

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA
CIVIL ACTION

TIMOTHY J. DAYTON and
REGINA L. DAYTON,

Plaintiffs,

v.

CITY OF MARCO ISLAND, FLORIDA,

Defendant.

BY _____
CLERK OF COURTS

C. MARTINEZ
Filed in Computer

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FILED 11/13/09
COLLIER COUNTY, FLORIDA

Case No. 09-9951-CA

COMPLAINT

Plaintiffs, Timothy and Regina Dayton hereby sue the Defendant, the City of Marco Island, and allege as follows:

Jurisdiction and Venue

1. This is a claim for damages in excess of \$15,000, exclusive of interest, costs and attorney's fees, for causes of action which have accrued and involve property located in Collier County, Florida.

The Parties

2. Plaintiffs Timothy and Regina Dayton (the "Daytons") are the owners of real property located at 524 Spinnaker Drive, Marco Island, Florida (hereinafter the "Dayton Home").

3. The City of Marco Island (the "COMI") is a municipality in Collier County, Florida, which maintains and administers a building department to issue building permits, review plans for compliance with state and local building codes and to conduct field inspections of projects to protect the health, safety and welfare of its residents.

The Facts

4. The Daytons purchased the homesite for the Dayton Home in 1998.
5. In January 2002, the Daytons contracted with non-party Kimball Hill Homes of Florida, Inc. ("KHH") to construct their home on their homesite on Marco Island.
6. The Property is located on the Gulf of Mexico within the Coastal Building Zone, and subject to both wind and flood planes – and subjecting it to the additional permitting requirements imposed by the State of Florida Department of Environmental Protection.
7. KHH applied for a construction permit for the Property from the COMI on July 21, 2003.
8. The COMI issued a construction permit to KHH for the Property on September 22, 2003.
9. The COMI issued its Certificate of Occupancy for the Property on April 14, 2006.

History of the COMI Building Department

10. Section 489.101, Florida Statute provides:

[t]he Legislature deems it necessary in the interest of public health, safety, and welfare to regulate the construction industry.
11. Section 468.601, Florida Statute further provides:

[t]he Legislature finds that, where building code administration and inspection personnel fail to adequately, competently, and professionally administer state of local building codes, physical and economic injury to the citizens of the state may result and therefore, deems it necessary in the interest of public health and safety to regulate the

practice of building code administration and inspection in this state.

12. Notwithstanding these obligations imposed on it by the State of Florida, after voluntarily assuming the mantle of responsibility from the Collier County Building Department, the COMI failed, among other things, to maintain adequate supervision of its plans examiners and building inspectors, failed to adequately train or ensure the competence of its plans examiners and building officials and failed to perform even the most rote functions of a building department as those duties and obligations are charged by the Florida Legislature.

13. The above-referenced failures amount to a systemic failure within the COMI and amount to gross negligence and knowingly, willful misconduct.

14. In 2000, after creation of their own building department and jettisoning the oversight and management from Collier County, the COMI abruptly dismissed its then chief building official, Roy Miele.

15. On December 26, 2000, the COMI appointed non-party Robert Mahar as its "Acting Building Official," notwithstanding that Mr. Mahar did not possess the requisite licensure from the State of Florida.

16. Not until April 4, 2001, did Mr. Mahar receive his Provisional Building Code Administrator license from the State of Florida.

17. During the pendency of Mr. Mahar's application for Provisional Building Code Administrator accreditation, in contravention of Florida law, the COMI failed to provide for the direct supervision of Mr. Mahar by a certified building code administrator holding a standard certification.

18. On May 21, 2001, non-party Michael Smithem was hired by the COMI to serve as its building inspector/plan reviewer. Again, the COMI continued with its negligent hiring practices in hiring Mr. Smithem allowing him to function as its building inspector/plan reviewer for some 141 days prior to having obtained his provisional building inspector's license in contravention of the requirements of Section 468.609, Florida Statute.

19. During the pendency of COMI building inspector/plan reviewer Michael Smithem's application for provisional building inspector licensure, in violation of Section 468.609, Florida Statute, the COMI failed to provide direct supervision of Smithem by a building code administrator holding standard certification.

20. Not until August 12, 2003, did non-party, Smithem receive his provisional building plans examiner license; however, in advance of that licensure the COMI permitted Smithem to review plans for compliance with state and local building codes without providing direct supervision of Smithem by a building code administrator holding a standard certification. Prior to obtaining this provisional license and without the required supervision required by Florida law, non-party Smithem reviewed the plans submitted for the Dayton Home for construction in violation of Section 468.609, Florida Statute.

21. These negligent hiring decisions and the knowingly inadequate supervision of only provisionally licensed building inspectors were continued by the COMI in the hiring and employ of Bruce Yakola and Gary Konicek – the inspectors for the Dayton Home – each of which held only provisional licenses during the construction of the Dayton Home, each charged with "performing" inspections of the Dayton Home to

ensure that the construction met state and local building code requirements without having the benefit of being supervised by a building code administrator holding a standard certification.

22. Non-party Mahar, the head of the COMI Building Department, did not receive his standard Plans Reviewer license until September 18, 2003 and his standard Building Code Administrator license until February 5, 2004, nearly three years after being tapped to be the Building Official for the COMI, and a year since the plans for the Dayton were reviewed for construction, and permitting to be built.¹

The Review, Permitting and Inspection of the Dayton Home by the COMI

23. The Daytons, through their contracted builder non-party KHH, submitted plans to the COMI for permitting on July 21, 2003.²

24. Upon review of the records of the COMI, Daytons believe that the appointed qualifying agent for KHH, non-party Jon Morris, failed to sign the Permit, in contravention of Florida law, and the permit application was instead signed and notarized by the same person – as evident from even a cursory review of the application - someone other than an employee of the KHH.³ Further evidence of the lack of even basic competence in administering state and local building codes

25. Notwithstanding that the Permit Application was neither signed by a contractor, nor a person representing herself to be a contractor nor holding a valid,

¹ Notwithstanding that the set "on file" with the COMI does not bear an authorizing signature or designation as to which building code would be deemed as "applicable" through construction.

² Neither Mahar nor Smithem possessed anything more than a provisional plans examiner license during the time of the only review of the Dayton Home plans.

³ Upon information and belief Cindy J. Williams has since had her notary license revoked.

active certificate or registration, the COMI issued a construction permit on September 22, 2003,⁴ in violation of Florida law.

26. Again, during this period, in contravention of Florida law, COMI's appointed Building Official Mahar, held only a provisional Building Code Administrator license, yet was charged by the COMI with supervising building inspectors and plans examiner who also only held provisional licenses.

27. In addition to Mr. Smithem, inspectors Gary Konicek and Bruce Yakola were hired by the COMI to perform inspections of single family homes, including the Dayton Home, without the benefit of having anything more than a provisional building inspection license and being supervised by a building official who himself had nothing more than a provisional license until well after permitting and construction of the Dayton Home in contravention of Florida law.

28. The COMI knowingly permitted its building officials to practice beyond the scope of their then license or accepted and performed professional responsibilities that its building inspections and building offices were not then competent to perform.

29. In addition to the foregoing, the COMI knowingly empowered Mahar to employ Mr. Smithem without first making the necessary determination that Mr. Smithem was then qualified for provisional certification as a plans examiner; alternatively, the COMI knowingly permitted Mr. Mahar to monitor building inspections and plans examiner, e.g., Mr. Smithem, knowing that Mahar did not possess the required, valid

⁴ The initials of both Smithem and Mahar appear on the retained plans for the Dayton Home retained by the COMI; however, there is no signature found which reflects that the plans were approved or met the building code then effect. Upon information and belief, the COMI has recently substantively revised its building permit application to comply with the requirements of Florida law.

standard certificate as a building code administrator at all times when he was supervising those that he was submitting and proposing for provisional certification.

30. At a minimum, it is incumbent upon a building official in complying with his/her mandate to "adequately, completely, and professionally administer state or local building code" to be competent in noting that the home being inspected is not in compliance with the permitted, reviewed plans and require a General Contractor to submit those revised plans to the COMI for review and endorsement.

31. Upon information and belief, the Daytons believe that the Hambro system was not properly constructed utilizing inferior concrete.

32. The COMI will be unable to produce inspection records demonstrating that the Hambro system, as installed, comported with state and local building codes, as no such inspection was performed nor could have performed as no comparison, permitted plans showing the use of the Hambro system was submitted, reviewed or endorsed by a building official or by the architect of record.

33. In addition to the foregoing, upon information and belief, the COMI failed to perform the required slab inspection or foundation inspections; however, the COMI permitted the General Contractor to continue vertical construction of the Dayton Home, ultimately issuing a Certificate Occupancy without administering, requiring or adhering to state and local building codes.

34. An elevation issue of more than a foot caused the General Contractor to leave plumbing pipe exposed in the garage. Again, this was a significant departure from the permitted plans which was not noted, questioned or challenged by the COMI.

35. Upon information and belief, successive inspections were either not performed or "rubber stamped" without having the COMI issue written releases from prior inspections, e.g., the permitted plans called for four elevations to have "breakaway walls" to be constructed on the ground floor of the home to minimize structure damage during a flood surge however the home the COMI issued a Certificate of Occupancy only has two elevations of "breakaway walls."

36. Additional examples of vagaries between the constructed home and the permitted plans are numerous, but include, without limitation: no flashing was installed contrary to the detail in the permitted plans resulting in flood damage and continuing water intrusion; no impact glass where the permitted plans depict their use; failure to install shower pans in the home; relocation of the air conditioning condensing pad. In addition, the COMI permitted construction to continue for months at the homesite even though there was no "qualifier of record" for the project after Jon Morris' departure, a condition not remedied until Francine Miller's registration many months later.

37. Upon information and belief, the COMI issued "approvals" without even visiting the home, e.g., the permitted plans for the Dayton home called for the installation of ridge vents near the apex of the roof, a position that would have been evident on even the most basic "street inspection." The Dayton home which was allowed to be constructed did not have ridge vents or construction devices that permit the venting of natural airflow through the interior of the home, demonstrating that the roof system was not inspected by the COMI.

38. The COMI failed to adequately, competently and professionally administer state and local building codes. In sum, the COMI was responsible for ensuring that the

General Contractor build a home in accordance with state and local building codes – the Dayton Home not only was not built in accordance with state and local building codes, it was not build in accordance with the permitted plans on file with the COMI and upon which its building officials were to rely in their inspections of the home.

39. Non-party Jon Miller ceased to be the qualifier for KHH on June 2005; however, for eight months between June 2005 and February 2006, the COMI failed to require KHH to appoint a new qualifier or someone authorized by Florida law to supervise the construction of the Dayton Home.

40. The COMI failed to require KHH to maintain a set of permitted drawings at the job site in violation of the Florida Building Code and Florida law. It is readily apparent that had such permitted drawings been on-site the substantive deviations from the plan would or should have been observed and remedied by a competent building inspector.

41. On May 20, 2008, as a supplement to building inspector Mike Smithem's Performance Appraisal – the plans examiner for the Dayton Home - the then Community Development Director for the City of Marco Island, Stephen R. Olmstead, alluding to a more systemic concern, noted that Mr. Smithem need to improve in two critical areas:

Inspections – Consistency with approved plans

It is critically important for all inspectors in the Building Services Division to make sure that any building or structure being inspected has been constructed in compliance with the official site plan and construction drawings previously approved by the City of Marco Island. Any proposed changes or alterations to a structure following approval of a site plan or construction drawings by the City of Marco Island must be identified in a revised set of plans. Proposed plan revisions must be approved by the City of Marco Island prior

to the commencement of construction of any proposed changes or alterations, and prior to the scheduling or completion of any inspections of the proposed changes.

Inspection Documentation

Mike is reminded of the importance of complete and thorough documentation of all building inspections. Thorough documentations is necessary to maintain a complete and accurate public record of work completed and inspected, and to provide the building owners and contractors with a clear understanding of work inspected and approved.

See, City of Marco Island Community Development Department, Performance Appraisal Supplement, attached as **Exhibit "A"**. No such training was provided.

42. Section 468.604(1), Florida Statutes provides, among other things, that:

It is the responsibility of the building code administrator⁵ or building official to administrate, supervise, direct, enforce, or perform the permitting and inspection of construction, alternation, repair, remodeling, or demolition of structures and the installation of building systems within the boundaries of their governmental jurisdiction, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. The building code administrator or building official shall faithfully perform these responsibilities without interference from any person. These responsibilities include:

(a) The review of construction plans to ensure compliance with all applicable sections of the code. The construction plans must be reviewed before the issuance of any building, system installation, or other construction permit. The review of construction plans must be done by the building code administrator or building official or by a person having the appropriate plans examiner license issued under this chapter.

⁵ Section 468.603(8), Florida Statute defines "Building code enforcement official" or "enforcement official" as:

a licensed building code administrator, building code inspector, or plans examiner.

(b) The inspection of each phase of construction where a building or other construction permit has been issued. The building code administrator or building official, or a person having the appropriate building code inspector license issued under this chapter, shall inspect the construction or installation to ensure that the work is performed in accordance with the applicable sections of the code.

(2) It is the responsibility of the building code inspector to conduct inspections of construction, alteration, repair, remodeling, or demolition of structures and the installation of building systems, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. Each building code inspector must be licensed in the appropriate category as defined in s. 468.603. The building code inspector's responsibilities must be performed under the direction of the building code administrator or building official without interference from an unlicensed person.

(3) It is the responsibility of the plans examiner⁶ to conduct review of construction plans submitted in the permit application to assure compliance with the Florida Building Code and any applicable local technical amendment to the Florida Building Code. The review of construction plans must be done by the building code administrator or building official or by a person licensed in the appropriate plans examiner category as defined in s. 468.603. The plans examiner's responsibilities must be performed under the supervision and authority of the building code administrator or building official without interference from any unlicensed person.

⁶ Section 468.63(7), Florida Statute defines "Plans examiner" as:

a person who is qualified to determine that plans submitted for purposed of obtaining building and other permits comply with the applicable building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes. Categories of plans examiners include:

- (a) Building plans examiner.
- (b) Plumbing plans examiner.
- (c) Mechanical plans examiner.
- (d) Electrical plans examiner.

43. It is evident that the COMI failed to adequately, competently, and professionally administer state or local building codes, exhibiting gross negligence in failing to comply with the following building code provisions:

a. Section 104.1.5 The building permit application shall indicate the proposed occupancy of all parts of the building and of that portion of the site or lot, if any, not covered by the building or structure and shall contain such other information as may be required by the building official. Each application shall be inscribed with the date of application, and the code in effect as of that date;

b. 104.3 Examination of Documents. 104.3.1 Plan review. The building official shall examine or cause to be examined each application for a permit and the accompanying documents, consisting of drawings, specifications, computations and additional data, and shall ascertain by such examinations whether the construction indicated and described is in accordance with the requirements of the technical codes and all other pertinent laws or ordinances;

c. 104.3.1.1 Minimum plan review criteria for buildings. The examination of the documents by the building official shall include the following minimum criteria and documents; a floor plan, site plan, foundation plan, floor/roof framing plan or truss layout and all exterior elevations;

d. 104.5.1 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;

e. 105.4 Inspections prior to issuance of Certificate of Occupancy or Completion. The building official shall inspect or cause to be inspected, at various intervals, all construction or work for which a permit is required, and a final inspection shall be made of every building, structure, electrical, gas, mechanical or plumbing system upon completion, prior to the issuance of the Certificate of Occupancy or Certificate of Completion;

f. 105.5 Posting of permit. Work requiring a permit shall not commence until the permit holder or his agent posts the permit card in a conspicuous place on the premises. The permit shall be protected from the weather and located in such position as to permit the building official or representative to conveniently make the required entries thereon. This permit card shall be maintained in such position by the permit holder until the Certificate of Occupancy or Completion is issued by the building official;

g. 105.6 Required inspections. The building official upon notification from the permit holder or his agent shall make the following inspections, 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. The building official shall determine the timing and sequencing of when inspections occur and what elements are inspected at each inspection; and

h. 106.1.2 Issuing Certificate of Occupancy. Upon completion of construction of a building or structure and installation of electrical, gas, mechanical and plumbing systems in accordance with the technical codes, reviewed plans and specifications, and after the final inspection, the building official shall issue a certificate

of occupancy and the allowable load per square foot for each floor in accordance with the provisions of this code.

44. The COMI knowingly failed to comply with each of the delineated requirement of the Florida Building Code then in effect, exhibiting gross negligence and reckless endangerment to the Daytons and all subsequent owners of the Property.

45. Notwithstanding the COMI's failure to comply with each and every of the above-referenced building code provisions and failure even to comply with the most basic obligations imposed upon them by the Florida legislature in maintaining a building department charged with providing for the health, safety and welfare of its citizens by ensuring that construction of peoples' homes would be built according to minimum state and local building codes, the COMI issued a Certificate of Occupancy for the Dayton Home on April 14, 2006.

46. Once the COMI undertook the duty to inspect, review and certify construction to be in accordance with state and local building codes from Collier County, it was obligated to do so reasonably and responsibly in accordance with acceptable standards of care.

47. Based on the foregoing, the COMI was grossly negligent in establishing and administrating its training programs, and knowingly and willfully negligent in failing to have the proper supervision of its building inspectors and plans examiners.

48. The COMI knew of the lack of qualifications and provisional authority of its Building Official and the building inspectors and plan examiners under his sole supervision.

49. The COMI took no action to protect the public and continued, and in fact promoted, the building inspectors and plans examiners endangering the public, including most notably, the Daytons.

50. The COMI knew or should have known of the unfitness of the Building Official, building inspectors and plans examiners involved in the inspection of the Dayton Home, but took no further action such as investigating, disciplining, training or reassignment.

51. The Daytons have complied with all material preconditions to suit,⁷ or those conditions precedent have been waived by the actions of the COMI.

COUNT I

NEGLIGENT SUPERVISION

52. The Daytons reallege the allegations set forth in paragraphs 1 through 51 above as though fully set forth herein.

53. During the course of the services provided by its Building Official, building inspectors and plans examiner, the COMI became aware or should have become aware of problems that indicated that its building department personnel were unfit to perform the functions of a building official and plans administrator.

54. The COMI failed to take appropriate action when faced with information which indicated, or should have indicated, its building department personnel's unfitness including failure to properly investigate the problems and delay, and failing to take appropriate remedial action.

⁷ A copy of the notice of claim served on the COMI is attached as **Exhibit "B"**.

55. The COMI owed the Daytons a duty to supervise and ensure that its building department performed the functions required of a building department as set forth in Florida law.

56. By failing to take reasonable and necessary steps in response to the fact that its building department personnel were unfit for the duties and obligations for which it was formed, the COMI breached its implied and expressed duties to the Daytons.

57. The Daytons have been injured by the COMI breach of its duty to properly supervise, or provide supervision, its building department personnel, which injury was foreseeable by the COMI and which, by exercising due diligence and authority over its building department personnel, the COMI reasonable could have prevented.

WHEREFORE, Timothy and Regina Dayton demand judgment against the City of Marco Island for compensatory damages in excess of \$15,000, attorneys' fees, costs and interest and such other relief as this Court deems appropriate.

COUNT II

NEGLIGENT HIRING

58. The Daytons reallege the allegations set for the in paragraphs 1 through 51 above as though fully set forth herein.

59. Prior to retaining its Building Official, building inspectors and plans examiners, the COMI failed to properly investigate those prospective employees to ensure that they had the necessary skill, knowledge, resources and licenses to adequately, competently, and professionally administer state of local building codes.

60. Had the COMI properly investigated the qualifications of its prospective Building Official, building inspectors and plans examiners, it would have discovered that these individuals were unfit and unqualified.

61. By failing to reasonable investigate its prospective building department personnel prior to hiring and/or prior to promoting them to job functions, the COMI would have known that they were unfit for the tasks required of a building department under Florida law.

62. By failing to reasonably investigate the qualifications of its building department personnel before their retention or promotion, the COMI breached its implied and express duties to the Daytons.

63. The Daytons have been injured by the building department personnel's unfitness, which injury was reasonably foreseeable to arise under the circumstances.

64. By exercising due diligence, the COMI reasonably could have prevented the injury suffered by the Daytons

WHEREFORE, Timothy and Regina Dayton demand judgment against the City of Marco Island for compensatory damages in excess of \$15,000, attorneys' fees, costs and interest and such other relief as this Court deems appropriate.

COUNT III

NEGLIGENT TRAINING

65. The Daytons reallege the allegations set for the in paragraphs 1 through 51 above as though fully set forth herein.

66. The COMI failed to properly train its building department personnel to ensure that they had the necessary skill, knowledge, resources and licenses to adequately, competently, and professionally administer state of local building codes.

67. By failing to adequately train and/or require basic competence levels from its building department personnel, the COMI breached its implied and express duties to the Daytons.

68. The Daytons have been injured by the COMI's failure to adequately train and/or require basic competence levels from its building department personnel, which injury was reasonably foreseeable to arise under the circumstances.

69. By exercising due diligence, the COMI reasonably could have prevented the injury suffered by the Daytons.

WHEREFORE, Timothy and Regina Dayton demand judgment against the City of Marco Island for compensatory damages in excess of \$15,000, attorneys' fees, costs and interest and such other relief as this Court deems appropriate.

Respectfully submitted,

CHEFFY PASSIDOMO, P.A.



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**City of Marco Island
Community Development Department
Performance Appraisal Supplement**

May 20, 2008

Mike Smithem, Building Inspector

Period: ~~may~~ 5/28/07 – 5/28/08

Mike is a well respected and productive inspector in the Building Inspections Division. Mike has shown initiative in pursuing an additional rating and qualifications as a one-and two family residential dwelling unit inspector. I concur with the Building Official's assessment of Mike's performance during the last year, but offer the following additional comments and recommendations for improvement as necessary to meet goals and expectations of the Building Services Division and Community Development Department.

Inspections – Consistency with approved plans


It is critically important for all inspectors in the Building Services Division to make sure that any building or structure being inspected has been constructed in compliance with the official site plan and construction drawings previously approved by the City of Marco Island. Any proposed changes or alterations to a structure following approval of a site plan or construction drawings by the City of Marco Island must be identified in a revised set of plans. Proposed plan revisions must be approved by the City of Marco Island prior to the commencement of construction of any proposed changes or alterations, and prior to the scheduling or completion of any inspections of the proposed changes.

Inspection Documentation

Mike is reminded of the importance of complete and thorough documentation of all building inspections. Thorough documentation is necessary to maintain a complete and accurate public record of work completed and inspected, and to provide the building owners and contractors with a clear understanding of work inspected and approved.

Strict compliance with both requirements identified above is critically important to accomplishment of the mission of the Building Services Division, the goals of City Council and the expectations and requirements of the Community Development Department.


Prepared by:


Stephen R. Olmsted, AICP
Community Development Director

Reviewed by:


Bob Mahar, Chief Building Official

Acknowledgement:


Mike Smithem, Building Inspector

EXHIBIT

A

ADDITIONAL COMMENTS:

Mike is well liked and respected by his co-workers and the Building Community. His experience and construction knowledge is a great asset for the City. He conducts himself in a fair and professional manner. He looks out for the interests of the Citizens of Marco Island.

EMPLOYEE:

Please acknowledge that this performance appraisal has been reviewed with you by signing your name and indicating the date of the review in the spaces below.

Also, indicate whether you intend to submit a written statement (due within 10 days from the date of your review) for any ratings or comments in which there were significant disagreements between you and your supervisor.

Written Statement

Yes No

Michael Christman
Employee

5-6-05
Date

[Signature]
Rater

5-2-2005
Date

[Signature]
Manager (if Applicable)

5/17/05
Date

[Signature]
Director

5-2-05
Date

Human Resources

Date

H. RICHARD BISBEE, P.A.
A Professional Association
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December 4, 2008

Mr. Matthew H. Mandel, Esq.
Weiss, Serota, Helfman, Pastoriza, *et. al.*
200 East Broward Boulevard
Suite 1900
Fort Lauderdale, Florida 33301

**conveyed via U.S. Mail*

Re: *Regina & Tim Dayton;*
Marco Island Tort Claims

Dear Mr. Mandel:

I wanted to take the opportunity to follow-up with you from our previous communications in September regarding this firm's clients, Regina and Tim Dayton. As you may recall, Regina and Tim Dayton (hereinafter to be referred to as "the Daytons"), contracted with Kimball Hill Homes for the construction of a residence on Marco Island. During the course of the construction process, the Daytons encountered a variety of difficulties stemming from the acts and/or omissions of their contractor, as well as certain acts and/or omissions for which Marco Island's Building Official's bear culpability.

Having had the opportunity to review the previously tendered bankruptcy claim package submitted by the Daytons relating to the scope of the injuries and/or damages they have sustained in connection with the efforts to construct their home, as well as the tort claim notice that was forwarded to your office's attention by the City of Marco Island, you are, no doubt, fairly familiar with the details of the Dayton's plight. Accordingly, it is likely not necessary to belabor the sheer egregiousness of the economic hardship and/or pitfalls that have been visited upon the Daytons during this process.

As the end of the pre-suit period contemplated by the Florida Tort Claims Act (codified as the *Florida Statutes, Chapter 768.28*), approaches, however, it did appear that it might behoove the parties to discuss the prospect of a pre-suit settlement in connection with the Dayton's claims against Marco Island in an effort to obviate the necessity of litigation and the attendant costs associated therewith.

H. Richard Bisbee, P.A.
For Settlement Purposes Only
Page Two (2)

From a legal standpoint, the Daytons believe that they have a viable case against the City of Marco Island in connection with this matter—to wit, the Daytons have contracted the services of Mr. Dennis Franklin, who is a professional and/or licensed building inspector in the State of Florida, for the purpose of determining the respective areas in which the subject Marco Island Building Inspectors deviated from the prevailing standard of care while performing their duties with regard to the Dayton home.

Mr. Franklin's review of the physical structure of the residence, in conjunction with the plans and permitting history, revealed a startling level of malfeasance ultimately ascribed to the City of Marco Island, *vis a vis* its agents and/or representatives in the Growth Management/Permitting Department including, but not limited to, the issuance of permits in the absence of receiving any actual building plans, the failure to secure a Qualifying Agent, the approval of plans in clear conflict with applicable and/or prevailing building codes, etc. (Please refer to a copy of the Administrative Complaint, as filed with the Florida Department of Business and Professional Regulation (DBPR), as appended immediately hereto and marked as **Exhibit "1"**).

Oftentimes, in the context of cases brought against municipalities predicated upon the acts and/or omissions of publicly-employed building inspectors, the municipality in question will attempt to rely on the quasi-ubiquitous precedent embodied in the case of *Trianon Condo Park Association, Inc. v. City of Hiialeah*, 468 So.2d 912 (Fla. 1985), for the proposition that sovereign immunity uniformly bars claims against public entities for the discretionary acts of their respective building official employees.

In an effort to expedite the prospect of settlement in the instant case, as well as to dispense with at least one (1) of the defenses Marco Island might seek to assert, it is, respectfully, suggested that *Trianon* would not apply to the facts of this particular case for several reasons. First, the Plaintiff in the *Trianon* case erroneously relied on a common law duty of care as the basis for its claim against the Defendant.

This is not the case in this dispute—to wit, as clearly set forth in the appended DBPR administrative complaint, the Daytons—in any future and/or prospective lawsuit—will be asserting a statutory duty of care pursuant to the *Florida Statutes, Chapter 468*, which sets forth the duties and/or obligations of Florida Building Inspectors.

Second, in addition to the general issue of negligent inspections and/or issuance of permits and subsequent certificates of occupancy, the Daytons also intend on bringing claims against the City of Marco Island for negligent hiring and retention of the Building

H. Richard Bisbee, P.A.
For Settlement Purposes Only
Page Three (3)

Inspectors at issue.¹ As you may know from independently investigating this matter, Kimball Hill Homes had been—until recently—prominently involved in the construction of new homes on Marco Island. The Daytons exemplify merely one (1) of many unfortunate scenarios wherein aspiring homeowners on Marco Island have sustained monumental financial and personal damages due to the proverbial “fast and loose” manner with which Kimball Hill Homes was allowed to engage in construction in the area.

That is to say, Marco Island had been put on notice of the systemic problems home-owners were experiencing with Kimball Hill Homes and, despite this notice, continued to work with Kimball Hill Homes, allowing for them to continue on—unabated—in its negligent and illegal practices by the repeated issuance of permits responsive to overtly deficient applications proffered by the builder. Needless to say, the Daytons believe that discovery with regard to this particular component of the Dayton’s claim will reveal compelling evidence of foreknowledge of the problems being caused by Kimball Hill Homes and willful disregard of those self-same problems and/or hazards by Marco Island Building Officials.

The foregoing notwithstanding, the Daytons would prefer to resolve this matter without the necessity of litigation. Pursuant to the bankruptcy materials recently conveyed to your attention by this office, you will have noted that the Daytons have listed their damages and/or injuries at approximately Nine-Hundred Thousand (\$900,000.00) Dollars.² Having reviewed the private commercial insurance policy you, graciously, provided to this office, it would appear that the City of Marco Island has commercial liability coverage in the aggregate amount of Two Million (\$2,000,000.00) Dollars.

As such, the *Florida Statutes, Chapter 768.28*, allow for the payment of claims in excess of the Two-Hundred Thousand (\$200,000.00) Dollars statutory cap set forth in the Florida Tort Claims Act. In an effort to resolve this matter expeditiously, please let this instant correspondence serve as Notice of the Dayton’s demand of Four-Hundred and Seventy-Five Thousand (\$475,000.00) Dollars to settle all of the claims of the Daytons against the City of Marco Island in their entirety.

¹ Negligent hiring and retention by public entities and/or political subdivisions of the State of Florida have long been recognized as cognizable claims pursuant to Florida common law. See *Metro Dade County v. Martino*, 710 So.2d 20 (Fla. 3rd DCA 1998).

² It is worthy of note that this number was based on the Dayton’s pre-petition damages and does not contemplate the damages sustained post-petition, which are cumulative and ongoing. To wit, recently ridge vents have been installed (at owners’ expense) in the roof of the Daytons’ home for ventilation purposes. This was necessary due to the fact that no ventilation had been incorporated into the original structure. Despite the fact that the original Marco Island-“approved” plans called for said ventilation, the vents were, in fact never installed and the home, inexplicably, ultimately passed inspection.

*H. Richard Bisbee, P.A.
For Settlement Purposes Only
Page Four (4)*

It is presumed that your office will, no doubt, have some follow-up questions with respect to the foregoing and/or enclosed. To that end, please do not hesitate to contact me as soon as practicable to discuss any of the issues addressed herein. In the interest of determining how the parties might proceed, it would be greatly appreciated if you would advise as to your client's disposition in this matter by no later than thirty (30) days following the receipt of this instant correspondence.

Thank you for your attention and anticipated cooperation in these matters. Please be governed accordingly.

Sincerely,

Patrick R. Frank, Esq.
"Of Counsel"

Enclosure(s): *DBPR Complaint/
Report (Exhibit "1")*

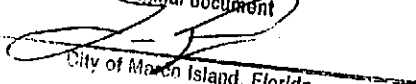
cc: Regina & Tim Dayton

Chief Building Official Bob Mahar:

Attached are 6 documents in re the subject Dayton house in your jurisdiction. They are:

1. Letter from the Office of the Governor requesting resignation of notary Cindy J. Williams for acts she took on documents relative to this house.
2. Limited Power of Attorney referenced in the Office of the Governor letter above wherein then notary Williams notarized her own signature and notarized the document in which she was a party. A dark rectangle is beside the supposed signature of Jon Morris. You will need to reference this signature on later documents.
3. State Certified License Registration form of Jon Morris wherein his signature is notarized by notary Tammy Phillips. A dark rectangle is beside the alleged signature of Jon Morris. You will note that this signature is gravely different than the alleged signature on document 2 above.
- 4 & 5. The front and last page of the Single Family New Permit Application on this house bearing your permit # 033164. A dark rectangle is beside the alleged signature of Jon Morris and notarized by then notary Williams. This matches the signature on Document 2 but is very different from Document 3.
6. Related License Information from DBPR's website showing the Qualifying Agents for Kimball Hill Homes, both past and present. You will notice the absence of Jon Morris on this list.

I hereby certify that this is a true and correct copy of the original document



City of Marco Island, Florida

Pursuant to Florida Building Code Section 110.4 Revocation.
"The building official is authorized to, in writing, suspend or revoke a certificate of occupancy or completion issued under the provisions of this code wherever the certificate is issued in error, or on the basis of incorrect information supplied, or where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code."

It is confirmed that Document 3 contains the valid signature of Jon Miller. As such, it appears obvious that Jon Miller did not sign Document 2 giving Cindy Williams the authority to sign for him, even if that is legal, which I doubt. By the power of Document 1, Document 2 is a legal nullity which the courts are likely to invalidate. This means the permit application, documents 4 & 5, was not signed by a licensed contractor. Per Document 6, Jon Miller was never a Qualifying Agent for Kimball Hill Homes of Florida Inc., and if that is true, the fraud on this house runs deep.

It is already known that there are issues with this house for which a 180 day construction contract drug into 4 years and it's still not right. It is known that Jon Miller left the job and Kimball Hill Homes in June/July of 2005 and that Francine Miller did not show up in Collier County until February 16, 2006 when she was added to the insurance forms. It is now known from Document 6 that Tom Brunow was a secondary Qualifying Agent for Kimball Hill Homes starting in June 2004. It is also known from Document 6 that Thomas Denittis was the Primary Qualifying Agent for Kimball Hill Homes at the time of the permit and contract and until November 29, 2005, when Francine Miller became the Primary Qualifying Agent.

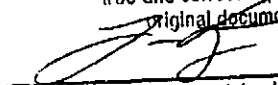
Pursuant to F.S. 489.1195(2)

(e) " A secondary qualifying agent is responsible only for:

1. The supervision of field work at sites where his or her license was used to obtain the building permit; and
2. Any other work for which he or she accepts responsibility.

A secondary qualifying agent is not responsible for supervision of financial matters."

I hereby certify that this is a
true and correct copy of the
original document


City of Marco Island, Florida

It should be noted that Tom Brunow didn't use his license number or name on Document 4 & 5, the building permit application, nor did he use it on any documents reviewed by me in this house file in your offices. Therefore, there is no evidence that Tom Brunow ever accepted any responsibility for this house.

The question of the day is then, What licensee is responsible for this house, if any? Because the answer to this is dubious at best, and highly questionable for sure, it is suggested that revocation of the certificate of occupancy pursuant to Florida Building Code Section 110.4 is the first immediate step you should take. Justification is found on page 2 of your permit application for this house at Regulation # 4, which states: "One application must be filled out with the original signature of the qualifier who is pulling the permit." You have documentary evidence that this did not happen.

Once the CO is revoked, you have authority over the house again and can arrange to have the various issues relating to contractor responsibility addressed. It is also then that you can require the legal contractor of record to address the issues raised by the owners as to differences between what was built vs what should have been built per the approved plans which might have been over-looked by your inspectors earlier in the process. These issues are major and include building code violations.

Recognizing the you will be reading this no earlier than Monday, November 19, 2007, (Thanksgiving week) it is requested that you take the appropriate action no later than November 28, 2007. The owners are in residence in Marco Island now and are available to meet or allow entry to you and your representatives. Subsequent to that date, the owners will take whatever legal actions are at their disposal, including writ of mandamus, to remedy their unacceptable situation in your jurisdiction. Inaction is no longer an option.

FINE TOOTH COMB INVESTIGATIONS, INC.

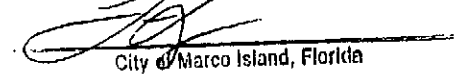
David Hodges, P.I., F.C.I.
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suburb of Jacksonville
ftci@comcast.net
A97-00009
904-237-5917
904-371-7817 fax

Please be reminded that I am not an attorney and cannot render legal advice. Nothing in this document is given as or to be perceived as legal advice. The owners have retained legal counsel which has visited the site with experts and they are prepared to take whatever steps are available to them

to bring resolution to this matter. This email is sent to attempt to bring reason to matters which seem to have been ignored up to this date.

It is requested that the State Attorney take prosecutorial notice of the violations which are evidenced by these documents and events. In addition to the charges previously alleged against then notary Cindy Williams, please add the charge of forgery of the signature of Jon Miller on Documents 2 and 4 & 5. The building official of Marco Island has the original signed documents in his files on permit number 033164. It is believed the F.S. 117.105 and 117.107 apply to this situation as well as others.

I hereby certify that this is a true and correct copy of the original document



City of Marco Island, Florida

Multiple email addressees have been included to prepare for possible bouncing of this email.