

## **SUPPLEMENTAL INFORMATION REGARDING THE RAMP AND LAW**

### **FACTS:**

The pedestrian/vehicular ramp in question is made of metal beams, metal joists and metal struts on top of which is mounted a metal grating. It is estimated to weigh in excess of 10,000 pound. At one side of the ramp, on top of the metal grating, is a diamond plate aluminum walkway approximately 48" wide running the length of the ramp from top to bottom. The pedestrian walkway was half this width when it was originally constructed in 1984 or 1985, according to the testimony of the representative of Fisher Island. It was widened in 1998 and a separator rail was constructed part way up the center of the walkway at that time. No permit was ever issued for either its original construction or its substantial renovations. The entire pedestrian/vehicular ramp is 35 feet long and 22 feet wide. It is permanently attached to a pier by a hinged pin that is made up of a 1-3/8" diameter stainless steel pin approximately 20 feet long. The hinge pin fits inside a 2" hinge pipe also approximately 20 feet long. One side of this hinge is permanently attached to the pier and the other side of the hinge is permanently attached to the metal ramp. The hinged end of the metal ramp remains attached to the pier as the other end of the ramp is raised up and then lowered onto the deck of a ferry boat. The walkway has a run greater than 25 feet and the slope is subject to change from time to time with the change in the tides, as is always the case for ramps that provide access to a vessel. However, the slope of this ramp is always greater than 1" rise for every 20" of horizontal run, even at high tide. The ramp and most of the pier are supported by pilings driven into the submerged land located in the Miami Ship Channel and within the jurisdictional boundaries of the City of Miami Beach..

### **MEMORANDUM OF LAW:**

The Florida Building Code ("the Code") applies to every structure and every appurtenance connected or attached to a structure unless specifically exempted by the Code or preempted by some other state or federal agency having exclusive jurisdiction. Section 101.2 states that "[t]he provisions of this code shall apply to the construction, alteration, ... replacement, repair, equipment, ... maintenance, ... of every building or structure or any appurtenances connected or attached to such buildings or structures." Since the ramp is a structure or an appurtenance to the pier, the Code provisions that apply to ramps must be enforced unless exempted or preempted.

The intent of the Code to make structures and appurtenances thereto safe for the public. Section 101.3 states: "The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, ... and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations." Thus, the Building Official's duty is to protect the "public health, safety and general welfare" and it should be a jealously guarded duty which is vigorously defended.

While part of the pier and part of the ramp are used by vehicles, neither the state or the federal DOT has any jurisdiction since the pier and the ramp are on private property. Even if the federal

or state DOT did have regulatory authority over private ramps, there is no rule or regulation that states that such rule or regulation preempts the Florida Building Code. Furthermore, there is no rule or regulation, that the petitioner knows of, that implies that any federal regulation preempts the Florida Building Code as to privately owned ramps.

While the federal ADA preempts the Code as to public facilities, it does not apply to private facilities, such as the Fisher Island ferry ramp. It should be noted that the Florida Accessibility Code has been Certified by the federal government as complying with the federal ADA requirements concerning **public facilities**. The ADAAG internet homepage provides answers to frequently asked questions and states that:

“Some jurisdictions have submitted their building code/standard for review by the Department of Justice. Standards that meet or exceed the minimum accessibility requirements of the ADA will be certified. To date, Florida, Maine, Texas and Washington state codes have been certified.”

There is historical evidence that the Florida Building Code is applied concurrently with the rules and regulations of other state and federal agencies. Section 301.2 of the 1984, 1988, 1994 and, as amended, 1998, South Florida Building Code does not abdicate the duty of the Building Official to enforce the Building Code when a structure is build in or over navigable waters. Just the opposite. It states that “[i]n addition” to the Building Official’s duty to enforce the Building Code, the Building Official is also obligated to enforce the permitting requirements of other agencies, **including** the Army Corp of Engineers. The following is a quote from the 1984 South Florida Building Code, Section 301.2:

“In addition, **the Building Official shall require that the laws, rules and regulations of any other regulatory authority** having jurisdiction, and where such laws, rules and regulations are applicable and are known to the Building Official, **shall be satisfied before a permit shall be issued**. The Building Official shall require such evidence, as in his opinion is reasonable, to show such other approvals. The Building Official shall not thereby be held responsible for enforcement of such other regulations as he is not specifically authorized to enforce. Following are some, but not necessarily all, other agencies having jurisdiction:

\* \* \*

(f) The U.S. Engineer Corps for construction of bulkheads or docks adjacent to or extending into navigable waters.

\* \* \*

(i) The Public Works Department for bulkheads, docks, similar construction or fill along waterfront property.”

Clearly, section 301.2 anticipated the application of the Building Code to structures constructed over or in navigable waters because, this code provision provides for permitting by the Army Corp of Engineers and directs the Building Official to enforce the Building Code and also to insure that the owner complies with the permitting requirement of the “U.S. Engineer Corps” for construction of docks that extend into navigable waters.

While part of the pier and all of the ramp were constructed in navigable water ( the Miami Ship Channel) there is no federal agency that has exclusive jurisdiction over the construction of the ramp in navigable waters and there is no federal agency that has any rules or regulations that preempt the Florida Building Code. The Army Corp of Engineers does have jurisdiction over whether the pier and ramp will cause a danger to navigation but their jurisdiction is concurrent with that of the Florida Building Code and does not preempt the Florida Building Code. A simple telephone call to the legal counsel for the Army Corp of Engineers would put this issue to rest.

Even if we were to ignore the history of concurrent jurisdiction, the United States Supreme Court has held that, in every analysis of the issue of federal preemption of a State's police powers, it is presumed that there is no preemption by federal legislature or federal agency rules or regulations.

“There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption. *E.I. Du Pont de Nemours & Co. v. Aquamar S.A.*, 881 So. 2d 1, 4 n.3 (Fla. 4th DCA 2004). Express preemption is when the language of the federal statute explicitly demonstrates Congress' intent to preempt state law. Field preemption applies when federal regulation in a legislative field is so pervasive, that Congress left no room for the states to supplement it. Conflict preemption occurs when it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law. *Id.*; *State v. Harden*, 873 So. 2d 352, 354 (Fla. 3d DCA 2004).

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)(“When Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).” See *Cloyd v. State*, No. 3D05-1816, 2006.FL.0005542<<http://www.versuslaw.com>> (Fla. 3<sup>rd</sup> DCA 2006).

Furthermore, “[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption is strongest when Congress legislates “in a field which the States have traditionally occupied.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation omitted). States have long possessed primary responsibility in our federal system for protecting the health and safety of their citizens. *Id.* at 475, 485. Indeed, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).” See *Southern Blasting Services, Incorporated v. Wilkes County, North Carolina*, 288 F.3d 584 (4th Cir. 2002)(federal regulation of explosives did not preempt the field and prevent enactment of local explosive safety ordinance.)

In the instant case, there is no federal building code that the petitioner has found that applies to

the pier and the ramp so as to create the implication that it preempted the Florida Building Code. Furthermore, the petitioner's attorney has searched but has not been able to find any federal code or federal regulation that specifically states that State building codes are preempted by federal law, rule or regulation. In fact, the petitioner's attorney has contacted the Army Corp of Engineers, the Florida DOT and the Federal DOT. The Florida DOT and federal DOT have stated that they do not govern the construction of this ramp and the Army Corp of Engineers has stated that the federal code and regulations do not preempt the Florida Building Code. Therefore, since the law presumes that no preemption exists, it is up to the party who advances the preemption argument to prove that there is specific language in some other agency's rules or regulations that states that it preempts the Florida Building Code, or to show that some other agency has preempted the field so pervasively that there is no room for further regulation, or to show that the Code provision in question prevents or interferes with the enforcement of the rules and regulation of the other agency.

The Florida Building Code has itself, by implication, established its governance over the field of structures that are in the nature of ramps that provide access to vessels by addressing such ramps in the section of the Florida Building Code that regulates Means of Egress. Section 1010 provides an exception in the means of egress subsection of the code that regulates the slope of ramps. It states:

"Ramps used as part of a means of egress shall have a running slope not steeper than one unit vertical in 12 units horizontal (8-percent slope). The slope of other ramps shall not be steeper than one unit vertical in eight units horizontal (12.5-percent slope). Exceptions: \* \* \* 2. Ramps that provide access to ... vessels, ... shall not be required to comply with the maximum slope or maximum rise for a single ramp run."

The Code regulates ramps and, by definition, the Code regulates those "gangplanks" that fit the definition of a ramp, i. e., "A walking surface that has a running slope steeper than one unit vertical in 20 units horizontal (5-percent slope)." See section 1002.1. While not every gangplank is a "ramp" with a slope greater than 1:20, ramps that are permanently affixed to a structure and provide access to vessels are not traditional "gangplank". The ramp in question is not a true gangplank because the ramp is permanently attached to the pier. Most, if not all, dictionaries defines a gangplank as a removable bridge between a ship and a pier. Webster's New Collegiate Dictionary defines a "gangplank" as - "A movable bridge used in boarding or leaving a ship at a pier". It defines a "gangway" as - "a temporary way of planks". American Heritage Dictionary defines a "gangplank" as - "A board or ramp used as a removable footway between a ship and a pier. Also called *gangway*." Dictionary.com defines it as "a flat plank or small, movable, bridge like structure for use by persons boarding or leaving a ship at a pier. Also called brow, gangway." WordNet by Princeton University defines a "gangplank" as "a temporary bridge for getting on and off a vessel at dockside.

Even if some provisions of the federal accessibility code define a "gangplank" as a ramp leading to a vessel, the "gangplank" is nevertheless a ramp if it has a slope greater than 1:20 and it is governed by the Florida Building Code. See also the use of the term ramp by the Department of

Justice when it is interpreting the ADA requirements for “ramps” for ferry docks. Even under the ADA regulations, which sometimes refers to ramps as “gangplanks”, the regulation still required “gangplank” to have handrails.

Fisher Island has pointed to the absence of any specific regulation for boat and ferry docks in the federal ADA Accessibility Guidelines (“ADAAG”), and in the Florida ADA (Florida has mirrored the provisions in the federal ADA in this regard). While there is no specific provision in the federal ADAAG for boat and ferry docks, the federal enforcing agency, the United States Department of Justice (“DOJ”), has provided its interpretation of the effect of the absence of such a regulation for a specific structure (the federal courts look to the DOJ’s for guidance when interpreting the federal ADA regulations. See *Botosan v. Paul McNally Realty*, 216 F.3d 827, 216 F.3d 827, 10 A.D. Cases 1185, 10 A.D. Cases 1185 (9th Cir. 06/20/2000); *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998); *Bragdon v. Abbott*, 118 S. Ct. 2196, 2199 (1998)).

The DOJ was asked whether there are accessibility requirements for boat and ferry docks, since Section 10.5 of the ADAAG under this title states: “reserved”(this is also the case in the Florida ADA regulation 11-10.5 which follows the federal ADAAG). In response, the DOJ, in its Technical Assistance website stated:

“The absence of requirements in section 10.5 simply means there are no special requirements for boat and ferry docks. Docks are covered by ADAAG section 4 to the same extent as other facilities required to be accessible by title II and III. The DOJ technical assistance manual states that the technical requirements should be applied to the extent possible. For example, it may not be possible for the ramp to a floating dock to maintain the 1:12 maximum slope under all tidal conditions.”

Notice that the DOJ refers to structures that provides access to a floating dock as a “ramp” and not as a “gangplank”. Thus, as Shakespeare so poetically pointed out in *Romeo and Juliet*, 1594: “What’s in a name? [T]hat which we call a rose [b]y any other name would smell as sweet;” The ramp is like the rose, you can call it a gangplank, but if it has a slope greater than 1:20, it is a ramp and it is regulated by chapter 1010 of the Florida Building Code.

The ramp in question is the only accessibility route for residents as well as the men and women who work on the island. There is no means for ingress and egress from the buildings on the island to a public way, other than by walking or driving onto the ramp which takes vehicles and/or individuals to the ferry boat for transportation to the mainland. Pedestrians are restricted to the walkway and vehicles are restricted to the metal grating. The ramp and ramp walkway are only provided for residents, their authorized guests, and workers who are employed by businesses operating on the island. All unauthorized use of the ramp and ramp walkway is prohibited without specific consent of the island developer and/or the island community association.

The island has a large number of employees who service a golf course, tennis courts, a marina, several restaurant and numerous condominium that are located on the island. There is also a

United States post office and a Miami Dade County fire station on the island.

This ramp is the only ramp made available for pedestrians employees, who are members of the general public and who work on the island, to gain access to the private boat transportation system and it is this boat transportation system that is the sole means of transportation made available to them to take them to the island. The pedestrian walkway attached to the ramp provides a means of egress from the ramp to a public way after pedestrian passengers depart one of the ferries. The ramp also provides a means of ingress for residents, and workers, who desire to walk from a public way, onto the private pier and down the ramp to gain access to a ferry that provides transportation to the private island buildings, work places and businesses. The only other means of egress and ingress from and to the island is by private pleasure boat, provided the occupants of the boat have specific clearance from the island.

The ramp in question is not analogous to a parking garage ramp because it has a separate means of ingress and egress for pedestrians and vehicles, therefore, the handrail exception for parking garage vehicular ramps (subsection 3 of section 1010.1) is not pertinent to the ramp in question. Furthermore, the parking garage exception only applies when the parking garage ramp is not part of an accessible route serving accessible parking spaces or when it is not part of a required accessible elements or part of an accessible means of egress. Since every structure, facility or appurtenance to a structure or facility is required to have a means of egress, the ramp walkway in our case, being a structure, or an appurtenance to the pier which is a structure, is required to have a means of egress when pedestrians are on the ramp. Even a parking garage ramp is required to provide handrails if the vehicular ramp was the only accessible route serving the parking spaces in the garage or where it is part of the required accessible elements or part of an accessible means of egress.

In our case the walkway on the ramp provides the only accessible route for pedestrians. In addition, the ramp walkway is part of a required accessible element of the ramp. Moreover, the ramp walkway is a part of an accessible means of egress to a public way from the ramp itself and from the buildings and work places, on the private island, to a public way on the mainland.

Section 1001.1 states that: "The provisions of this chapter shall control the design, construction and arrangement of means of egress components required to provide an approved means of egress from structures and portions thereof. Section 1001.6 states that: "The general requirements of Chapter 10 apply to all occupancies except as modified for specific occupancies in accordance with s. 1024 and s. 1026 through 1033." None of the occupancies described in ss. 1024, 1026, 1027, 1028, 1029, 1030, 1031, 1032 or 1033 appear to specifically apply to a ramp permanently attached to a pier/platform supported by piling over submerged land. However, the ramp provides a means of ingress and egress to Fisher Island which is itself a commercial enterprise and, hence, it could be classified as Business Group B under s. 304 and governed by s. 1026. But in any event, none of the provisions contained in these sections, even if they applied, would allow the ramp in question to be constructed without a handrail since section 1010.1 states that: "The provisions of this section shall apply to ramps used as a component of a means of egress."

Clearly, the drafters of the building code found that a ramp that provided access to a vessel is a component of a means of egress and that such ramps should have the same safeguards as any other ramp. This conclusion is based on the fact that the chapter in the Code governing means of egress provides a partial except for ramps leading to vessels. Section 1010.2 states that:

"Ramps used as part of a means of egress shall have a running slope not steeper than one unit vertical in 12 units horizontal (8-percent slope). The slope of other ramps shall not be steeper than one unit vertical in eight units horizontal (12.5-percent slope). Exceptions: \* \* \* 2. Ramps that provide access to ... vessels, ... shall not be required to comply with the maximum slope or maximum rise for a single ramp run."

It is important to note that, had the drafters of the building code intended to totally exclude from the purview of the Code, those ramps leading to vessels, they would have done so and they would not have had any need to provide a limited exception to the slope requirements of such ramps.

Contrary to Mr. Velazquez' opinion, the requirements of the building code does not change just because a part of a structure can be labeled as equipment or as a "mechanical" device. Section 102.2 states that: "The provisions of the Florida Building **Code shall apply to** the construction, erection, alteration, modification, repair, **equipment**, use and occupancy, location, maintenance, removal and demolition of **every** public and private building, **structure or facility** or floating residential structure, **or any appurtenances** connected or **attached to such** buildings, **structures or facilities.**" Thus, even if the ramp is defined as "equipment" of the pier or as an "appurtenance connected or attached to" the pier, section 1010.8 (handrails for ramps) applies to the ramp in question. Moreover, even if the ramp could be classified as a "mechanical system" it still provides a means of egress to pedestrians and if any other provision of the Code that is more restrictive than the Mechanical Building Code, it must be applied. See section 102.1 that states: "Where, in any specific case, different sections of this code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable."

There is no merit or support in the building code for Mr. Velazquez' opinion that the building code does not apply simply because he has labeled the ramp as "mechanical". Section 101.4.3 of the Florida Building Code, Mechanical, states that: "The provisions of the Florida Building Code, Mechanical shall apply to the..., alterations, ... of **mechanical systems**, including equipment, appliances, fixtures, fittings and/or appurtenances, including ventilating, heating, cooling, air-conditioning and refrigeration systems, incinerators and other energy-related systems. "[Emphasis added].

A "mechanical system" is defined in Florida Building Code, Mechanical, Section 202, as ["a] system specifically addressed and regulated in this code...." There is no "system", comprised of a metal ramp, such as the ramp in question, that has been specifically address anywhere in the Florida Building Code, Mechanical. In any event, there is nothing in the "mechanical" portion of

the building code that would exempt a ramp from the means of egress requirements of chapter 1010 of the Code, even if the ramp was a “mechanical system”.

Consequently, when a structure does not fit into any specific classification, the code is intended to protect individuals who use the structure. Section 553.775 (Fla Stat) provides that:

“(1) It is the intent of the Legislature that the Florida Building Code be interpreted by building officials, local enforcement agencies, and the commission in a manner that protects the public safety, health, and welfare at the most reasonable cost to the consumer by ensuring uniform interpretations throughout the state and by providing processes for resolving disputes regarding interpretations of the Florida Building Code which are just and expeditious. “

See similar language in earlier provisions of section 773.72, dating back to 1974 in which this section affirms that the purpose of the state minimum building codes are to provide regulations that are flexible enough to cover all phases of construction and which will allow reasonable protection for public safety, health, and general welfare. Hence, it would be a travesty of Code interpretation to increase the danger to the safety, health and general welfare of the public by the simple expedience of classifying the ramp as a “mechanical system” and sidestepping the safety requirements that govern ramps. The Code makes it abundantly clear that the building official is charged with the responsibility of making interpretations that increase the safety, health and general welfare, as oppose to decreasing it.