 3109.4.2.

CONCLUSION

For the reasons set forth in the above Memorandum of Law in Support of Petitioner's Proposed Answers to the Questions Posed in the Petition, Petitioner respectfully requests that the Commission issue a declaratory statement holding:

1. Paramount may have intermediate structural slabs seaward of the CCCL that are below the wave crest elevation; and portions of Paramount that are seaward of the CCCL must comply with the provisions of Section 3109 of the FBC while those portions of Paramount that lie landward of the CCCL are not required to comply with Section 3109; and

2. For major structures that are subject to Section 3109.4.2 or its exceptions, structural slabs that are constructed below the wave crest elevation are not required to be frangible or of break-away construction. However, walls and partitions that are subject to 3109.4.2 are required to be frangible or of breakaway construction unless they fall within another exception of 3109.4.2; and

³ Definition of *arithmetic* mean: a value that is computed by dividing the sum of a set of terms by the number of terms. Merriam-Webster Dictionary, www.merriam-webster.com/dictionary (last visited May 7, 2015). Note: Merriam-Webster Dictionary used due to unavailability of Webster's Third New International Dictionary of the English Language, Unabridged.

3. Paramount is not considered a low-rise building for the purposes of Section 3109 because its mean roof height does not qualify it as a low-rise building.

Respectfully submitted,

GREENBERG TRAUIG, P.A.

*Attorneys for Petitioner, Belmar
Development Associates, LLC.*

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By: _____

ROBERT S. FINE

Florida Bar No. 0155586

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by

REGISTERED EMAIL upon:

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John Travers
Building Official
City of Fort Lauderdale
700 N.W. 19th Avenue
Fort Lauderdale, Florida 33311
JTravers@fortlauderdale.gov

This 7th day of May, 2015,

By: 

Robert S. Fine

EXHIBIT A

STATE OF FLORIDA
BUILDING COMMISSION

In the Matter of

CITY OF HOLLYWOOD, FLORIDA,

Case #: DCA07-DEC-179

Petitioner.

_____ /

DECLARATORY STATEMENT

The foregoing proceeding came before the Florida Building Commission (the Commission) by a Petition from Alan Fallik of the CITY OF HOLLYWOOD, FLORIDA, (Petitioner) which was received on September 10, 2007, and subsequently amended on or about January 16, 2008, by Robert Fine, Esq., of Greenberg Traurig, P.A. Based on the statements in the petition and the material subsequently submitted, it is hereby ORDERED:

Findings of Fact

1. The petition is filed pursuant to, and must conform to the requirements of Rule 28-105.002, Florida Administrative Code.
2. The Petitioner is an incorporated municipality in the State of Florida who, in this circumstance, has both the authority to enforce the Florida Building Code (FBC) and owns property on which a development is proposed that is subject to the FBC.
3. Specifically, the Petitioner has proposed to develop its property on the beach and landside of the City's Historic Broadwalk. The Broadwalk is a 2.5 mile pedestrian promenade lined with shops. A third-party developer proposes to construct a hotel with

amenities, which will include commercial uses in space that extends wholly or partially seaward of the Coastal Construction Control Line or CCCL (the “Project”).

4. The Petitioner Hollywood seeks a declaratory statement regarding the application of section 3109 of the FBC to the Project to determine allowable uses in certain areas of the Project that are located wholly or partially seaward of the CCCL, and, specifically:

(a) Whether the Petitioner is entitled to rely on the past consistent interpretations of the Florida Department of Environmental Protection (‘DEP’), and its predecessor agency, the Florida Department of Natural Resources (‘DNR’), regarding the application of the same regulatory language that is now set forth in section 3109 of the FBC (as evidenced by the past consistent history of permits issued) to determine what uses may occupy an enclosed space in the Project that exists seaward of the CCCL and in between the FEMA/NFIP-established base flood elevation and the lowest horizontal structural member as described in section 3109.3 of the FBC; and

(b) Whether section 3109.3, Florida Building Code, Building Volume (2004 as amended), applied in light of the historical application of language by the predecessor agencies referred to above permit use of enclosed space that exists seaward of the CCCL and in between base flood elevation and the lowest horizontal structural member to include retail shops, pool and other bars, snack bars, grills with portable cooking equipment, dining areas where the permanent kitchen is located landward of the CCCL or above the lowest horizontal structural member, toilet rooms and bathrooms, cabanas, recreational spaces such as gyms and card rooms and service/storage/back-of-house facilities.

Conclusions of Law

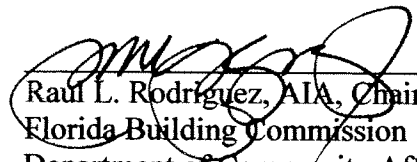
1. The Florida Building Commission has the specific statutory authority to interpret the provisions of the FBC by entering a declaratory statement.
2. Section 3109.3 of the FBC, Building Volume (2004 as amended 05/07), states:

All habitable structures shall be elevated at or above an elevation which places the lowest horizontal structural member above the 100-year storm elevation as determined by the Florida Department of Environmental Protection in the report titled "One-Hundred-Year Storm Elevation Requirements for Habitable Structures Located Seaward of a Coastal Construction Control Line.
3. Section 3109.2 of the FBC, Building Volume (2004 as amended), defines "habitable structure" as those which are "designed primarily for human occupancy and are potential locations for shelter from storms. Typically included within this category are residences, hotels and restaurants."
4. The foregoing language is identical to that which was historically enforced by the DEP and DNR, and the Petitioner has demonstrated by the documentation submitted together with the statement of its witnesses that the uses identified by the Petitioner would have been ruled to be permissible under the circumstances of the proposed development.
5. On the basis of the foregoing, the Commission affirmatively answers both of the Petitioner's inquiries. The Petitioner is entitled to rely on the past consistent interpretations of the DEP and DNR to the extent that the historical application of the regulation is consistent with the current context of the FBC. The Petitioner has demonstrated that the contexts are consistent and that, under the particular circumstances of the proposed development, the regulations now contained in Section 3109.3 of the

FBC, Building Volume (2004 as amended) prohibit restaurants, residences and hotels; and permit use of enclosed space that exists seaward of the CCCL and in between base flood elevation and the lowest horizontal structural member to include retail shops, pool and other bars, snack bars, grills with portable cooking equipment, dining areas where the permanent kitchen is located landward of the CCCL or above the lowest horizontal structural member, toilet rooms and bathrooms, cabanas, recreational spaces such as gyms and card rooms and service/storage/back-of-house facilities, subject to appropriate permitting as required by law.

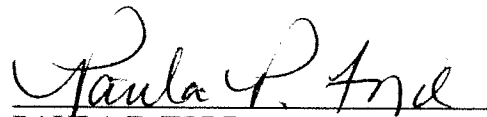
Petitioner and all other interested parties are hereby advised of their right to seek judicial review of this Order in accordance with Section 120.68(2)(a), Florida Statutes, and with Fla. R. App. 9.030(b)(1)(C) and 9.110(a). To initiate an appeal, a Notice of Appeal must be filed with Paula P. Ford, Clerk of the Commission, Sadowski Building, 2555 Shumard Oak Boulevard, Tallahassee, FL 32399-2100, and with the appropriate District Court of Appeal no later than thirty days after this Order is filed with the Clerk of the Commission. A Notice of Appeal filed with the District Court of Appeal shall be accompanied by the filing fee specified by section 35.22(3), Florida Statutes.

DONE AND ORDERED this 19th of March, 2008, in Coral Gables,
Miami-Dade County, State of Florida.


Raul L. Rodriguez, AIA, Chair
Florida Building Commission
Department of Community Affairs
Sadowski Building
2555 Shumard Oak Blvd.
Tallahassee, FL 32399-2100

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to the
following by the method indicated on this 20th day of March, 2008.


PAULA P. FORD
Commission Clerk

Via U.S. Mail

Alan E. Fallik, Esq.
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Via Hand Delivery

Mo Madani, C.B.O. Manager
Codes and Standards Section
Department of Community Affairs
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EXHIBIT B

**STATE OF FLORIDA
BUILDING COMMISSION**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	1/20/2015
File #	2015-00517

In the Matter of

HFZ CAPITAL GROUP doing business as THE SHORE CLUB
Petitioner.

DS 2014-116

DECLARATORY STATEMENT

The foregoing proceeding came before the Florida Building Commission (Commission) by a Petition from HFZ Capital Group, doing business as The Shore Club (Petitioner), which was received September 4, 2014. Based on the statements in the petition, the material subsequently submitted and the subsequent request by the Petitioner, the Commission states the following:

Findings of Fact

1. The petition is filed pursuant to, and must conform to the requirements of Rule 28-105.002, Florida Administrative Code.
2. Petitioner is a New York based real estate investment and development company that owns property on the beach side of Collins Avenue in the City of Miami Beach in the Ocean Drive/Collins Avenue Historic District, located at or about 1901 Collins Avenue, Miami Beach, the location of the Shore Club resort.
3. Petitioner seeks clarification as to whether the holding of DCA07-DEC-179 may be utilized by the City of Miami Building Official if the Building Official determines that the material facts of DCA07-DEC-179 are consistent those of the Petitioner's project.
4. Specifically, the Petitioner requests an answer to the following question:

Is the Building Official of the City of Miami Beach authorized by the applicable statutes, rules, and law to utilize and apply the Hollywood Dec Statement to the Shore Club and its proposed

development project, if, in his (the Building Official's) opinion, the relevant, underlying, material facts of the Hollywood Dec Statement are consistent with the corresponding material facts of the Shore Club's proposed project and he otherwise feels the application would be appropriate?

Conclusions of Law

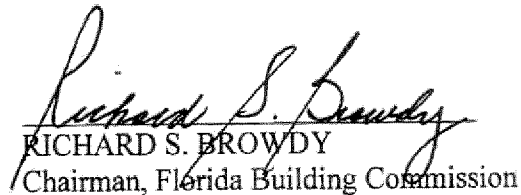
5. The Commission has the specific statutory authority pursuant to Section 553.775(3)(a), Florida Statutes (2014) to interpret the provisions of the Florida Building Code by entering a declaratory statement.

6. Section 553.775(2), Florida Statutes (2014) states:

Local enforcement agencies, local building officials, state agencies, and the commission shall interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission, except that conflicts between the Florida Fire Prevention Code and the Florida Building Code shall be resolved in accordance with s. 553.73(11)(c) and (d).

7. In response to Petitioner's request, the answer is yes. If the Building Official determines that the underlying material facts and conditions in the Declaratory Statement DCA07-DEC-179 are consistent with the corresponding material facts and conditions in the Shore Club's project, he may apply the holding of Declaratory Statement DCA07-DEC-179 to the Project.

DONE AND ORDERED this 15th day of January, 2015 in Jacksonville,
Duval County, State of Florida.


RICHARD S. BROWDY
Chairman, Florida Building Commission

NOTICE OF RIGHT TO APPEAL

Petitioner and all other interested parties are hereby advised of their right to seek judicial review of this Order in accordance with Section 120.68(2)(a), Florida Statutes (2014), and Florida Rules of Appellate Procedure 9.110(a) and 9.030(b)(1)(C). To initiate an appeal, a Notice of Appeal must be filed with Agency Clerk, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1000 and with the appropriate District Court of Appeal not later than thirty (30) days after this Order is filed with the Clerk of the Department of Business and Professional Regulation. A Notice of Appeal filed with the District Court of Appeal shall be accompanied by the filing fee specified by Section 35.22(3), Florida Statutes (2014).

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been filed with the undersigned and furnished by U. S. Mail to the persons listed below this 20th day of January, 2015.



Agency Clerk's Office
Department of Business and Professional Regulation
& Florida Building Commission
1940 North Monroe Street
Tallahassee, Florida 32399-1000

Via U.S. Mail

HFZ Capital Group d/b/a The Shore Club
600 Madison Avenue, 17th Floor
New York, New York 10022

Robert S. Fine, Esq.
Greenberg Traurig, P.A.
333 Southeast 2nd Avenue
Suite 4400
Miami, Florida 33131

Via Inter-Office or Email Delivery

Mo Madani, Planning Manager
Codes and Standards Section
Department of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399
Mo.Madani@myfloridalicense.com

Marjorie Holladay
Joint Administrative Procedures Committee
Pepper Building, Room 680
Tallahassee, Florida 32399-1300

FILED

Department of Business and Professional Regulation
Deputy Agency Clerk

CLERK Brandon Nichols

Date 9/4/2014

File #

**STATE OF FLORIDA
BUILDING COMMISSION**

IN RE:

HFZ CAPITAL GROUP d/b/a THE
SHORE CLUB

CASE NO.

DS 2014-116

**PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BUILDING COMMISSION**

HFZ Capital Group, d/b/a The Shore Club (the "Shore Club") files this petition for declaratory statement (the "Petition") regarding the applicability of a prior declaratory statement to a current and unrelated project whose material facts are consistent with the corresponding underlying material facts in the declaratory statement in question, and states as follows:

JURISDICTION

1. The Florida Building Commission (the "Commission") has jurisdiction to issue declaratory statements pursuant to section 120.565, Florida Statutes, relating to an agency's interpretation and enforcement of the specific provisions of the Florida

Building Code (FBC), which the agency is authorized to enforce. See § 553.775(3)(f), Fla. Stat.¹

The Petitioner

2. Petitioner's address is 600 Madison Avenue, 17th Floor, New York, New York 10022. Petitioner may be reached by telephone through undersigned counsel.

3. Petitioner is also the owner of property on the beach side of Collins Avenue in the City of Miami Beach in the Ocean Drive/Collins Avenue Historic District, located at or about 1901 Collins Avenue, Miami Beach, the location of the Shore Club resort.

4. Petitioner intends to make improvements to the existing buildings and facilities on the Shore Club site and add additional buildings and facilities (the Project"). Some aspects of the Project are located seaward of the Coastal Construction Control Line ("CCCL"). For those components of the Project that lie seaward of the CCCL and have a floor elevation above FEMA's base flood elevation but below the *One Hundred Year Storm Elevation* ("100-year Elevation") as defined in Section 3109.2 of the Florida Building Code- 2010 Building volume ("FBC 2010"), Petitioner wishes to utilize the Commission's holding in Declaratory Statement DCA07-DEC-179 (March 19, 2008)(the "Hollywood Dec Statement") in executing the Project.

¹ All references to Florida Statutes shall be to the 2014 edition unless otherwise indicated.

SUMMARY OF FACTS

4. In 2008, the City of Hollywood, Florida, petitioned for a declaratory statement which sought an interpretation of Section 3109 of the 2004 edition of the FBC ("FBC 2004") as applied to certain development conditions occurring seaward of the CCCL. The Commission granted the Hollywood Dec Statement. The Hollywood Dec Statement provides answers to the same substantive issues that are now of concern to the Petitioner.

5. Because it is unclear to the Building Official if the prior declaratory statement (DCA07-DEC-179) is still valid under a now-later edition of the Florida Building Code than the building code edition it was issued under, and because the prior declaratory statement was issued to a location in Hollywood, Florida, as opposed to Miami Beach, the Building Official expressed concern as to the applicability of Hollywood Declaratory Statement to the Shore Club's project so that even if he determined that the underlying material facts in the Hollywood Dec Statement that corresponded with the Shore Club's project were substantially the same, he does not know whether he be would authorized (i.e., allowed) to apply the holding of the Hollywood Dec Statement to the Project.

COUNSEL FOR THE PETITIONER

7. Petitioner is represented by: Robert S. Fine, Esq., AIA. Florida Bar Number 0155586. Greenberg Traurig, P.A., 333 S.E. 2nd Avenue, Suite 4400, Miami,

Florida 33131. Telephone: 305.579.0826. Facsimile: 305.961.5826. Email:
FineR@gtlaw.com.

**THE STATUTES, RULE AND CODE PROVISIONS, AND THEIR
EFFECT ON PETITIONER**

8. Florida Building Code Provisions

a. The Florida Building Code

- i. FBC, 2010 Building volume (“FBC-Building”), Section 3109

9. Florida Statutes

- i. Section 553.775(2), Florida Statutes (2014)

- ii. Section 120.565, Florida Statutes

10. The Florida Administrative Code

- i. Chapter 28-105, Florida Administrative Code (“FAC”)

- ii. Rule 61G20-1.001, FAC (The Florida Building Code- see ¶ 8a
above)

11. The Effect of these Code Provisions on Petitioner

Petitioner is the owner and developer of an oceanfront resort property in south Miami Beach. Petitioner has proposed, and is in the process of attaining entitlements, for a project to update and upgrade the site and its existing buildings and facilities, as well as construct additional buildings and facilities in order to better serve its clientele, and elevate its place in the local resort hotel market. Some of the proposed

improvements occur on the site seaward of the CCCL. Some of these improvements are above FEMA's base flood elevation but below the 100-year Storm Elevation. The Commission addressed specifically this issue in the Hollywood Dec Statement, however, the Building Official is not comfortable applying that declaratory statement to the Project (because it was issued under an earlier code edition and for a project in a different jurisdiction) without the Commission confirming that it would not be inappropriate for him to do so.

NATURE OF DECLARATORY STATEMENT SOUGHT

11. The Shore Club seeks a declaratory statement answering the question: "is the Building Official of the City of Miami Beach authorized by the applicable statutes, rules and law, to utilize and apply the Hollywood Dec Statement to the Shore Club and its proposed development project if, in his (the Building Official's) opinion, the relevant, underlying, material facts of the Hollywood Dec Statement are consistent with the corresponding material facts of the Shore Club's proposed project and he otherwise feels the application would be appropriate?"

PETITIONERS' PROPOSED ANSWERS TO QUESTIONS POSED IN THE PETITION

12. Yes. Because Section 3109 of the FBC 2010, as relevant to the question posed, has not been substantively changed from Section 3109 of the FBC 2004, the Hollywood Dec Statement remains valid under the FBC2 2010. Section 553.775(2) of

the Florida Statutes provides: “[l]ocal enforcement agencies, local building officials, state agencies, and the commission shall interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission.” Therefore, if the Building Official determines that the underlying material facts and conditions in the Hollywood Dec Statement are consistent with the corresponding facts and conditions in the Project, he may apply the holding of the Hollywood Dec Statement to the Project.

**ABBREVIATED MEMORANDUM IN SUPPORT OF
PETITIONER’S PROPOSED ANSWER TO THE QUESTION
PROPOSED IN THIS PETITION**

13. The Hollywood Dec Statement is based on the Commission’s interpretation of Section 3109 of FBC 2004. Substantively, Section 3109 of FBC 204 is identical to Section 3109 of FBC 2010, the building code that the Project will be subject to. *See* Redline comparison of Section 3109 of FBC 2004 and Section 3109 of FBC 2010, attached as Exhibit A. In courts of general jurisdiction, the doctrine requiring courts to generally follow the precedents of previous decisions is referred to as the doctrine of *stare decisis*. The doctrine of *stare decisis* as applied to administrative agencies under the executive branch of state government (referred to as administrative *stare decisis*) was addressed in *Gessler v. Dept. of Business and Professional Regulation*, 627 So. 2d 501 (Fla. 4th DCA 1993), *superseded by statute on other grounds, as stated in Caserta*

v. Department of Business and Professional Regulation, 686 So. 2d 651 (Fla. 5th DCA 1996), which concluded that:

[w]hile it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative *stare decisis* in Florida.

Id., 627 So. 2d at 504. Other courts have noted that *Gessler* applies “the fundamental principle that like cases should be treated alike.” See *Pagan v. Sarasota County Public Hospital*, 884 So. 2d 257, 266 (Fla. 2d DCA 2004) (Canady J., concurring). Other courts have concluded that an agency’s “unexplained, inconsistent policies are contrary to established administrative principles and sound public policy.” See *Brookwood-Walton County Convalescent Ctr. v. Agency for Health Care Admin.*, 845 So. 2d 223, 229 (Fla. 1st DCA 2003). Agencies, therefore, must attempt to be consistent when addressing similar sets of circumstances over time. If an agency changes its established policies, “it must either explain its reasons based upon expert testimony, documentary opinions, or other appropriate evidence.” See *Health Care and Retirement Corp. of America v. Dep’t of Health and Rehabilitative Servs.*, 559 So. 2d 665, 667-68 (Fla. 1st DCA 1990). Accordingly, since the Section 3109 of FBC 2010 has not changed in substance from Section 3109 FBC 2004, the holding in the Hollywood Declaratory Statement should remain intact and maintain its validity.

Florida (Building Code-authorizing) Statutes provide:

Local enforcement agencies, *local building officials*, state agencies, and the commission shall interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building Construction *in a manner that is consistent with declaratory statements* and interpretations entered by the commission...

§ 553.775(2), Fla. Stat. (2014)(emphasis added). Section 120.565, Florida Statutes, provides that declaratory statements are fact-specific. Therefore, a building official applying a declaratory statement should ascertain the underlying material facts of a declaratory statement and assure him/herself that they are consistent with the corresponding material facts of a project that the declaratory statement is sought to be applied to. However, once the building official is comfortable that the corresponding material facts are consistent, Section 553.775(2) clearly authorizes, if not mandates, the building official to apply the declaratory statement to the condition where its application is sought.

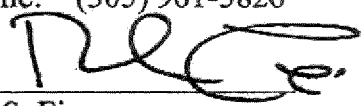
In the particular case of this petition, it is significant to note that in the petition that led to the issuance of the Hollywood Dec Statement, the vast majority of the 12 projects cited in support of the declaratory statement were located in Miami Beach, at least two of which being located within 3 blocks of the Shore Club.

Conclusion

Based on the principle of administrative *stare decisis*, and the provisions of Section 553.775(2), Florida Statutes, the Commission should issue a declaratory statement holding that if the Building Official determines that the underlying material facts and conditions in the Declaratory Statement DCA07-DEC-179 are consistent with the corresponding material facts and conditions in the Shore Club's project, he may apply the holding of Declaratory Statement DCA07-DEC-179 to the Project.

Respectfully submitted,

Robert S. Fine, Esq.
Florida Bar No. 0155586
Greenberg Traurig, P.A.
333 S.E. 2nd Avenue, Suite 4400
Miami, Florida 33131
Telephone: (305) 579-0826
Facsimile: (305) 961-5826

By: 
Robert S. Fine
Counsel for HFZ CAPITAL GROUP
d/b/a THE SHORE CLUB

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by

REGISTERED EMAIL upon:

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Director, Florida Building Comm.
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This 4th day of September, 2014.


By: 
Robert S. Fine
Counsel for HFZ CAPITAL GROUP
d/b/a THE SHORE CLUB

EXHIBIT A

Chapter 31, Section 3109 - STRUCTURES SEAWARD OF A COASTAL CONSTRUCTION CONTROL LINE

SECTION 3109 STRUCTURES SEAWARD OF A COASTAL CONSTRUCTION CONTROL LINE

~~Chapter 31, Section 3109, (1)~~

3109.1 General.

Swimming pools shall comply with the requirements of this section and other applicable sections of this code.

~~Chapter 31, Section 3109, (1)(1)~~

3109.1.1 Scope.

The provisions of Section 3109 shall ensure that structures located seaward of the coastal construction control line are designed to resist the predicted forces associated with a 100-year storm event and shall apply to the following:

~~Chapter 31, Section 3109, (1)(1)(ab1)~~

1. All habitable structures which extend wholly or partially seaward of a coastal construction control line (CCCL) or 50-foot (15.3 m) setback line.

~~Chapter 31, Section 3109, (1)(1)(ac2)~~

2. Substantial improvement of or additions to existing habitable structures.

~~Chapter 31, Section 3109, (1)(1)(ad3)~~

3. Swimming pools that are located in close proximity to a habitable structure or armoring. An ~~environmental~~ environmental permit from the Florida Department of Environmental Protection, requiring special siting considerations to protect the beach-dune system, proposed or existing structures and public beach access, is required prior to the start of construction. The environmental permit may condition the nature, timing and sequence of construction of permitted activities to provide protection to nesting sea turtles and hatchlings and their habitat, including review, submittal and approval of lighting plans.

Exception: The standards for buildings seaward of a CCCL area do not apply to any modification, maintenance or repair ~~to~~ of any existing structure within the limits of the existing foundation which does not require, involve or include any additions to, or repair or modification of, the existing foundation of that structure.

~~Chapter 31, Section 3109, (1)(2)~~

3109.1.2 Certification.

As part of the permit process and upon placement of the lowest horizontal structural member, the applicant shall submit to the building official certification of the elevation of the lowest horizontal structural member of the lowest floor as built in relation to National Geodetic Vertical

Datum (N.G.V.D.). Said certification shall be prepared by or under the direct supervision of a registered land surveyor or professional engineer or architect and certified by ~~the~~ same and be submitted prior to commencing any addition work. Any work undertaken prior to submission of the certification shall be at the applicant's risk. The building official shall review the submitted elevation data, and any deficiencies found shall be corrected by the permit holder immediately and prior to any further work being permitted to proceed.

~~Chapter 31, Section 3109, (2)~~
3109.2 ~~Definitions~~Definition.

The following word and term shall, for the purposes of this section and as used elsewhere in this code, have the meaning shown herein.

ARMORING. A manmade structure designed to either prevent erosion of the upland property or protect upland structures from the effects of coastal wave and current action. Armoring includes certain rigid coastal structures such as geotextile bags or tubes, seawalls, revetments, bulkheads, retaining wall or similar structures, but does not include jetties, groins or other construction whose purpose is to add sand to the beach and dune system, alter the natural coastal currents or stabilize the mouths of inlets.

BREAKAWAY WALL. A partition independent of supporting structural members that is intended to withstand design wind forces but to collapse from a water load less than that which would occur during a 100 year storm event without causing collapse, displacement or other structural damage to the elevated portion of the building or supporting foundation system.

COASTAL CONSTRUCTION CONTROL LINE. The line established by the State of Florida pursuant to Section 161.053, Florida Statutes, and recorded in the official records of the county which defines that portion of the beach-dune system subject to severe fluctuations based on a 100-year storm surge, storm waves or other predictable weather conditions.

DESIGN GRADE. The predicted eroded grade caused by the 100-year storm.

FIFTY-FOOT SETBACK LINE. A line of jurisdiction, established pursuant to the provisions of Section 161.052, Florida Statutes, in which construction is prohibited within 50 feet (15.13 m) of the line of mean high water at any riparian coastal location fronting the Gulf of Mexico or the Atlantic coast shoreline.

HABITABLE STRUCTURE. Structures designed primarily for human occupancy and are potential locations for shelter from storms. Typically included within this category are residences, hotels and restaurants.

LOWEST HORIZONTAL STRUCTURE MEMBER. Any shore-parallel structural member which supports floor, wall or column loads and transmits them to the pile foundation.

ONE-HUNDRED-YEAR STORM ELEVATION. The height of the breaking wave crest or wave approach as superimposed on the storm surge with dynamic wave set-up of a 100-year storm. This 100-year storm elevation is determined by the Florida Department of Environmental Protection based on studies published as part of the coastal construction control line establishment process and an analysis of topographic and other site specific data.

REBUILDING. See definition of "Substantial improvement."

SUBSTANTIAL IMPROVEMENT. See ~~definition in Section 161.54(12), Florida Statutes, 1612.~~

~~Chapter 31, Section 3109, (3)~~
3109.3 Elevation standards.

All habitable structures shall be elevated at or above an elevation which places the lowest horizontal structural member above the 100-year storm elevation as determined by the Florida Department of Environmental Protection in the report titled "One-Hundred-Year Storm Elevation Requirements for Habitable Structures Located Seaward of a Coastal Construction Control Line."

An applicant may request the Department of Environmental Protection to determine a site-specific 100-year storm elevation for the applicant's proposed habitable structure as part of the environmental permit application process. The elevation will be provided as part of the applicant's environmental permit and shall be subject to review under the provisions of Chapter 120, Florida Statutes.

Exceptions:

1. Additions, repairs or modifications to existing nonconforming habitable structures that do not advance the seaward limits of the existing habitable structure and do not constitute rebuilding of the existing structure.
2. Habitable structures located landward of existing armoring which is capable of protecting buildings from the effects of erosion from a 100-year storm surge. The applicant shall provide scientific and engineering evidence that the armoring has been designed, constructed and maintained to survive the effects of the design storm and provide protection to existing and proposed structures from the erosion associated with that event. Evidence shall include a report with data and supporting analysis, and shall be certified by a professional engineer registered in this state, that the armoring was designed and

constructed and is in adequate condition to meet the following criteria:

- a. The top must be at or above the still water level, including setup, for the design storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination, and must be high enough to preclude runoff overtopping.
 - b. The armoring must be stable under the design storm including maximum localized scour, with adequate penetration and toe protection to avoid settlement, toe failure, or loss of material from beneath or behind the armoring.
 - c. The armoring must have sufficient continuity or return walls to prevent flanking under the design storm from impacting the proposed construction.
 - d. The armoring must withstand the static and hydrodynamic forces of the design storm.
3. A higher elevation standard is required by either the National Flood Insurance Program (NFIP), as found on a community's Flood Insurance Rate Map (FIRM), or the local flood damage prevention ordinance. In such instances, the higher elevation standard shall apply.

~~Chapter 31, Section 3109, (4)~~
3109.4 Construction standards.

~~Chapter 31, Section 3109, (4) (1)~~
3109.4.1 Pile foundations.

All habitable structures shall be elevated on, and securely anchored to, an adequate pile foundation. Pile foundations for habitable structures shall be designed to withstand all reasonable 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. All habitable structures should be anchored to their pile foundation in such a manner as to prevent flotation, collapse or lateral displacement. The elevation of the soil surface to be used in the calculation of pile reactions and bearing capacities for habitable structures shall

not be greater than that which would result from erosion caused by a 100-year storm event. Calculation of the design grade shall account for localized scour resulting from the presence of structural components. Design ratio or pile spacing to pile diameter should not be less than 8:1 for individual piles located above the design grade. Pile caps shall be set below the design grade unless designed to resist increased flood loads associated with setting the cap above the design grade, but at or below the natural grade. Pile penetration shall take into consideration the anticipated loss of soil above the design grade.

Exceptions:

1. Additions, repairs or modifications to existing nonconforming habitable structures that do not advance the seaward limits of the existing habitable structure and do not constitute rebuilding of the existing structure.

2. Habitable structures located landward of existing armoring which is capable of protecting buildings from the effects of erosion from a 100-year storm surge. The applicant shall provide scientific and engineering evidence that the armoring has been designed, constructed and maintained to survive the effects of the design storm and provide protection to existing and proposed structures from the erosion associated with that event. Evidence shall include a report with data and supporting analysis, and shall be certified by a professional engineer registered in this state, that the armoring was designed and constructed and is in adequate condition to meet the following criteria:

a. The top must be at or above the still water level, including setup, for the design storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination, and must be high enough to preclude runup overtopping.

b. The armoring must be stable under the design storm including maximum localized scour, with adequate penetration and toe protection to avoid settlement, toe failure or loss of material from beneath or behind the armoring.

c. The armoring must have sufficient continuity or return walls to prevent flanking under the design storm from impacting the proposed construction.

d. The armoring must withstand the static and hydrodynamic forces of the design storm.

~~Chapter 31, Section 3109, (4) (2)~~

3109.4.2 Walls below the 100-year storm elevation.

No substantial walls or partitions shall be constructed below the level of the first finished floor of habitable structures. All other walls shall be designed to break away.

Exceptions:

1. Stairways and stairwells;
2. Shear walls perpendicular to the shoreline;
3. Shear walls parallel to the shoreline, which are limited to a maximum of 20 percent of

the building length in the direction running parallel to the shore;

4. Shear walls parallel to the shoreline, which exceed 20 percent of the total building length (including any attached major structure) when they meet the following criteria:

a. A certification is provided by a Florida-registered professional engineer that certifies that the increased length of shear walls, over 20 percent, are located landward of the 100-year erosion limit;

b. A hydraulic analysis is provided and certified by a Florida-registered professional engineer that evaluates the potential impact of flow increase on the subject parcel and adjacent properties;

c. The hydraulic analysis demonstrates that although the overall shearwall coverage is more than 20 percent, the increased shearwall length will not result in substantial increase of flow velocities and drag forces on the structural components of the proposed structure and neighboring structures; and

d. The provisions under Section 3109.4.2 (Exception 4) do not include any low-rise building as defined in Section 1609.2.

5. Wind or sand screens constructed of fiber or wire mesh;

6. Light, open lattice partitions with individual, wooden lattice strips not greater than 3/4 inch (19 mm) thick and 3 inches (76 mm) wide;

7. Elevator shafts;

8. Small mechanical and electrical rooms; and

9. Break-away or frangible walls.

~~Chapter 31, Section 3109, (5)~~

3109.5 Flood loads during a 100-year storm.

~~Chapter 31, Section 3109, (5)(1)~~

3109.5.1 Load basis.

The structural design shall be based on the 100-year storm as determined by the Florida Department of Environmental Protection in studies published as part of the coastal construction control line establishment process. Breaking, broken and nonbreaking waves shall be considered as applicable. Design wave loading analysis shall consider vertical uplift pressures and all lateral pressures to include impact, as well as dynamic loading and the harmonic intensification resulting from repetitive waves.

~~Chapter 31, Section 3109, (5)(2)~~

3109.5.2 Hydrostatic load.

Habitable structures shall be designed in consideration of the hydrostatic loads which would be expected under the conditions of maximum inundation associated with a 100-year storm event. Calculations for hydrostatic loads shall consider the maximum water pressure resulting from a fully peaked, breaking wave superimposed on the design storm surge with dynamic wave setup.

Both free and confined hydrostatic loads shall be considered. Hydrostatic loads which are confined shall be determined using the maximum elevation to which the confined water would freely rise if unconfined. Vertical hydrostatic loads shall be considered as forces acting both vertically downward and upward on horizontal or inclined surfaces of major structures (e.g., floors, slabs, roofs, walls). Lateral hydrostatic loads shall be considered as forces acting horizontally above and below grade on vertical or inclined surfaces of major structures and coastal or shore protection structures. Hydrostatic loads on irregular or curving geometric surfaces may be determined in consideration of separate vertical and horizontal components acting simultaneously under the distribution of the hydrostatic pressures.

~~Chapter 31, Section 3109, (5)-(3)~~
3109.5.3 Hydrodynamic loads.

Habitable structures shall be designed in consideration of the hydrodynamic loads which would be expected under the conditions of a 100-year storm event. Calculations for hydrodynamic loads shall consider the maximum water pressures resulting from the motion of the water mass associated with a 100-year storm event. Full-intensity loading shall be applied on all structural surfaces above the design grade which would affect the flow velocities.

~~Chapter 31, Section 3109, (6)~~
3109.6 Wind loads.

All habitable structures shall be designed in accordance with Chapter 16.

~~Chapter 31, Section 3109, (7)~~
3109.7 Swimming pools.

Swimming pools located in close proximity to an existing habitable structure or armoring shall be designed with an adequate pile foundation for the erosion and scour conditions of a 100-year storm event.

~~Chapter 31, Section 3109, (8)~~
3109.8 Storm debris.

All structures will be designed to minimize the potential for wind and water-borne debris during a storm.

Document comparison by Workshare Compare on Monday, August 11, 2014
4:50:26 PM

Input:	
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Document 2 ID	file://C:\Users\lopezsj\Desktop\2010 FBC Sec 3109.pdf
Description	2010 FBC Sec 3109
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Padding cell	

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Deletions	23
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Style change	0
Format changed	0
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EXHIBIT C

Greenberg Traurig

To Robert Fine, Esq.
From Seann Frazier, Esq. and Paul Savage, Esq.
Date October 31, 2007
Re City of Hollywood CCCL

The City of Hollywood is undertaking coastal construction and is seeking required approvals for that work. Traditionally, coastal construction permits were governed solely by Florida's Department of Environmental Protection (the "Department"). In statutory amendments made effective in March 2002, however, jurisdiction for certain coastal construction aspects including design, construction, alteration, modification, repair and demolition of buildings was shifted from the Department to the Florida Building Commission (the "Commission"). See Ch. 2000-141, § 5, Laws of Fla., eff. March 1, 2002, (amending Section 161.052, Fla. Stat.) and Ch. 2000-141, § 6, eff. March 1, 2002 (amending Section 161.053, Fla. Stat.).¹

There is a risk that the Commission will take positions on such permits which differ from precedent established by the Department when it retained jurisdiction over similar projects. You asked whether the Commission should be bound by the precedent established over many years by the Department.

Generally, successor agencies are bound by the precedent established by their predecessor agencies. While no specific legislative history or case addressing whether the Commission in particular should be bound by precedent established by Department was identified in our research, we believe that the general proposition requiring successor agencies to follow established precedent should apply. In other words, the Commission should follow precedents established by the Department. The legal reasoning for this conclusion follows.

In courts of general jurisdiction, the doctrine requiring courts to generally follow the precedents of previous decisions is referred to as the doctrine of *stare decisis*. The doctrine of *stare decisis* as applied to administrative agencies under the executive branch of state government (referred to as administrative *stare decisis*) was addressed in *Gessler v. Dept. of*

¹ These changes also authorized the Commission to adopt rules to implement these laws and the provisions of Section 553.73 and 553.79, Florida Statutes. Rules addressing the particular circumstances of this case apparently have not yet been adopted.

To Robert Fine
Date October 31, 2007
Page 2

Business and Professional Regulation, 627 So. 2d 501 (Fla. 4th DCA 1993), *superseded on other grounds, Caserta v. Department of Business and Professional Regulation*, 686 So. 2d 651 (Fla. 5th DCA 1996), which concluded that:

[W]hile it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative *stare decisis* in Florida.

Id., 627 So. 2d at 504. Other courts have noted that *Gessler* applies “the fundamental principle that like cases should be treated alike.” *See Pagan v. Sarasota County Public Hospital*, 884 So. 2d 257, 266 (Fla. 2d DCA 2004) (Canady J., concurring). Other courts have concluded that an agency’s “unexplained, inconsistent policies are contrary to established administrative principles and sound public policy.” *See Brookwood-Walton County Convalescent Ctr. v. Agency for Health Care Admin.*, 845 So. 2d 223, 229 (Fla. 1st DCA 2003).

So, agencies must attempt to be consistent when addressing similar sets of circumstances over time. If an agency changes its established policies, “it must either explain its reasons based upon expert testimony, documentary opinions, or other appropriate evidence.” *See Health Care and Retirement Corp. of America v. Dep’t of Health and Rehabilitative Servs.*, 559 So. 2d 665, 667-68 (Fla. 1st DCA 1990).

The more particular question you ask is whether the doctrine of administrative *stare decisis* should bind the Commission when it assumed regulatory authority over a program once administered solely by the Department. The case law confirms that it should. In *Florida Hospital-Orlando and Florida Hospital-Altamonte Springs v. State of Florida, Agency for Health Care Administration*, DOAH Case No. 95-1573, 1995 WL 1053090, *20 (Fla. Div. Admin. Hrgs., Rec. Order, Dec. 20, 1995) *adopted in relevant part* (Agency for Health Care Admin., Final Order, Nov. 22, 1996), an administrative law judge found that a successor agency was bound by the precedents of its predecessor agency:

Respondent is bound to follow the prior decision of its predecessor agency unless Respondent can show a compelling reason for departing from controlling precedent.

Id., 1995 WL 1053090, *20, para. 208 (emphasis supplied).

The issue in *Florida Hospital* was whether an agency administering the Medicaid Program in Florida should be bound by decisions that bound its predecessor agency once charged with administering the same Medicaid Program. An administrative law judge and eventually the Agency itself concluded that the precedent of prior agencies bound the successor agency that assumed responsibility for the same program.

To Robert Fine
Date October 31, 2007
Page 3

Most noteworthy is the fact that successor agency determinations are *reversed as incorrect* when they fail to follow predecessor agency precedent. For example, the First District Court of Appeal reversed a decision of the Agency for Health Care Administration (“AHCA”) by citing numerous contrary precedents issued by its predecessor agency, the Florida Department of Health and Rehabilitative Services (“HRS”), in *Vantage Healthcare Corporation v. Agency for Healthcare Administration*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997). The issue in *Vantage* was whether the AHCA erred in accepting a late-filed letter of intent to apply for a certificate of need. In reversing the AHCA’s decision as error, the *Vantage* Court explained that the AHCA’s decision contravened the applicable administrative rule and at least two decisions by the “predecessor agency,” the HRS. *Vantage*, 687 So. 2d at 308 (citing *Mederi of Alachua County, Inc. v. Department of Health and Rehabilitative Services*, 13 F.A.L.R. 3502 (HRS 1991) and *Beverly Enterprises Florida, Inc. v. Department of Health and Rehabilitative Services*, 5 F.A.L.R. 1846-A (HRS 1983)).

Another example is found in an administrative law judge’s use of decisions by the Florida Department of Environmental Regulation (“DER”) -- the predecessor agency to the Florida Department of Environmental Protection (“FDEP”) -- to address whether to allow the modification of an Environmental Resource Permit. *See Phillip Buchner v. Florida Department of Environmental Protection*, DOAH Case No. 02-2940, 2002 WL 31554151 at *10-11 (Fla. Div. Admin. Hrgs. Nov. 13, 2002) *adopted and incorporated* (Florida Department of Environmental Protection Final Order, Dec. 19, 2002). The administrative law judge in *Buchner* cited to numerous prior decisions of the DER as the “predecessor agency” as authoritative and controlling on the issue of the agency’s proper consideration of secondary and cumulative impacts of the proposed permitted activity. *Id.*

Finally, an administrative law judge ruled that a home for the developmentally disabled was entitled to rely upon the prior historical practice of a “predecessor agency” in *Sunrise Community, Inc. v. Agency for Healthcare Administration*, DOAH Case No. 95-6028, 1996 WL 1060143 at *4-5 (Fla. Div. Admin. Hrgs. July 11, 1996) *adopted and incorporated in relevant part* (Agency for Healthcare Administration Final Order, Dec. 1, 1996). In *Sunrise Community*, the administrative law judge explained that the prior practice of the predecessor agency should control, as follows:

It is found that the new Krome Avenue facility should be treated as a “new provider” for purposes of establishing its interim rate.

The preceding finding is consistent with AHCA's *past practice*. According to the evidence, AHCA *or its predecessor agency always has established* a total-budgeted interim rate whenever a provider has changed the physical location of its clients. . . .

To Robert Fine
Date October 31, 2007
Page 4

* * * *

AHCA attempted to explain that the new Krome Avenue facility should be treated differently because it was a “consolidation” from two locations to one. That explanation is rejected.

Sunrise was entitled to rely on the terms of the Reimbursement Plan and the past practice of AHCA and its predecessor agency under it. In reliance on the past practice, Sunrise proceeded with the construction of the facility at 1102 Krome Avenue.

Id. (emphasis supplied).

The foregoing cases and analysis make clear that a successor agency is bound by the decisions of a predecessor agency because such decisions are recognized as precedent under the doctrine of administrative *stare decisis*. Courts and administrative law judges treat predecessor agency precedent as binding when deciding issues. A similar method and result should hold here. Barring some compelling reason for departing precedent of the Department, the Commission should be required to follow the precedent established by the Department.

EXHIBIT D

DEP/DNR Permits Allowing Interim Structural Slabs Below 100-Year Wave Crest Elevation

Project / Address	DEP Permit	Permit Issuance Date	WCE ^{1, 2}	Lowest Floor ¹	Interim Slab Levels ¹	1st Habitable Floor ¹
Oceania 16445 Collins Ave Sunny Isles Beach	DA-186	1991	+18.2'	+9.5'	+14.5'	+31.2'
Diplomat 3515 S Ocean Drive Broward County	BO-441M3	1999	+19.1'	+4.5'	+15.0'	+55.0'
Pinnacle 17600 Collins Ave Sunny Isles Beach	DA-309	1996	+17.35'	+5.9'	+15.1'	+24.4'
Royal Palm 1535 Collins Ave Miami Beach	DA-351	1997	+15.75'	+3.75'	+12.7'	+15.75'
South Beach Marriott 161 Ocean Drive Miami Beach	DA-356	1997	+20.4'	+2.5'	+12.5'	+34.3'
Ocean One 194th Street & Collins Ave Sunny Isles Beach	DA-358	1997	+18.2'	+7.0'	+16.3'	+27.6'
Loews 1600 Collins Ave Miami Beach	DA-317 M2 R	1998	+16.5'	+4.0'	+17.0'	+65.0'
Solara 9559 Collins Ave Bal Harbour	DA-318 M2	1998	+18.2'	+4.0'	+14.0'	+26.0'
Dilido 1669 Collins Ave Miami Beach	DA-377	1999	+20.4'	+3.0'	+11.7'	+34.5'
The Bently 101 Ocean Drive Miami Beach	DA-391	1999	+16.6'	+21.5'	+8.5'	+37.5'
St. Regis - Ft. Lauderdale	BO-483	2001	+16.9'	+7.0'	+15.5'	+77.8'

One North Fort Lauderdale Beach Fort Lauderdale							
Ocean Three 18925 Collins Ave Sunny Isles Beach	DA-426	2001	+18.2'	+6.0'	+15.3'	+36.7'	
Acqualina Ocean Resort 17875 Collins Ave Sunny Isles Beach	DA-427	2001	+18.2'	+6.0'	+16.5'	+48.75'	
620 Ocean Drive 620 Ocean Drive Miami Beach	DA-438	2001	+20.4'	+5.3'	+16.6'	+38.0'	
Bijou 315 Ocean Drive Miami Beach	DA-442	2001	+20.4'	+8.0'	+12.45'	+17.3'	
The Atlantic 601 N Atlantic Blvd Broward County	BO-485	2002	+16.0'	+3.7'	+13.0'	+63.5'	
Pelican Beach 2000 N Atlantic Blvd Broward County	BO-512	2002	+18.6'	+7.5'	+17.0'	+34.0'	
Sole 17315 Collins Ave Sunny Isles Beach	DA-458	2002	+18.2'	+5.0'	+14.8'	+24.7'	
Capri 3101 Bayshore Drive Broward County	BO-532	2003	+15.6'	+4.0'	+14.0'	+27.0'	
TRG-Hallendale Beach, LTD 1850 South Ocean Blvd Hallandale Beach	BO-166 M1	2003	+19.0'	+6.9'	+16.1'	+34.0'	
Bel Aire 6515 Collins Ave Miami Beach	DA-452 M1 ATF	2003	+16.6'	+8.0'	+8.0'	+56.3'	
Five Seas 16701 Collins Ave Sunny Isles Beach	DA-374 M1	2003	+18.2'	+13.5'	+13.5'	+56.7'	

Continuum I 100 South Point Drive Miami Beach	DA-368 M2	2003	+20.4'	+3.0'	+22.7'	+38.3'
Los Olas Beach Club 101 S Ft Lauderdale Beach Blvd Broward County	BO-543	2004	+19.1'	+2.0'	+12.0'	+18.4'
Trump Palace (Residences at Ocean 18001-18101 Collins Ave Sunny Isles Beach	DA-395 M4	2004	+18.2'	+5.5'	+15.0'	+25.3'
Setai 2001 Collins Ave Miami Beach	DA-340 M2	2004	+20.4'	+8.0'	+8.0'	+104'
Maremas Resort 18683 Collins Ave Sunny Isles Beach	DA-431 M3	2004	+18.2'	+5.6'	+15.5'	+45.1'
Sea Breeze Ocean Developers 16251 Collins Ave Sunny Isles Beach	DA-462 M1	2005	+16.6'	+3.0'	+12.0'	+42.0'
The W 2201 Collins Ave Miami Beach	DA-527	2006	+20.4'	-5.2' (NAVD)		+33.7' (NAVD)
The Sands at Canyon Ranch 6901 Collins Ave Miami Beach	DA-535	2006	+18.2'	+1.3' (NAVD)		+48.3' (NAVD)
South of Fifth 125 Ocean Drive Miami Beach	DA-514 M1	2007	+20.4'	+2.2' (NAVD)	+9.5' (NAVD)	+19.9' (NAVD)
Regalia 19505 Collins Ave Sunny Isles Beach	DA-550	2007	+18.2'	+9.45' (NAVD)	+9.45' (NAVD)	+36.9' (NAVD)
DaVinci 17141 Collins Ave Sunny Isles Beach	DA-479	2008	+16.7'	+62' (NAVD)		+52.5' (NAVD)
St. Regis Hotel 9701 Collins Ave	DA-533 M1	2009	+18.2'	-56' - +2.4' (NAVD)		+56.9' (NAVD)

Bal Harbour							
Porsche Towers	DA-607	2012	+18.4'	+5.72'	+10.78'	+25.39'	
18555 Collins Avenue Sunny Isles Beach							
Mansions at Acqualina	DA-617	2013	+18.6'	+3.5'	+5.5'	+21.17'	
17749 Collins Avenue Sunny Isles Beach							
Surf Club	DA-631	2013	+18.0'	+6.66'	+16.15'	+27.15'	
9011 Collins Avenue Surfside							
The Seville	DA-608	2012	+16.6'	+3.5'	+13.0'	+18.33'	
2901 Collins Avenue Miami Beach							
The Saxony Condominium by Faena	DA-620 M1	2014	+15.0'	-0.1'	+11.9'	+19.4'	
3201 Collins Avenue Miami Beach							

¹ All elevations shown are in NGVD, for consistency as this was the datum original utilized by the DEP, unless specified.

² Wave crest elevation; either DEP Published or DEP approved site specific elevation.

PROJECT DRAWINGS

Address: 1000
City: Miami
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Project Name: [Signature]
Project No: [Signature]
Date: [Signature]

PARAMOUNT

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1000
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DATE: 12/13/2014

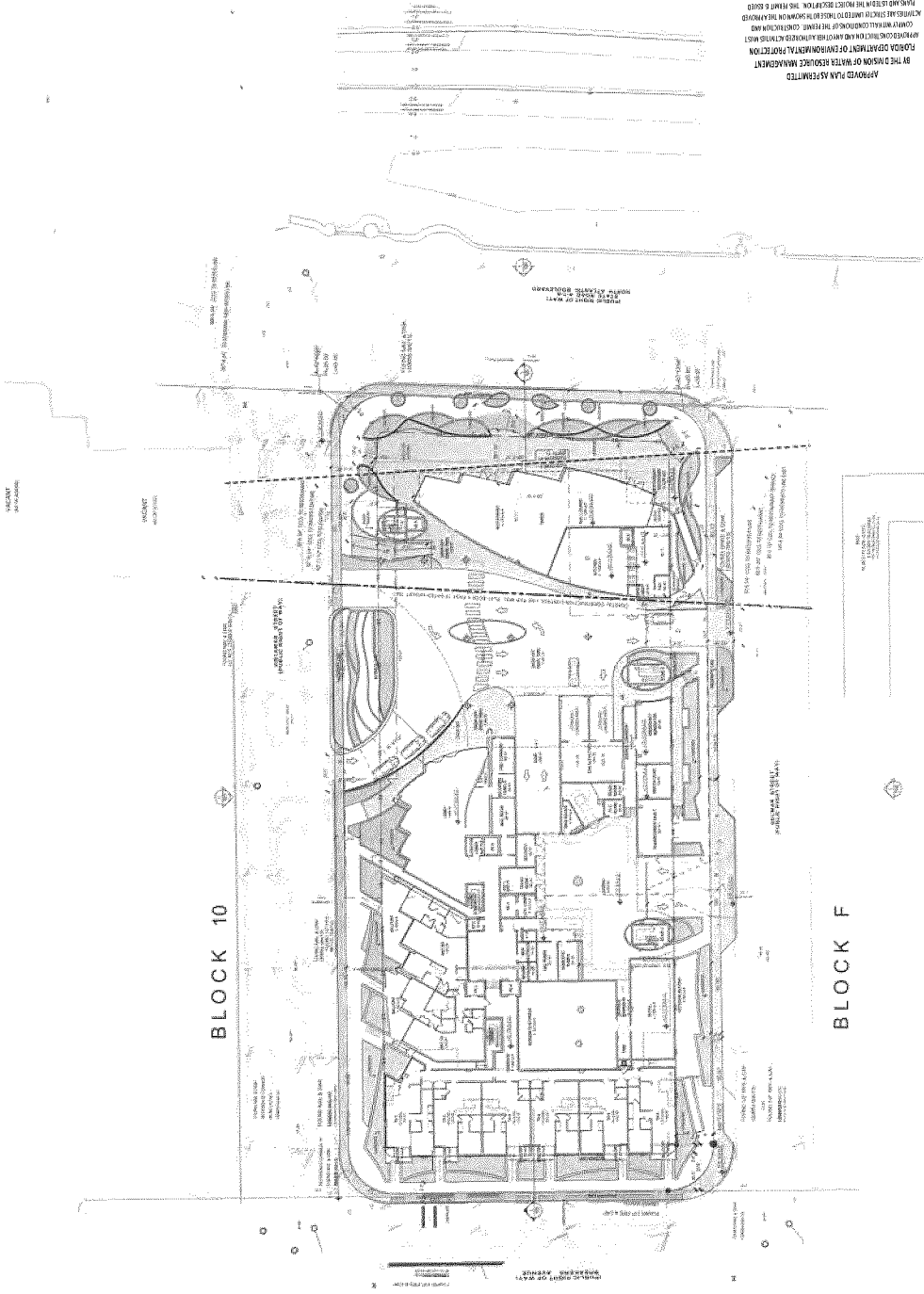
DESIGNER: [Signature]
CHECKED BY: [Signature]
PROJECT NO: 13001
DATE: 12/13/2014

DEP-100.1



Issued By: [Signature]
Date: December 13, 2014

APPROVED PLAN AS PERMITTED BY THE DIVISION OF WATER RESOURCE MANAGEMENT
FOR THE DIVISION OF ENVIRONMENTAL PROTECTION
CONSTRUCTION PERMITS SECTION
FOR THE PROJECT DESCRIBED IN THE PERMIT & BOND
FOR THE PROJECT DESCRIBED IN THE PERMIT & BOND
FOR THE PROJECT DESCRIBED IN THE PERMIT & BOND
FOR THE PROJECT DESCRIBED IN THE PERMIT & BOND



1 LOCATION PLAN
SCALE: 1/8" = 1'-0"

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