

FILED
Department of Business and Professional Regulation
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File #

**Petition For Declaratory Statement
Before the Florida Building Commission
June 22, 2017 via e-mail and USPS**

Petitioner

Company: DALK Land LP
Neil Hedrick
Address: 16780 Old State RD 4A
Sugarloaf Key, FL 33042

Name: Neil W. Hedrick
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DS 2017-046

Petitioner's Attorney: Robert Cintron
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Owner

Company: Giampaoli Family Trust
Pete Giampaoli
Address: 901 Bruce Rd Ste 280
Chico, CA 95928

Name: Pete Giampaoli
Title:
Telephone: 530-891-4757
E-mail:
Permit: #09100217 Monroe County, FL

Petitioner is a Substantially Affected Person

Petitioner is an adjacent property owner. Both properties are in VE flood zones. Subject Owner uses a driveway owned by Petitioner, to support his construction activity. The Owner has a permit to deposit fill on his property, which is a high hazard flood zone. Fill will be placed within a few feet of Petitioner's boundary line.

Owner has used his construction project as justification to suspend Petitioner's important easement rights.

The project is unending with practically no construction progress, in almost 7 ½ years, to date. Minimal work is paced to allow consecutive 180 day permit extensions.

Statutes, Agency Rules, Agency Orders, and or Code Sections on which a Declaratory Statement is sought:

2007 Florida Building Code Portions of Chapter 1 Building
Portions of 2007 Florida Building Code Chapter 1, 2 and 3 Residential
Portions of FS553.73

Background:

The previous Owner/Builder, Peter and Elizabeth Giampaoli, applied for and received a single-family residence (SFR) building permit, Number #09100217, from Monroe County, FL. The project is located in AE and VE flood zones on the Atlantic Ocean.

The permit allowed 3,160 CY of landscape and structural fill. Fill was to be used to support an elevated driveway, an elevated swimming pool and establish grades around these structures. A hydraulic engineering study was included in the permit application based upon specific land contours and fill locations.

The fill was hauled in and placed during September 2014. Contrary to the specific permit drawings and language, it was placed as a level pad with sloping ramps at the North and South ends. Fill was placed over a large portion of the property. A large amount of the fill, perhaps 50% or more, was placed in locations never contemplated for fill placement by the permit. The Owner never submitted revised construction documents to the Building Department for approval. A hydraulic engineer designed the fill pad so that subsequent calculations would support a Letter of Map Revision (LOMR). A LOMR is the official process for modifying the flood insurance rate map, or flood zone. This particular LOMR application did not disclose that it was based upon fill, but instead indicated that FEMA's topographical mapping was incorrect.

In this case the Owner/Builder wanted to change his Flood zone designation from VE-13 to AE-11. This would allow him to build a less expensive structure at a lower elevation and also bring in additional fill.

During November 2014 the LOMR was submitted to Monroe County for approval. Without review, Monroe County approved the LOMR submission. It was then sent to the Federal Emergency Management Agency (FEMA) for final approval. FEMA approved the LOMR in June 2015 subject to appeal and Petitioner appealed the LOMR in July 2015. FEMA subsequently ordered rescission of the LOMR Approval.

As part of the building permit approval process, on June 9, 2009, Monroe County sent the Owner a letter stating that the building permit application met the standards of the flood plain management ordinance but with the following admonition. *“Fill may not be used for structural support in the V-zone. Fill may not be used to alter the existing grade that the current flood insurance study base flood elevations were based on.”*

Petitioner sampled the fill in November 2014 and found it to be contaminated with a carcinogen at four times the allowable level for Florida State standards for residential purposes. Petitioner forwarded the sample results to Florida Department of Environmental Protection (FLDEP) on February 6, 2015. FLDEP forwarded the lab results to Monroe County on Feb 9, 2015 and FLDEP conclusions on Feb 20th to Monroe County. FLDEP decided that jurisdiction lay with Monroe County as the fill had been placed pursuant to the building permit issued by Monroe County. FLDEP suggested that the fill be resampled to confirm results. In response, Monroe County visually inspected the fill on February 27th, 2015, and without any further investigation, approved the fill inspection of that same date.

The Owner/Builder in anticipation of the eventual LOMR approval and flood zone change, from VE to AE, substantially redesigned his SFR and landscape fill contours and submitted a permit revision application to Monroe County.

Owner/Builder did not respond to the Petitioner’s letter request of March 17, 2015, for removal of the contaminated fill, Owner did in fact secretly sample the fill and confirmed its contamination exceeded FL State standards by many times over. Petitioner filed suit in Monroe County District Court in June 2015.

During early July 2015 the Owner/Builder removed the fill in its entirety and restored the lot to its original contours and elevation.

The permit, issued on April 9, 2010 received its first approved inspection on October 7, 2014 for a temporary power pole. The permit received its second approved inspection on Feb 27, 2015 for fill and received its third and fourth approved inspections on July 22, 2015 for temporary power pole and underground electric. Electrical power was not attached to the temporary power pole until after the second inspection of it.

Between October 7, 2014 and July 22, 2015 there was no net progress on construction of this SFR except the underground electric and temporary power pole inspections of July 22, 2015.

1. FS553.775 Interpretations

“(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.”

2. FS553.73 Florida Building Code

“(4)(a) All entities authorized to enforce the Florida Building Code pursuant to s. 553.80 shall comply with applicable standards for issuance of mandatory certificates of occupancy, minimum types of inspections, and procedures for plans review and inspections as established by the commission by rule. Local governments may adopt amendments to the administrative provisions of the Florida Building Code, subject to the limitations of this paragraph. Local amendments shall be more stringent than the minimum standards described herein and shall be transmitted to the commission within 30 days after enactment. The local government shall make such amendments available to the general public in a usable format. The State Fire Marshal is responsible for establishing the standards and procedures required in this paragraph for governmental entities with respect to applying the Florida Fire Prevention Code and the Life Safety Code.”

“553.73(5) any amendment to the Florida Building Code shall be transmitted within 30 days by the adopting local government to the commission. The commission shall maintain copies of all such amendments in a format that is usable and obtainable by the public. Local technical amendments shall not become effective until 30 days after the amendment has been received and published by the commission.”

3. FBC R101.2.1

The provisions of Chapter 1, Florida Building Code, Building, shall govern the administration and enforcement of the Florida Building Code, Residential.

4. FBC 102.2 Building

“The provisions of the Florida Building Code shall apply to the construction, erection, alteration, modification, repair, equipment, use, and occupancy of every public and private building.....”

5. **FBC 109**

“109.1 General. Construction or work for which a permit is required shall be subject to inspection by the building official and such construction or work shall remain accessible and exposed for inspection purposes until approved. Approval as a result of an inspection shall not be construed to be an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Inspections presuming to give authority to violate or cancel the provisions of this code or of other ordinances of the jurisdiction shall not be valid.”

6. **Section R202 Definitions**

JURISDICTION. The governmental unit that has adopted this code under due legislative authority.

7. **Section R323 Flood Resistant Construction**

“R323.1 Floodplain construction.This code is not intended to supplant or supercede local ordinances adopted pursuant to that authority, nor any local floodplain management ordinances to be deemed amendments to the code.”

8. **MC 122-4(b)(5) Coastal high-hazard areas (V zones).**

“Within the areas of special flood hazard are areas designated as coastal high-hazard areas, which have special flood hazards associated with wave wash. The following provisions shall apply in these areas:

e. There shall be no fill used as structural support.

f. Nonstructural fill shall not be placed in a V zone except with an approved Coastal Model meeting the minimum NFIP standards, that demonstrates such fill will not increase potential flood damage by wave ramping and/or deflection.”

9. **FS Chapter 62-777 Table II Soil Cleanup Target Levels F.A.C.**

Benzo(a)Pyrene

10. Permit Conditions for permit #09100217.... “3160 SF CY FILL WITH THIS PERMIT. HYDRAULIC ENGINEERING ANALYSES FOR THE ABOVE GROUND SWIMMING POOL AND LANDSCAPE FILL IN FILE.”

“NO DEVIATIONS ALLOWED WITHOUT A REVISED PERMIT AND PLANS.”

11. FBC 106.4 Amended construction documents. *Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents.*

12. FBC 105.4 Conditions of the permit.

“105.4.1 Permit intent. A permit issued shall be construed to be a license to proceed with the work and not as authority to violate, cancel, alter or set aside any of the provisions of the technical codes, nor shall issuance of a permit prevent the building official from thereafter requiring a correction of errors in plans, construction or violations of this code. Every permit issued shall become invalid unless the work authorized by such permit is commenced within 6 months after its issuance, or if the work authorized by such permit is suspended or abandoned for a period of 6 months after the time the work is commenced.”

“105.4.1.3 Work shall be considered to be in active progress when the permit has received an approved inspection within 180 days. This provision shall not be applied in case of civil commotion, or strike or when the building work is halted directly to judicial injunction, order or similar process.”

Questions

- 1) Contrary to FBC 106.4 and the actual permit conditions, the fill, which was authorized in the building permit, was not used as permitted, but instead, all of it was used in a manner that was explicitly not allowed. The Owner made a very major deviation in construction from the approved construction documents. The Owner should have sought a revision to his permit for the actual fill placement Was the fill legally placed according to the Florida Building Code?**
- 2) FBC Section R232 specifically does not allow the FBC to supercede the local floodplain management ordinance. Did the building inspector, in approving the fill placement in areas and uses not permitted by the building permit and not allowed by the local flood plain management ordinance, exceed his authority under the Florida Building Code?**
- 3) After notification and referral by FLDEP to the Monroe County Building Department, that the fill had been placed pursuant to a**

building permit and may have been contaminated and may have exceeded the limits of FS Chapter 62-777, the building inspector made a visual inspection of the fill but made no further investigations into the allegations. Did the building inspector exceed his authority under the Florida Building Code by approving the fill?

- 4) Is the approved inspection of Feb 27, 2015 of the fill still considered valid?**
- 5) Between October 7, 2014 and July 22, 2015 there was no net progress on construction of the SFR. Did the permit expire 180 days after October 7, 2014?**
- 6) There are no Local Amendments by Monroe County, on file with the Florida Building Commission, to the Administrative Sections of the 2007 Florida Building Code,. Does Monroe County have the authority to deviate from the published Florida Building Code?**

Argument

The jurisdictions at issue in this case are unincorporated areas of Monroe County and the State of Florida. Both have adopted the Florida Building Code.

The building permit at issue here was issued pursuant to very specific construction documents and review as required by the Florida Building Code. In particular the fill was an issue for compliance with the local Floodplain Management Ordinance. Failure to follow the approved plans meant that there was a violation of that ordinance. In fact that is what exactly happened as fill was placed in a V zone without proper justification. In addition the fill was used to change the flood zone mapping designation, in direct violation of the Monroe County permit letter sent to the Owner. When the inspector approved the placement of the fill pursuant to the building permit, he was in fact approving violations of the building permit and violations of the ordinance. FBC R323 specifically prevents the Florida Building Code and consequently the building inspector from superceding the flood plain management ordinance. In fact no one in the Building Department in Monroe County has the authority to issue a waiver to any provision of the Floodplain Management Ordinance. Monroe County should have required the Owner to seek a revision to his permit. The inspection approval given by the inspector is not valid pursuant to FBC 109.1, 106.2 and R323 and the permit.

The county Building Department was aware that the fill might have been contaminated prior to their inspection. FLDEP had transferred enforcement responsibility to Monroe County specifically because the fill was part of a building permit the county had issued. Monroe County neither ordered the Owner to

investigate or investigate it themselves. Instead the inspector approved the fill. There is nothing in the FBC that supports an approval of the fill in this circumstance. Indeed the inspection approval given by the inspector is not valid pursuant to FBC 109.1 as the fill was subsequently shown to be in violation of FS Chapter 66-777.

The temporary power pole which was inspected on October 7, 2014 was merely a sham. The inspection was used to gain another 180 day extension of this old permit. Power was never hooked up to the pole until after July 22, 2015, by which time the pole required extensive repairs and another inspection. The fill, which was inspected on Feb 27, 2015, served to extend the permit for another 180 days. The fill inspection should be considered not valid per FBC 109.1 for the reasons enumerated above. Nevertheless, the entire fill was removed in early July 2015. There was no active progress towards construction between Oct 7, 2014 and July 22, 2015. The permit should have expired no more than 180 days after Oct 7, 2014.

Time limits and the need to show active progress are important concepts in the Florida Building Code and should not be taken lightly.

There are no Local Amendments to the Florida Building Code on file with the Commission. FS553.775 (1) states that it is the intent of the Legislature that there be uniform interpretations of the Florida Building Code statewide. Monroe County building officials should interpret the Florida Building Code as written and published by the Commission.

Neil Hedrick

Neil Hedrick Manager