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November 10, 2005

James Richmond, Esq.
Department of Community Affairs
Office of the General Counsel
Tallahassee, FL 32399-2100
United States of America

Re: Courtesy copy of Petition for Review pursuant to section 553.775, Fla. Stat.

Dear Jim:

Enclosed is a copy of our client, Island Paradise Group, LLC's petition for review pursuant to section 553.775(3)(c), Florida Statutes. In accordance with the statute, we have served the petition on John Alcorn, the building official of the City of Fort Pierce, in order to allow him an opportunity to respond and then forward the petition to the Commission. However, as a courtesy, we wanted to provide you with a copy and let you know that this matter was forthcoming. Should you have any questions, please do not hesitate to contact us.

Sincerely,

Edward G. Guedes

Edward G. Guedes

EGG/ct

Enclosure

cc: Alfred J. Malefatto, Esq. (w/o encl.)
Robert Fine, Esq. (w/o encl.)

**TO AVOID DELAY, THIS
LETTER WAS SIGNED IN
THE ABSENCE OF THE ATTORNEY.**

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Tokyo-Office/Strategic Alliance

BEFORE THE FLORIDA BUILDING COMMISSION
STATE OF FLORIDA

CASE No. _____

ISLAND PARADISE GROUP, LLC,

Petitioner,

v.

CITY OF FORT PIERCE, FLORIDA, and
JOHN ALCORN, Building Official, City of Force Pierce

Respondents.

ISLAND PARADISE GROUP, LLC'S PETITION FOR REVIEW
PURSUANT TO SECTION 553.775(3)(c), FLORIDA STATUTES

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Counsel for Island Paradise Group, LLC

**PETITION FOR REVIEW PURSUANT TO
SECTION 553.775(3)(c), FLORIDA STATUTES**

I. The municipality and local building official.

The municipality in which the 2001 Florida Building Code¹ (“FBC”) is being misinterpreted is the City of Fort Pierce, Florida (“City”). The local building official misinterpreting the FBC is John Alcorn. The address for the City and Mr. Alcorn is P.O. Box 1480, Fort Pierce, Florida 34954. In addition, the interpretation of Mr. Alcorn was appealed to the City’s Construction Board of Adjustments and Appeals (“Board”), which upheld Mr. Alcorn’s interpretation after a two-day hearing held on August 30, 2005 and September 27, 2005.²

II. The petitioner.

The petitioner in these proceedings is Island Paradise Group, LLC (“Island Paradise”), whose representative is John Carrino. Their address is P.O. Box 530078, Lake Park, Florida 33403, and their counsel’s telephone number is (561)

¹ The 2001 version of the FBC is the applicable version.

² Copies of the transcripts of the hearings are attached as Exhibits A and B. Because the Florida Building Commission (“Commission”) has not yet promulgated rules and procedures governing the remedies afforded by section 553.775(3)(c), Florida Statutes, it is not entirely clear whether the Commission’s review will consist of an appellate review of the record created during the local proceedings or a de novo evidentiary consideration of the merits. Island Paradise contends that the clear language of section 553.775(3)(c) calls for a “review” of a local interpretation after conclusion of any local appellate proceedings and limits the Commission’s authority to a review of the record evidence. However, in an abundance of caution, this petition will be couched in terms of the possibility that the Commission’s review may extend beyond the record evidence presented to the Board.

650-7900. Island Paradise's substantial interests are adversely affected by the local interpretation of the FBC by virtue of its ownership of three rental apartment buildings, two of which are located at 615 South Ocean Drive, while the third is located at 1906 Gulfstream Avenue, within the City (collectively, the "Buildings"). The Buildings were damaged during the 2004 hurricane season. When Island Paradise applied to the City for permits to effectuate repairs on the Buildings, it was told by Mr. Alcorn that the repair costs exceeded 50 percent of the value of the Buildings and, therefore, the Buildings would have to be brought into full compliance with the FBC. *See* Composite Exhibit C.

III. The FBC provisions at issue.

The FBC provisions at issue are sections 3401.7.2.6 (the "50 percent rule") and 3401.8.5, which read, in pertinent part, as follows:

Section 3401.7.2.6 (in Section 3401.7.2 Repairs and Alterations)

When repairs and alterations amounting to more than 50 percent of the value of the existing building are made during any 12 month period, the building or structure shall be made to conform to the requirements for a new building or structure or be entirely demolished.

Section 3401.8.5 Value Determination

The value of a building or structure shall be the estimated cost of constructing a new building of like size, design and materials at the site of the original structure, assuming such site to be clear. Cost of additions, alterations and repairs shall be construed as the total cost of labor, materials and services based on current prices for new materials.

The definition of “valuation” in section 3401.8.5³ is essentially consistent with the definition found in section 202 of the FBC, which states: “When applied to a building, [value] means the estimated cost to replace the building in kind.”

IV. Mr. Alcorn’s misinterpretation of the FBC provisions.

Mr. Alcorn’s misinterpretations of the FBC, which the Board upheld, consisted of the following:

- (1) Determining the valuation of the Buildings “as-is,” in their damaged condition, as reflected in his correspondence of June 20, 2005. *See* Composite Exh. C.
- (2) Reading into the FBC’s 50 percent rule a non-existent requirement that the Buildings be restored exactly to the condition in which they existed prior to being damaged by the 2004 hurricanes.
- (3) Attempting to make an assessment as to validity of the costs of repairs without conducting an independent analysis as to how the contractor’s costs were determined or considering any competent substantial evidence.
- (4) Withholding from the Board and from Island Paradise the City’s own appraisal of value, which clearly established (i) a value for the Buildings in excess of that proposed by Island Paradise, and (ii) the proposed cost of repair of the Buildings would not exceed 50 percent of the value of the Buildings.

³ Section 3401.7.2 does not contain its own definition of “value.” However, the definition in section 3401.8.5 is particularly appropriate not only because it mirrors the earlier definition in section 202, but also because it relates to repairs and alterations to existing buildings in High Velocity hurricane zones, which are subject to more stringent standards.

These misinterpretations were communicated to Island Paradise through correspondence (*see* Composite Exh. C) and through testimony and evidence presented during the appeal hearings before the Board. *See* Exh. A and B.

V. The correct interpretations of the FBC.

A. The value of the Buildings.

The FBC clearly provides in section 3401.8.5 that “value” consists of the replacement cost of the Buildings, not the value “as-is.” That Mr. Alcorn misinterpreted this provision of the FBC is evident not only from his June 20, 2005 correspondence, but also from his testimony at the hearings, which ranged far and wide in an effort to explain “value”:

And they have the option, the owner has the option, of either using the appraisal method by their appraiser or the value of the buildings prior to the storm or 50 percent of the market value of the structure before. And the alternative is to use the county appraiser’s numbers. So they have that option to do that. The second is the FBC, which is 50 percent of the value of the existing building. Now, existing building is not prior to the storm. Existing means existing today. So they amount to 50 percent or more of the value of the existing building, and then it talks about the – you know, value is as defined which means when a building is gutted in that condition that that’s how we would apply the standard.

(Tr. I:44).⁴ Eventually, Mr. Alcorn conceded on cross-examination during the second day of the hearing, that the value had to be determined based on

⁴ In a striking demonstration of Mr. Alcorn’s willingness to play “fast and loose” with the FBC and due process, he withheld from the Board and from Island Paradise an appraisal he had requested in accordance with his “as-is” theory of value. At the commencement of the September 27, 2005 hearing, (continued . . .)

replacement cost: "I think the one, the only one we're dealing with right here today is the building code issue, just to make that simple for this board, 50 percent of the replacement value of a new building." (Tr. II:43).

Citing to the International Code Council's ("ICC") values for reconstruction, Mr. Alcorn estimated the reconstruction value based on \$75 per square foot. (Tr. II:43). The un rebutted evidence presented at the hearing was that the Buildings measured 2,652, 1,420 and 4,952 square feet, respectively, which yielded ICC reconstruction values of \$198,900, \$106,500 and \$371,400, respectively. (Tr. II:88). These reconstruction or replacement values exceeded both the "market value" figure and the replacement cost valuation for the Buildings of \$605,961 provided by Island Paradise's appraiser.⁵

(. . . continued)

Mr. Alcorn testified under oath that his requested appraisal had arrived but later indicated it was not "complete." (Tr. II:58, 97). In actuality, the City's appraisal for the Buildings "as-is" came in at \$778,000, considerably above both the market value appraisal submitted by Island Paradise and Mr. Alcorn's reconstruction value based on \$75 per square foot. In short, the City's appraisal was not "incomplete;" it was merely not favorable to Mr. Alcorn's interpretation and therefore was suppressed. A copy of the report is attached as Exhibit D. Mr. Alcorn's subsequent improper attempt to have the appraiser change his appraisal, even after the hearing, continues to insist upon an "as-is" valuation. A copy of his letter is attached as Exhibit E.

⁵ Island Paradise provided "market value" calculations at the direction of the Board's counsel, who indicated that "market value" was the relevant standard. (Tr. II:19). The market values for the Buildings derived by Island Paradise's appraiser were \$138,181, \$73,989 and \$259,064, respectively. As noted below, even using the market values, the repairs did not exceed 50 percent of the value of the Buildings.

The correct interpretation of “value” under the FBC is replacement or reconstruction value, in accordance with section 3401.8.5. Under Mr. Alcorn’s own estimation of replacement value, using the ICC projections, the values of the Buildings are \$198,900, \$106,500 and \$371,400, respectively.

B. The FBC’s 50 percent rule does not require a property owner to repair and restore a building to its condition prior to being damaged.

Implicit in Mr. Alcorn and the Board’s rejection of Island Paradise’s costs for the scheduled repairs was the assumption that the Buildings had to be repaired and restored to their original condition. Such a requirement finds no support in the FBC. On the contrary, the 50 percent rule is specifically written in such a way as to allow a property owner to effectuate limited repairs within a 12-month period so as to avoid the consequences of exceeding the 50 percent rule. It is entirely within the property owner’s discretion to make limited repairs within a 12-month period and supplement those repairs in a subsequent 12-month period, all without having to bring the entire building into compliance with the FBC. The property owner takes the risk associated with not bringing his rental properties back to the same level of “luxury.” In fact, Mr. Alcorn eventually conceded on cross-examination that a property owner would be entitled to a building permit under the 50 percent rule, even though he could return and perform additional repairs 12 months and one day later. (Tr. II:63).

Island Paradise’s representative, Jeff Van Dyke, testified at the hearing that because of the 50 percent rule, they consciously did not restore the Buildings to the

same quality of finish. (Tr. I:38; Tr. II:18). The repair costs submitted by Island Paradise were sworn to and prepared in conjunction with its contractor, and Mr. Van Dyke testified that Island Paradise was prepared to enter into contracts for repairs based on those figures. (Tr. II:17). Mr. Alcorn and the Board questioned Mr. Van Dyke at length regarding specific cost estimates. (Tr. II:34-41). In each instance, he provided thorough and knowledgeable answers as to how the cost figures were derived and why they were not higher, as the Board consistently intimated. *Id.*

Contrary to the correct interpretation of the FBC's 50 percent rule, one Board member, Paul Frischkorn, accused Island Paradise of "cheating" simply because it elected to make limited repairs in order to fall under the 50 percent threshold.⁶ (Tr. II:100). Interestingly, though, the City's own appraiser, whose report Mr. Alcorn suppressed, stated in his report that, "The available refurbishment costs were apparently supplied by the owner, however in my opinion it appears the refurbishment costs are marginally adequate to complete all of the apparent damage." *See* Exh. D. There is nothing improper about phasing repairs on a particular property over sequential 12-month periods in order to avoid triggering the 50 percent rule.

⁶ Specifically, Mr. Frischkorn stated: "They even admit they're cheating, for all practical purposes, in order to make it, if you accept the numbers that they've got."

C. The sworn repair estimates provided by Island Paradise do not trigger the 50 percent rule; in contrast, the City presented no evidence to rebut Island Paradise's repair costs.

Island Paradise presented evidence to the Board that the cost of repair for each building would be \$67,590, 35,435.23 and \$95,752, respectively. Using Mr. Alcorn's own figures for the replacement value of the Buildings (\$198,900, \$106,500 and \$371,400), it is immediately apparent that Island Paradise came nowhere near triggering the 50 percent rule for any of the Buildings.⁷ Mr. Alcorn elected to present no evidence whatsoever regarding his view of what the repair costs should have been. In fact, he conceded in response to questioning by the Board chairman, that he had done nothing to determine a figure for repair costs:

ALCORN: I have not made a determination what it would cost to make the repairs. I have looked at their numbers, and I questioned \$13,000 per unit.

* * *

WATERS: So did I miss this sitting here? Exactly what was the figure – did you come up with a figure of what it would cost?

ALCORN: I did not.

(Tr. I:52-53). Instead of doing his own homework and presenting a contrary estimate of repair costs, Mr. Alcorn kept insinuating that Island Paradise should have disclosed its repair estimates prepared by its insurance company. (Tr. I:57).

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A copy of the spreadsheet prepared by Island Paradise and submitted to the Board detailing values and repair costs is attached as Exhibit F. Even using the market value of the Buildings, the 50 percent rule was not triggered.

The Board's attorney, however, correctly instructed the Board that the insurance estimates were irrelevant.⁸ (Tr. I:85; Tr. II:57, 90). The Board chairman noted that Island Paradise had submitted a bona fide contractor's bid and that there was no evidence to the contrary before the Board. (Tr. II: 98-99).

At the conclusion of the hearing, the Board nonetheless voted to uphold Mr. Alcorn's interpretation of the FBC and the denial of building permits to Island Paradise on the grounds that the 50 percent rule had been violated. Despite being advised by its attorney that findings of fact were required by the City Code, the Board refused to make any. Instead, Board member Frischkorn observed: "Finding of fact, we don't have fact. We have opinion. That's the way I see it. They have their opinion, we've got ours. I've got my opinion." (Tr. II:104).

Unfortunately for the City and Mr. Alcorn, there were plenty of facts presented by Island Paradise at the hearing. Sworn testimony established the detailed repair costs for each of the Buildings. Sworn expert testimony also established the replacement value of each of the Buildings. The rest is a simple mathematical equation. The cost of limited repair for each of the Buildings, even if it was less than what would have been required to bring the Buildings back to their original condition, was considerably less than 50 percent of the replacement or reconstruction value of the Buildings. As such, section 3401.7.2.6 of the FBC

⁸ Moreover, Island Paradise could have properly elected not to effectuate all the repairs which might have been encompassed within the insurance estimate.

was not triggered and the Mr. Alcorn lacked a legal or factual basis for denying Island Paradise's request for building permits.

CONCLUSION

Mr. Alcorn and the Board have incorrectly interpreted the FBC by assigning an incorrect valuation to the Buildings, by ignoring the uncontested costs of repair and by refusing to issue building permits to Island Paradise when the evidence establishes that the proposed repairs cost less than 50 percent of the replacement value of the Buildings. This interpretation and denial of the permits are without basis in fact or law, and Island Paradise respectfully requests that the Commission correct the interpretation of Mr. Alcorn and the Board and issue an opinion determining that under the facts of this case (i) the 50 percent rule in section 3401.7.2.6 of the FBC has not been triggered, and (ii) that the requested building permits should issue.

Respectfully submitted,

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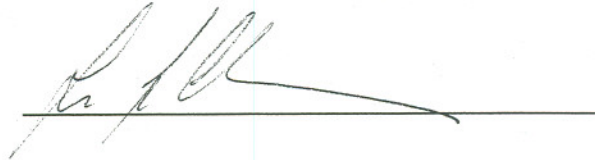
Counsel for Island Paradise Group, LLC

CERTIFICATE OF SERVICE

I certify that a copy of this petition for review was hand-delivered on
November 10, 2005 to:

John Alcorn, Building Official
Building & Community Response Dept.
P.O. Box 1480
Fort Pierce, Florida 34954

James Walker, Esq.
Brennan, Hayskar, Walker, Schwerer,
Dundas & McCain, P.A.
515-519 S. Indian River Drive
Fort Pierce Florida 34950

A handwritten signature in black ink, appearing to read "James Walker", is written over a horizontal line.

**BUILDING OFFICIAL'S RESPONSE TO ISLAND PARADISE'S
PETITION FOR REVIEW PURSUANT TO SECTION 553.775(3)(c)**