GT GreenbergTraurig

Memorandum

TO: Florida Building Commission – BOAF Binding Interpretation Panel

CC: Ann Russo
Mo Madani

FROM: Robert S. Fine

DATE: April 19, 2021

RE: Petition for Binding Interpretation No. 207: Supplement to Statement Petitioner Contends Should Be Given to Provisions of the Florida Building Code

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Supplement to Statement of the Interpretation

that the petitioner contends should be given to the provisions of the Florida Building Code and a statement supporting the petitioner's interpretation

This Supplement is intended to substitute for and replace the statement of interpretation petitioner contends… that was filed with the original petition.

Petitioner respectfully requests that the panel interpret the 2017 edition of the Florida Building Code, as it is administered and enforced in the City of Riviera Beach, Florida by virtue of the duly adopted local administrative amendments to the FBC, as follows:

> **(i) When a building permit subject to the Florida Building Code is issued by the Building Official or Building Code Administrator, as those terms are defined in Sections 468.601 *et seq.*, Florida Statutes, any voiding, rescinding or revocation of the permit can only be performed by the Building Official or Building Code Administrator, and not a layperson;**
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> **(ii) When a person who is not authorized by the Florida Building Code, duly adopted local administrative amendments to the Florida Building Code and applicable Florida Statutes, takes action that purports to rescind, void or revoke a building permit that was issued under the Florida Building Code by a building official who is duly authorized to issue building permits, the rescission, voiding or revocation of the building permit is void with the permit being restored to what its current active state was immediately before the purported voiding, rescission or revocation took place; and**
>
> **(iii) When work specified in a building permit for the construction of a fence issued under the Florida Building Code and duly adopted local administrative amendments to the Florida Building Code by the duly**

appointed building official has been completed, a final inspection has been called in for by the contractor who is the permitholder or his or her agent in accordance with Section 110.3 of the FBC and Section 105.6 of the Local Amendments, the building official performs the inspection but neither confirms the final inspection's approval nor identifies the specific project features that do not comply with applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the permitholder as required by the FBC, Local Amendments and Section 553.79(1)(a), Florida Statutes, and over 200 days later the building official who performed the final inspection notifies the permitholder that the permit has gone over 180 days without an approved inspection, and thereafter, enforcement actions are begun against the permitholder and property owner, the permit shall be deemed to have attained an approval of its final inspection and closed.

Statement in Support of Petitioner's Interpretation

Brief Background

As is set forth in detail in other documents that are a part of this petition and its submittals (of both Petitioner and the Building Official), this matter arises from the issuance of a building permit (the "Permit") by the duly licensed and appointed building official under Sections 468.601 *et seq.*, Florida Statutes, the Florida Building Code ("FBC") and the City of Riviera Beach ("Riviera Beach" or the "City") local administrative amendments to the Florida Building Code ("Local Amendments" or for citations, the "FBC-RBLA") for the construction of a fence. Three days after the Permit was issued, Petitioner and its contractor received a telephone call and email from the City's Acting Director of Development Services, Jeff Gagnon ("Mr. Gagnon") informing them that he (Mr. Gagnon) had "voided" the Permit. At all times relevant to the petition and even now, Mr. Gagnon was not, and is not, licensed as a building official or building code administrator under Sections 468.601 *et seq.*, Florida Statutes. The City has acted at various times as though the Permit was revoked and at other times as though it remained active. With the consent of the assistant building official the fence was completed. A final inspection was called for and performed the following day by the building official (who, to be clear, is not the current building official who submitted the Response) who told the contractor the fence appeared to meet all applicable requirements but never entered an approval in the building department computer (or returned a signed permit card to the contractor) but also never provided the contractor a list of any deficiencies found during the inspection. Several months later, enforcement actions were commenced against the permitholder and property owner for failure to maintain work under the Permit in active progress— the work for which a final inspection was called and the final inspection performed by the building official who never entered the approval or provided a list of deficiencies in violation of the FBC, Local Amendments and Section 553.79(1)(a), Florida Statutes.

I. **Memorandum in Support of Petitioner's Interpretation(s)**

A. The language of the FBC and Local Amendments make clear that the building official, and only the building official has authority to revoke building permits in the jurisdiction of Riviera Beach, Florida.

As an initial matter, the applicable FBC provisions state, in pertinent part:

> Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any impact-resistant coverings, electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, *shall first make application to the building official and obtain the required permit*.

§ 105.1, FBC (emphasis added); and

> *The building official* shall examine or cause to be examined applications for permits and amendments thereto within a reasonable time after filing. If the application or the construction documents do not conform to the requirements of pertinent laws, the building official shall reject such application in writing, stating the reasons therefor. If the building official is satisfied that the proposed work conforms to the requirements of this code *and laws and ordinances applicable thereto*, the *building official shall* issue a permit therefor as soon as practicable…

§ 105.3.1, FBC (emphasis added); and

> The *building official* shall examine or cause to be examined the accompanying submittal documents and shall ascertain by such examinations whether the construction indicated and described is in accordance with the requirements of this code *and other pertinent laws or ordinances.*

§ 107.3, FBC (emphasis added). Relevant to each of the above-cited provisions, the FBC defines "building official" as follows: "BUILDING OFFICIAL. The officer or other designated authority charged with the administration and enforcement of this code, or a duly authorized representative." § 202, FBC. That definition, however, is incomplete. The FBC is an administrative rule. *See* Rule 61G-20-1.001, Florida Administrative Code ("F.A.C.") (2020). As such, it cannot be interpreted to be inconsistent with related statutory provisions. Therefore, the definition of "building official" in the FBC must incorporate the applicable provisions of Sections 468.601 *et seq.*, Florida Statutes. *See* § 553.73(1)(a), Fla. Stat. An argument that the FBC's definition of "building official" should not incorporate the applicable provisions of Chapter 468, Florida Statutes would be unavailing in terms of adjudicating the petition as the Local Amendments expressly incorporate the requirements of Chapter 468, Florida Statutes.

The definition of "building official" in the FBC includes not just the building official him/herself, but also the building official's "duly authorized representative". If any of the panel has questions as to whether Mr. Gagnon might have been the building official's duly authorized representative at the time he "revoked" the Permit, those panelists need only review the letter written by the building official at that time, Ladi March-Goldwire, to Interim City Manager Dierdre Jacobs on March 29, 2019, which states, in part:

> As we are all painfully aware, acting as Building Official without the appropriate authority to do so is a crime. The revoking of the above referenced permits unilaterally by Mr. Gagnon has placed him in legal jeopardy for violation of this statute. I am advising and asserting under the authorities extended to me by the State of Florida, Department of Business and Professional Regulation, and Florida Building Commission the aforementioned permits are valid. The authority to issue, void. or rescind permits rest exclusively with the Building Code Administrator also referred to as the Building Official. I am formally requesting that Mr. Gagnon he censured for his illegal activity…

Letter from Ladi March, Building Official to Interim City Manager, dated April 29, 2019, attached to this Supplement as Supplement Exhibit A. Clearly, Mr. Gagnon was not the building official's duly authorized representative in any matter regarding the Permit.

While the FBC does not contain provisions that expressly state who has the authority to revoke building permits, the code is clear that the only person it authorizes to take *any* official action regarding building permits is the building official, defined as the building official or her "duly authorized representative", § 202, FBC, of which Mr. Gagnon undisputedly was not. It would not make sense for the proper interpretation to bestow authority upon some person or official not named in the FBC to be able to revoke permits while neither the Legislature, the Florida Building Commission or Riviera Beach City Counsel saw fit to identify this person or position in the FBC (or the FBC, the Local Amendments or Building Code Administrators and Inspectors-related statutes). *See* Chapter 468 Part XII and Chapter 553 Part IV Fla. Stat., *generally*; § 103.4, FBC-RBLA.

That the FBC does not contain provisions that expressly states who has the authority to revoke building permits does not alter the ultimate result the panel should reach because what the FBC lacks regarding this question, the Local Amendments more than ably provide. When the Legislature adopted legislation that created and authorized the FBC, it authorized local governments to adopt amendments to the administrative provisions of the FBC. § 553.73(4)(a), Fla. Stat. Thereafter, the City adopted its own set of administrative amendments to the FBC:

> The city hereby amends and supplements Chapter 1 of the Florida Building Code by the adoption or deletion of the following sections of said chapter, Chapter 1, as hereby amended and supplemented and as set forth below, shall be in full force and effect within the city…

§ 22-32(a) of the Code of the City of Riviera Beach, Florida ("City Code").

As relevant to the petition, the Local Amendments state as follows:

> There is hereby established a division to be called the building division and the person in charge to be known as the building official.

§ 102.1 FBC-RBLA.

> The building official shall be *licensed as a building code administrator by the State of Florida*. The building official shall be appointed or hired by the city and shall be bound by the applicable personnel rules of the city, if an employee, or by the terms of the contract appointing him or her, if an independent contractor.

§ 102.2.1 FBC-RBLA (emphasis added).[1]

> *The building official may revoke a permit or approval, issued under the provisions of this code*, in case there has been any false statement or misrepresentation as to a material fact in the application or plans on which the permit or approval was based.

§ 103.4.1 FBC-RBLA (emphasis added).

> *The building official may revoke a permit* upon determination by the building official that the construction, erection, alteration, repair, moving, demolition, installation, or replacement of the building, structure, electrical, gas, mechanical or plumbing systems for which the permit was issued is in violation of, or not in conformity with, the provisions of this code.

§103.4.2 FBC-RBLA.

The language of the Local Amendments could not be more clear— the building official has the authority to revoke building permits. However, this begs the question: in the jurisdiction that is subject to the Local Amendments, does anyone else (in addition to the building official) have the authority to lawfully revoke building permits? Petitioner suggests that under Florida law, the answer is NO— no one besides the building official (and in deference to the FBC, possibly his or her duly authorized representative as well) may revoke building permits.

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[1] The FBC-RBLA's utilization of the term "licensed as a building code administrator by the State of Florida" necessarily incorporates by reference the terms and requirements of Section 468.601 *et seq.* into the FBC-RBLA.

It is Petitioner's position that the Local Amendments are clear and unambiguous in setting forth who has authority to revoke building permits in Riviera Beach— the building official. §§ 103.4.1-103.4.2, FBC-RBLA. If the panel sees fit to consider a broader result, it must apply the rules of statutory construction in order to do so. Petitioner acknowledges the FBC is a not a statute. It is, however, an administrative rule. Rule 61G20-1.001, F.A.C. Petitioner also acknowledges the Local Amendments were adopted as a local ordinance, again, not a statute. The Florida Supreme Court, however, has instructed: "[o]ur courts have long recognized that the rules of construction applicable to statutes also apply to rules." *Brown v. State of Florida*, 715 So. 2d 241, 242 (Fla. 1998). It has also held: "[m]unicipal ordinances are subject to the same rules of construction as are state statutes." *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973). Therefore, to interpret the Local Amendments, the panel must apply the rules of statutory construction (or rules of construction, as the Court sometimes calls them).

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning… the statute must be given its plain and obvious meaning. *McLaughlin v. Department of Highway Safety and Motor Vehicles*, 2 So. 3d 988, 991 (2d DCA 2008). The local amendments unambiguously state the building official has the authority to revoke permits. §§ 103.4.1, 103.4.2, FBC-RBLA. To the extent the panel agrees that the building official has the authority to revoke building permits, but does not consider the language in Sections 103.4.1 and 103.4.2 to be determinative, it should take note of the instruction from the Florida Supreme Court: "[c]ourts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear the omission was inadvertent, and must give to a statute (or ordinance) the plain and ordinary meaning of the words employed by the legislative body (here the City Council). *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553 (Fla. 1973). Stated in a manner more directly applicable to the petition, the Florida Supreme Court has directed: "[w]hen the Legislature has prescribed the mode, that mode must be observed. When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way." *Alsop v. Pierce*, 155 Fla. 185, 19 So. 2d 799, 805 (Fla. 1944). Applying this rule, the panel should issue a binding interpretation to the effect that only the building official has the authority to revoke building permits in the jurisdiction of Riviera Beach, Florida.

B. Regarding Part ii of Petitioner's requested interpretation, the panel should issue a binding interpretation that includes a holding that the voiding, rescission or revocation of a building permit issued by the duly appointed building official by a person who is not authorized by Florida Statutes, the FBC or Local Amendments to void, rescind or revoke building permits is void *ab initio* with the permit being reinstated to its previously active state as though the action to purportedly void, rescind or revoke the permit had never taken place.

The Response does not dispute that at the time she issued the building permit, Ms. March-Goldwire was licensed as a building code administrator by the Department of Business

and Professional Regulation and was employed as the building official by the City of Riviera Beach as its building official. The building permit was therefore lawfully issued by an official who was authorized to issue building permits under the FBC, the Local Amendments and the Florida Statutes.

As far as there being allegations of an error in the issuance of the building permit, which Petitioner strongly asserts there was not, Mr. Gagnon had the same remedy available to him as does every other zoning or development services director (whether acting or permanent) in every other municipality and county in the state. He could have, and should have, brought his concerns to the building official and request that she take action on the permit, whether to revoke it, require a timely correction or otherwise. Sections 105.3.1 and 107.3 of the FBC make clear that the building official can take action on a building permit made necessary by the scope of work the permit covers' compliance with "other pertinent laws or ordinances." *See, e.g.,* § 107.3, FBC. Instead of following the statutory and FBC-mandated process for resolving alleged deficiencies in building permits that involves notifying the building official of the alleged deficiency and requesting she take the action she deems appropriate, Mr. Gagnon chose to take the "self-help route", in violation of Florida Statutes, the FBC and the Local Amendments. If Mr. Gagnon brought his concerns about alleged deficiencies in the issuance of the Permit to the building official and she disregarded them in a manner he felt was incorrect or inappropriate, his remedy was not to undertake a "self-help" remedy in blatant disregard for, and in violation of, the FBC, the Local Amendments, and Florida law, but to undertake an appeal of the building official's decision as provided for in Section 553.775(3)(c), Florida Statutes, i.e, utilizing the very same process the petition is being reviewed under in this matter.

As discussed and analyzed above, it is the building official and only the building official who has authority to revoke building permits in Riviera Beach. §§ 102.2.1, 103.4.1, 103.4.2, FBC-RBLA; *see also Alsop v. Pierce*, 19 So. 2d @ 805. As required by the Local Amendments (and Chapter 468 Part XII, Florida Statutes), to be the building official, a person must be licensed as a building code administrator by the State of Florida. § 102.2.1, FBC-RBLA; § 468.603(2), Fla. Stat. As noted elsewhere in the petition, a printout from the myfloridalicense.com website of the Florida Department of Business and Professional Regulation ("DBPR"), a copy of which was included with the filing of the petition, indicates that Mr. Gagnon possessed neither a license as a building code administrator or a provisional building code administrator (or any other license category under Chapter 468, Part XII, Florida Statutes) at all times relevant to the petition. At the time of its purported revocation by someone with no authority to do so, the Permit had been issued by the person who did have actual authority under the FBC, Local Amendments and Florida law to issue building permits.

Finally, if there is any question about the propriety of the Permit, the panel need only look to Response Exhibit 5. Response Exhibit 5 is a letter dated November 8, 2019, from Judson Dulany who was the building official at the time the letter was written and apparently, the immediate successor to Ms. March-Goldwire. The letter, addressed to the permitholder, Mr. Greene, puts Mr. Greene on notice that the Permit has gone 180 days without an approved

inspection (which will be discussed in more detail in the following section). The City, and the building official, simply cannot have it both, i.e., two inconsistent ways. They cannot assert the Permit has been validly voided by Mr. Gagnon, as Mr. Grimm unquestionably asserts in the Response, and yet the permitholder of that so-called "voided permit" is put on notice for not showing work in active progress for 180 days— when such work would be in violation of the FBC, Local Amendments and Florida law if it were to be performed under a revoked permit. Further, the letter from Mr. Dulany grants the permitholder a 90 day extension to show active progress (by means of an approved inspection)[2]. The same holds true for Mr. Dulany's email of June 19. 2019. Mr. Dulany states it is within his authority to return this issued permit to review status [seems like "this issued permit" reflects a valid permit]. Response Exhibit 4. Mr. Dulany then states "*[t]he conclusion* is this permit was issued prematurely without the approval from Zoning Department." *Id.* (emphasis added). Note that Mr. Dulany states that it is "the" conclusion, not that it is "his" conclusion. This may be a generalization, but people who become building officials do not do so to shy away from their authority, stand behind and take credit for their decisions. Being a building official is a tough job dealing with lots of often very difficult people and issues and that strength of character and sense of authority is an important characteristic of many if not most building officials. It may be no more than a reasonable inference, but the panel should keep in mind that "the conclusion" was, in all likelihood, "not Mr. Dulany's" conclusion. *Id.* But even if it was Mr. Dulany's conclusion, his letter to Mr. Greene on November 8, 2019, reflects exactly what action he took with regard to the Permit. He considered the Permit to not have been voided and allowed it to remain so. Response Exhibit 5. Otherwise, he would have never written the November 8, 2019 letter. As the Panel will see in the next section, Mr. Dulany had personal knowledge long before November 8, 2019, that the fence covered by the Permit had, in fact, been completed, and in accordance with code, as well. Accordingly, if Mr. Dulany, the building official on November 8, 2019, had any thought that the Permit had been revoked, he would have written a very different letter- or issued a citation— regarding work performed without a permit. But that is not the letter or citation Mr. Dulany wrote. *Id.* Accordingly, the panel should issue a binding interpretation holding, in the appropriate section, that the purported voiding or revocation of the Permit by Mr. Gagnon did not revoke the Permit, his unauthorized action was void, and the Permit remained valid and in good standing.

C. When a permitholder calls for an inspection authorized and required under Section 110.3 of the FBC and Section 105.6 of the Local Amendments, and in in response the building official performs the inspection but does not enter an approval, the panel should issue a

[2] Granting the permitholder a 90 day extension to attain an approved inspection was meaningless as Mr. Dulany well knew. Mr. Dulany had already performed an inspection on the fence himself, told the contractor that the fence appeared to meet all applicable requirements and then never entered the approval into the City's permitting system (or returned a signed permit card to the contractor or provided a list of any deficiencies). Granting the extension was just a ploy to make the building official appear to be acting reasonable when he already knew first hand that the fence had passed an inspection and the only reason the City's records did not reflect such was because he, the building official, refused to enter the inspection results.

> **binding interpretation of the FBC and Local Amendments holding that the act of not approving the inspection constitutes a denial requiring the local enforcing agency (i.e., the building department) to "identify the specific project features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based and provide this information to the permit applicant" and the failure to do so, creates a rebuttable presumption that the inspection was approved or in the absence of such approval requires the building official[3] be subject to disciplinary action against his or her license pursuant to Section 468.621(1)(i), as set forth in Section 553.79(1)(a), Florida Statutes.**

There can be no arguing that the matter before the panel as described in the petition is messy. However, the facts that are indisputable, documents that say what they say, sworn testimony and the law (the FBC, Local Amendments and Florida Statutes) lead directly to only one result, and that is the binding interpretation (in 3 parts, the first two already discussed) that petitioner is contending the panel should issue.

Robert L. Greene, President of Martin Fence Co. as well as the permit applicant and permitholder in this matter, applied for a building permit under the FBC and Local Amendments on April 9, 2019. Response Exhibits 1 and 2. The Permit was issued by the duly appointed and authorized building official at the time on April 26, 2019. Response Exhibit 2 (before "Void" was written over it). Several days after the Permit was issued, the Acting Director of Development Services, a person clearly unauthorized under the law and FBC to do so, purported to void or revoke the Permit. *Id.* The building official who issued the Permit wrote a letter to the City Manager to inform her of improper and allegedly unlawful actions of the Acting Director of Development Services including in regard to his purported voiding of the Permit <u>and *coincidentally*, was terminated from her position the same day without prior notice</u>. Supplement Exhibit A; *See also* Letter from Interim City Manager terminating Building Official, attached as Supplement Exhibit B. Thereafter, an assistant building official told the permitholder the Permit had not been voided.

Subsequent building officials have danced around the question of whether the permit was active and valid in various correspondence while also indicating the permit was in some form of review status yet asserting work was not being actively in progress, *see, e.g.,* Response Exhibits 4 and 5. However, the direct successor building official to Ms. March-Goldwire would not even say that it was "his" conclusion that the Permit was issued prematurely. Response Exhibit 4.

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[3] It could be a building code inspector if that is who performed the inspection, but in this particular matter, it was the building official himself.

The Response from the current building official, Mr. Grimm, states his opinion on this matter, summing up as follows:

> In summary, the Petition should be denied *as the permit at issue was properly revoked* for zoning issues and that revocation has been subsequently confirmed by two (2) Building Officials. Further, while I agree that only a certified Building Official may revoke a permit for Florida Building Code purposes, the fence in question did not receive a proper zoning approval *and therefore was properly revoked.*

Response at 2.

The position of Mr. Grimm seems to be clear in some places but it does seem a bit strange that he seems not to be bothered by the fact that when the Permit was purportedly revoked (of which he takes the position the revocation was valid), the purported revocation was performed by a person who had no authority to do so in violation of the Florida Statutes, the FBC and Local Amendments, the very statutes, rules and ordinances Mr. Grimm is charged with enforcing. A careful reading of the correspondence from the two building officials Mr. Grimm refers to clearly shows that neither one of them took action to revoke the Permit and both dance around the question of whether the Permit was revoked at all and act more as though it is active (as opposed to being in review status?), *see* Response Exhibits 4, 5 and 7. And yet, the current building official has taken the position the Permit "was properly revoked".

Attached to this Supplement as Supplement Exhibit C is an affidavit containing testimony that was sworn to under penalty of perjury. It is the first such piece of evidence either supporting or opposing the relief sought in the petition that was provided under oath. The affidavit provides the sworn testimony of Robert L. Greene. ("Greene Affidavit") who is, as discussed above, the permit applicant and permitholder. There is no need to restate the entire affidavit, it is attached for the panel's members to read. Mr. Greene's sworn testimony provides a description of events and occurrences in this matter that are directly relevant to the final issue raised in the petition.[4]

Mr. Greene testifies that on or about April 23, 2019, Building Official Ladi March-Goldwire issued Building Permit # 19-01026, the Permit that is the subject of the petition. Greene Affidavit ¶ 4, Response Composite Exhibit 2. On April 26, 2019, Jeff Gagnon, Acting Director of Development Services sent Mr. Greene an email saying the permit was issued in error and is now void. *Id.* ¶ 5. Mr. Greene met with Assistant Building Official Bovell Richards on May 24, 2019, who told Mr. Greene that the Permit was still open and that he (Mr. Greene) had an obligation to complete the work under the Permit and pass a final inspection in order to close it out or it would remain open until it expired. *Id.* ¶ 6. Mr. Bovell told Mr. Greene he had the authority to determine the Permit was open. *Id.* ¶ 7.

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[4] The panel should take note that neither Mr. Grimm's response, nor any of the exhibits in this matter that contain communications from any person were attested to under penalty of perjury, with the exception of the testimony contained in Mr. Greene's affidavit. Supplement Exhibit C.

On or about June 6,2019, the installation of the fence authorized by the Permit was completed with the exception of attaining an approved final inspection from the Building Department. On June 6, 2019, Martin Fence Co. employee John Mastrovani called the Building Department to request a final inspection to close out the Permit. *Id.* ¶ 8. In response, on June 7, 2019, Judson Dulany, the Building Official at the time, visited the Property to inspect the completed fence. *Id.* ¶ 9.

On the afternoon of June 7,2019, Mr. Greene spoke with Mr. Dulany by telephone. Mr. Dulany told Mr. Greene he had been "confronted by area residents and felt threatened" while performing the inspection and that he had to leave the site. Mr. Dulany confirmed to Mr. Greene that notwithstanding the concerning events at the site, he did visit the site, performed the inspection and that the fence "appeared to comply" with all applicable requirements. Mr. Greene asked Mr. Dulany if he left the signed permit card on the fence (the norm for fence inspections in Riviera Beach during and around the time frame relevant to the petition). Mr. Dulany responded to Mr. Greene that he had not left the signed permit card attached to the fence, but had taken it with him. *Id.* ¶ 10. Early in the week of June 10th, Mr. Greene reached Mr. Dulaney by telephone and was told permit card was not ready to be picked up yet and he would call Mr. Greene to pick up when ready. After not hearing from Mr. Dulaney for about 10 days Mr. Greene again reached Mr. Dulaney by telephone *and was told by Mr. Dulaney that "there was no final yet and Mr. Dulaney had to kick the matter upstairs*". Mr. Greene received no response from Mr. Dulaney regarding upon whose instruction he was acting. Subsequent telephone calls to Mr. Dulaney by Mr. Greene were not answered or returned. *Id.* ¶¶ 10—11 (emphasis added).

As recounted by Mr. Greene's sworn testimony, the work on the fence was completed, an employee of his called in for the final inspection, the inspection was performed by the building official at the time, Judson Dulany, who that same afternoon confirmed to Mr. Greene that he had, in fact, performed the inspection. Notwithstanding that Mr. Dulany told Mr. Greene on the afternoon of June 7, 2019, that the fence appeared to comply with all applicable requirements, some time around June 20, 2019 or shortly thereafter Mr. Dulany told Mr. Greene: "there was no final yet and [he] had to kick the matter upstairs." *Id.* ¶ 11. Petitioner understands that an inspector (even the building official) can perform an inspection, have an initial impression that what was inspected meets all applicable requirements, and upon reviewing notes and reflection determine that something the inspector saw was deficient, and that can be entirely appropriate. What is not appropriate is (1) having to kick the matter upstairs and (2) denying an inspection approval without providing the permitholder or applicant with information regarding the denial as prohibited by Section 553.79(1)(a) of the Florida Building Code Statutes, Section 110.3 of the FBC and Section 105.6 of the Local Amendments.

Florida Statutes state: "[i]t is the responsibility of the building code administrator or building official to administrate… enforce, or perform the permitting and inspection of construction… within the boundaries of their governmental jurisdiction, when permitting is

required… to ensure compliance with the Florida Building Code… The building code administrator or building official; shall faithfully perform these responsibilities *without interference from any person*." § 468.604(1), Fla. Stat. (emphasis added). "Having to kick the matter upstairs" does not sound like anything close to "without interference from any person." What, if any, "interference from any person(s)" Petitioner is not prepared to say. However, with the unusual set of facts and events that are related to the fence, the Permit and the petition, it is also not irrelevant that the building official allegedly made that statement to Mr. Greene, even without providing additional information. The upshot of kicking the permit upstairs is that the inspection was not approved, the building official was influenced by something or someone other than his own knowledge, observations and discretion in not issuing an approval, and yet no deficiencies were noted.

In the end, however, the panel is left with the situation of a Permit that was voided by a person without authority; the building official who issued the Permit was terminated essentially on the spot when she complained about the unlawful voiding of the Permit; the successor building official, Judson Dulany, confirmed to Mr. Greene he performed a final inspection of the fence on June 7, 2019, Greene Affidavit ¶¶ 9-10, after the final inspection request was called in on June 6, 2019, by Martin Fence Co. employee John Mastrovani. *Id.* ¶ 8; during the afternoon of June 7, 2019, after he had inspected the fence, in a phone conversation, Mr. Dulany told Mr. Greene the fence appeared to comply with all applicable requirements but did not leave the signed permit card affixed to the fence (as was custom in the jurisdiction at the time); in a follow-up call the next week Mr. Dulany said the card was not ready to be picked up. *Id.* ¶ 11; approximately 10 days thereafter, Mr. Dulany told Mr. Greene there was no final yet and he "had to kick the matter upstairs". *Id.*; subsequent calls from Mr. Greene to Mr. Dulany to check on the status of the Permit and inspection approval went unanswered or were not returned, *Id.*; and then on November 8, 2019, Mr. Dulany sent a letter to Mr. Greene asserting that work had not been in active progress as evidenced by no approved inspections having taken place for 180 days.

<u>Leaving everything else in the petition and Response aside, a building official performed a final inspection in accordance with Section 110.3 of the FBC and Section 105.6 of the Local Amendments but did not comply with the requirements of those sections</u>, for example:

> Required inspections. The building official upon notification from the permit holder or his agent shall make the following inspections, and such other inspections as deemed necessary, *and shall either release that portion of the construction or shall notify the permit holder or his agent of any violations which must be corrected* in order to comply with the technical codes.

§ 105.6, FHC-RBLA (emphasis added).

Section 110.3 of the FBC contains the same requirement but with a notable difference. The FBC is an administrative rule, Rule 61G-20-1.001 of the Florida Administrative Code. Administrative rules must be authorized by statutes and be consistent

with their authorizing statutes. *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 598 (1st DCA 2000). The Florida Building Code, received its statutory authorization in Section 553.73 of the Florida Statutes:

> The commission shall adopt, by rule pursuant to ss. 120.5436(1) and 120.54, the Florida Building Code *which shall contain or incorporate by reference all laws and rules which pertain to* and govern the design, construction… of public and private buildings, structures, and facilities and *enforcement of such laws and rules*, except as otherwise provided in this section.

§ 553.73(1)(a), Fla. Stat. (emphasis added).

> The FBC requires:
>
> The building official upon notification from the permit holder or his or her agent shall make the following inspections, and shall either release that portion of the construction or shall notify the permit holder or his or her agent of any violations which must be corrected in order to comply with the technical codes…
>
> **Building**
>
> * * *
>
> 5. Final Inspection. To be made after the building is complete and ready for occupancy.

This language tracks the language of one of the statutes whose requirements are required by Section 553.73(1)(a), Florida Statutes to be incorporated into the FBC:

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

§ 553.79(1)(a), Fla. Stat. (emphasis added). While the statutory language does not use the work inspection, it is clear from what the statutory language requires, it has to include inspections or a large part of the statute would be rendered meaningless. The statutory section continues on:

> A plans reviewer or *building code administrator who is responsible for issuing a denial*, revocation, or modification request *but fails to provide to the permit applicant a reason for denying*, revoking, or requesting a modification, *based on compliance with the Florida Building Code or local ordinance, is subject to disciplinary action against his or her license pursuant to s. 468.621(1)(i).*

Id. (emphasis added).

Not to be repetitive (and so leaving out some intermediate events), what is irrefutable in this matter is that the Permit was lawfully issued and unlawfully purportedly revoked. When the assistant building official (after the building official who issued the Permit was terminated) told the permitholder the permit was not void and the work had to be performed or the Permit would expire, the permitholder completed the work under the Permit and his agent called in for a final inspection. Supplement Exhibit C ¶ 8**.** The building official at the time, Mr. Dulany, went to the project site on June 7, 2019, and inspected the fence that was the subject of the Permit and communicated by phone the same afternoon to the permitholder the fence appeared to meet all applicable requirements. *Id.* ¶ 8. **207 days later**, on November 8, 2019, Mr. Dulany sent a letter to the permitholder stating that 180 days had passed without an approved inspection but he was granting a 90 day extension to accomplish the approved inspection so that the Permit would not expire (but see Footnote 2, above). With this set of facts, there is only a limited universe of possible results under the FBC, the Local Amendments and Florida law (including Sections 553.79(1)(a) and 468.621(1)(i), Florida Statutes, which are incorporated into the FBC by reference pursuant Section 553.73(1)(a), Florida Statutes):

- When Mr. Dulany performed the final inspection of the fence, the fence that he shortly thereafter communicated to the permitholder appeared to meet all applicable requirements, he inadvertently failed to follow-up and note the approval of the inspection; or

- Mr. Dulany has allegedly violated Section 553.79(1)(a) of the Florida Statutes, as incorporated by reference into the FBC as required by Section 553.73(1)(a), Florida Statutes, as well as in violation of Section 110.3 of the FBC and 105.6 of the Local Amendments, leaving Mr. Dulany subject to disciplinary action against his license pursuant to Section 468.621(1)(i).

II. <u>Reply to Certain Remaining Allegations in Building Official's Response to the Petition</u>

There is no other way to say it— the Response simply does not reflect permitting reality, the requirements of the FBC, the Local Amendments or Florida law. The Response states:

> After Ms. March's departure from the City's employment, the City's subsequent Building Official, Judson Dulany, confirmed via email that the resulting permit is typically called a "Building Permit" but in fact it often has dual or several purposes and in some instances has no Florida Building Code purpose whatsoever. An example of such a permit is a Landscaping Permit.
>
> As in this case, the Building part of a permit cannot be separated out from the other aspects of the permit's necessary approvals. A permit revoked by one of the other approval authorities should have the effect of preventing the entire work from proceeding.

Response, pages 1-2. Why the Response even mentions permits that have no connection to the FBC, such as a "Landscaping Permit" is surely puzzling. The FBC states: "[t]he provisions of this code shall apply to the construction… of every building or *structure*… " § 101.2, FBC (emphasis added). The FBC provides the following definition: "STRUCTURE. That which is built or constructed." § 202, FBC. More relevant, the Local Amendments list under "PERMITS… *When required….* Barriers & Signs -*Erect* or replace *fences*, walls, signs or sign structures." § 104.1.1, FBC-RBLA (emphasis added).

The Response might have been better off referencing a chickee to explain the point petitioner thinks the Response is trying to get across. A municipality may not require a chickee meeting certain requirements to comply with the FBC or attain a building permit (the kind issued by the building official). § 553.73(10)(i), Fla. Stat.; § 102.2, FBC. However, that exemption from the FBC does not exempt a chickee from local zoning requirements and a permitting jurisdiction may require a permit, but not a building permit, in effect a zoning permit, to document that the installation has been reviewed and approved as meeting local zoning requirements. In such case, the permit is not one that was issued under the FBC or the FBC-RBLA, and therefore, a permit for a chickee (that meets the statutory exemption from the FBC requirements) is not subject to the limitations in the FBC, Local Amendments and Florida Statutes as to who can issue and revoke building permits—because it is not a building permit. However, the Permit, a building permit for a fence is not likewise exempted. § 104.1.1, FBC-RBLA.

In the normal building permitting scenario, upon receipt of a completed appropriate application, building department plans reviewers review plans for compliance with the applicable requirements of the FBC and the technical codes. Other disciplines and regulated subject matter are reviewed and approved by the appropriate departments and agencies, and their respective approvals are noted in the plans' permit processing records. In most if not all jurisdictions, plans are reviewed for compliance with zoning requirements by zoning department plans reviewers who, upon confirming compliance of the plans with the applicable zoning requirements will communicate their approval to the building official. They do not issue a zoning permit. It would be the same with Fire Prevention and Public Works and other disciplines. An analogous process occurs with many environmental approvals (although there are projects that require specific environmental permits in addition to building permits). When the plans reviewers for the disciplines in the FBC and the technical codes have all approved the plans in the permit application, the building official reviews the application to confirm that all the applicable FBC disciplines that are relevant to the application have been approved. But as the panelists know well, the building official does not stop there. He or she also reviews the application to assure that all of the other disciplines and subject areas that require approval have received approval before issuing the building permit. That is a huge responsibility building officials in Florida have. And it is codified in the FBC: "[t]he building official shall examine or cause to be examined the accompanying submittal documents and shall ascertain by such examinations whether the construction indicated and described is in accordance with the requirements of this code

and other pertinent laws or ordinances." § 107.3, FBC (emphasis added). When a serious defect in the review process that involves a non-FBC discipline or regulated subject matter requires a building permit to be revoked, it is the building official who revokes the permit. Not the zoning director; not the public works director, but the building official. In closing this section, it should be noted that the Local Amendments expressly give the building official authority to revoke building permits with no suggestion or anticipation of any other person having such authority. And the amendments do not mention the zoning director by any title that would approximate the position. Likewise, the administrative chapter, Chapter 1 of the FBC also does do not mention the zoning director by any title that would approximate the position and yet it expressly gives authority to the building official. As instructed by the Florida Supreme Court: "[w]hen the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way." *Alsop v. Pierce*, 155 Fla. 185, 19 So. 2d 799, 805 (Fla. 1944). The panel should hold that it is the building official and only the building official that has the authority to revoke building permits; certainly not someone who is not licensed under Chapter 468 Part XII, Florida Statutes.

The zoning review issue raised by the City and the Response is a red herring. Although it is beyond the scope of this panel (and should be), an examination of the City's building permit files would reveal that it was, and possibly still is, standard procedure that for fences meeting certain criteria in certain zoning districts and/or along certain roads, including where the property the Permit (solely to erect a fence) was issued for is located, separate zoning reviews were not typically not performed. If you look at the exhibits to the Response, you will see that included with the initial voiding, the City first used the supposed fact that the contractor did not have a valid county license. Response Exhibit 2. In the April 29, letter from Ms. March-Goldwire to the Interim City Manager expressing concerns about Mr. Gagnon's actions in voiding the permit, the zoning issue as a justification for voiding the Permit was not yet even on the table. Supplement Exhibit A. Regardless, Mr. Gagnon chose an illegal remedy as opposed to proper, lawful means of challenging a building official's decision.

Including the March 5, 2020, letter from Mr. Guy to Mr. Greene in the response is an act of bad faith and misrepresentation. Attached as Supplement Exhibit D is a letter to Mr. Guy from Attorney Kerri L. Barsh informing him that she had provided the information Mr. Guy says had not been timely provided and included with her letter the transmittal email to Judson Dulany and Bovell Richards dated December 30, 2019 as well as all of the attachments. Petitioner could further comment but will allow the Supplement Exhibit D to speak for itself.

III. <u>Conclusion</u>

The first section of the binding interpretation (consisting of three parts) Petitioner contends the panel should issue (who is authorized to revoke a building permit issued under the FBC) should be a relatively simple and straightforward, fact-independent matter of law issue even if whatever the City's motivations behind its actions aren't.

Similarly with the request for the second part of the binding interpretation Petitioner is seeking, if an act of an official nature for whom the law only authorizes certain persons to

perform, is purportedly performed by a person without the required authority under applicable law (including codes), did the act officially take place… or is the purported action a nullity.

The final part of this binding interpretation is admittedly not so simple. The factual scenario underlying the petition, *in toto*, screams out for an equitable resolution. It is unfortunate for both the Petitioner and the panel that the legislature did not leave the panel with a more complete set of tools to resolve this and similar matters, when they become part of the binding interpretation process as a first tier review because the affected jurisdiction does not have, or have access to, a board of appeals. Petitioner acknowledges that the binding interpretation process was intended to be an appellate type process over decisions of local boards of appeals. However, because Riviera Beach does not have a board of appeals nor does it have an interlocal agreement with a neighboring community to utilize the neighbor's board, this panel is charged with acting in the role of a board of appeals, even though this system was not set up to do the kind of fact-finding that most boards of appeals are set up to do, as petitioner's exclusive remedy according to Section 553.775(3)(c), Florida Statutes.

Petitioner took the time to reply to certain assertions made in the Response that may not necessarily be specifically required to reach an appropriate result, but because Petitioner believes that providing the panel with Petitioner's response to the allegations asserted in the Response is necessary for the panel to fairly adjudicate this petition (from Petitioner's perspective), Petitioner so replied. With that said, Petitioner believes that the truly equitable result is for the panel to apply the FBC, Local Amendments, and applicable Florida law to the very specific and unique factual scenario that encompasses this matter and issue the third part of the binding interpretation as follows:

> **When the building official responds to a call for a final inspection and performs the inspection of a fence permitted under the FBC and Local Amendments, and the building official who performed the inspection neither confirms the final inspection's approval nor identifies the specific project features that do not comply with applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the permitholder as required by the FBC, Local Amendments and Section 553.79(1)(a), Florida Statutes, and over 200 days later the building official who performed the final inspection notifies the permitholder that the permit has gone over 180 days without an approved inspection, and thereafter, enforcement actions are begun against the permitholder and property owner, the permit shall be deemed to have attained an approval of its final inspection and closed.**

How can anything less be equitable? The question, however, is whether the panel has the authority to issue such an interpretation. If it does, the third part of the binding interpretation Petitioner contends should be issued is set forth immediately above. While

deeming a permit approved appears to be an extraordinary remedy, this matter is based on an extraordinary set of facts and which is why the proposed interpretation is extremely fact-specific.

If the panel does not feel it has the jurisdiction to deem the final inspection approved and closed as a local board of appeals with broader rules might, then the following is petitioners requested (third section) binding interpretation:

> **When the building official responds to a call for a final inspection and performs the inspection of a fence permitted under the FBC and Local Amendments, and the building official who performed the inspection neither confirms the final inspection's approval nor identifies the specific project features that do not comply with applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the permitholder as required by the FBC, Local Amendments and Section 553.79(1)(a), Florida Statutes, and over 200 days later the building official who performed the final inspection notifies the permitholder that the permit has gone over 180 days without an approved inspection, and thereafter, enforcement actions are begun against the permitholder and property owner, a rebuttable presumption has been created that the final inspection be considered approved as final and the permit is closed. If Respondent building official wishes to rebut this interpretation and he may do so by providing clear and convincing evidence the Permit should not be considered final and closed as part of a timely filed appeal to the Florida Building Commission under Section 553.775(3)(c)(7).**

Respectfully submitted,

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