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The Threshold Inspector: Champion of the Public Weal or Construction Industry Rogue?

by Kevin P. Kelly

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Have you felt the sway of a highrise in a brisk wind? How about feeling stadium seating bouncing in cadence to the motion of the fans?

Have you seen on television or, God forbid, in person, a building toppled in an earthquake? Who is it, behind the scenes, that gives us confidence we're safe in a hurricane? After all, most structures are built by a low bidder or someone with a motive to cut construction costs and time. Would you be concerned if the structure you work in was inspected by someone with conflicting loyalties to the profit-conscious owner and the safety-conscious, but overworked, public building official? That's how it's done in Florida, and the guy in the middle is the "threshold inspector."

A subtle tug-of-war occurs on commercial construction projects between the owner and the public building code inspector (for simplicity, referred to as the "building official"). This inherent tension is good. It provides an equilibrium between the drive for profit and the concern for safety. Commercial owners and contractors, as entrepreneurs, aim to maximize profits. This may be at odds with the public building official's goal of ensuring code compliance. Disturbing the equilibrium can have dire consequences. Hurricane Andrew exposed the consequences of a profit motive inadequately checked by inattentive (or overburdened) building officials: destruction in the billions of dollars, much attributable to inadequate code compliance.¹ On the other hand, an overzealous or tyrannical building official can halt a construction project, bankrupting a contractor. These competing interests must balance for a project to be both safe and profitable.

A potentially destabilizing element of this equilibrium originated in 1982 when the Florida Legislature created a second category of inspector, the "threshold inspector."²

The Threshold Inspector

The threshold inspector is a unique character. Unlike the building official, the threshold inspector is a private citizen. Unlike the owner, he does not wield the power of the purse. He is a certified, licensed, or registered engineer or architect whose sole focus is structural integrity.³ During construction, he inspects the structural components of all buildings meeting the following thresholds:⁴ 1) over three stories or 50 feet in height; or 2) an assembly occupancy exceeding 5,000 square feet and an occupant content greater than 500 persons.⁵ In other words, if the building is tall or holds a lot of people, the threshold inspector must inspect its structural elements during construction.⁶ Before a building official issues a certificate of occupancy, the threshold inspector must submit a signed and sealed statement that all structural, load-bearing components comply with the permitted construction documents.⁷ The intent was to increase the safety of structural components, the failure of which could spell disaster to persons and property. Good intentions.

In creating the threshold inspector, however, the Florida Legislature did an unusual thing: It cleaved the threshold inspector's responsibility from his remuneration. This left murky the question of who, if anyone, controls and directs the threshold inspector.

In dissecting the tensions at work on the threshold inspector, let's start with the known. The threshold inspector is statutorily "responsible" to the building official.⁸ On the other hand, the threshold inspector is selected and paid by the owner.⁹ This appears to contradict the common sense notion that with money, so goes control.

This dichotomy of responsibility is the root of the threshold inspector's schizophrenia and leaves unanswered questions: Does the building official or the private owner (or both) have the right to control and direct the threshold inspector? What responsibility does the threshold inspector owe the building official? What, if any, responsibility does the threshold inspector owe the owner?

The answers to these questions can have a significant financial impact on those affected by threshold inspections, including the owner, the designer, the contractor, and subcontractors. More importantly, the answers bear on whether a building is soundly constructed.

Whose Agent is the Threshold Inspector?

As a practical matter, an owner who selects and pays a threshold inspector will expect accountability. The contract for threshold inspection defines this accountability. The owner may control the threshold inspector through his right to schedule the threshold inspector's services and his right to preapprove and remove the threshold inspector's employees. The ability to withhold payment and to fire the threshold inspector are the most effective means of control.

The owner wants the threshold inspector to overlook inconsequential nonconformances. For instance, if reinforcing steel bars are spaced every inch rather than the specified three-quarters of an inch, the owner may expect the threshold inspector to approve the pouring of concrete without correction. The owner wants to avoid delays and interference which fuels litigation among owners, contractors, and designers. The owner wants a minimum of inspections and wants to pay the threshold inspector only for this minimum. If the threshold inspector determines a greater number of, or more detailed, inspections are necessary, the owner may resist. The owner doesn't want to pay for delays resulting from overzealous inspections. Under this contractual relationship, the owner considers the threshold inspector his agent. Under current Florida law, the owner may be wrong.

How do the owner's expectations affect the threshold inspector's responsibility to the building official? The opportunities for conflict are abundant, if not inherent.

The public building official wants the threshold inspector to reject noncompliant work. In our example, the building official would expect the threshold inspector to reject the nonconforming rebar. The building official is not concerned if the project is delayed. The building official prefers a threshold inspector who is deliberate and thorough even if it costs the owner time and money. In the gray area between what is clearly a structural deficiency and what is clearly proper work, does the threshold inspector side with the owner's desire to move ahead or with the building official's interest in code compliance?

These conflicting responsibilities and expectations added to the threshold inspector's own agenda create a volatile mix. The threshold inspector is not a public employee. He is in business to make money and he wants to maximize his profit. Since the owner pays him, the threshold inspector's loyalty or "responsibility" to the building official may be superficial and may be subordinated to his loyalty to the owner. At a minimum, the threshold inspector has an incentive to make the owner happy. His financial interests could cloud his judgment. Maybe he will overlook the nonconforming rebar if payment is due the next day or if he is bidding on other work for the same owner. A disinterested observer will not be able to discern whether the threshold inspector is exercising sound engineering judgment or economic self-preservation.

The owner may expect that his contract provides a check on an overzealous or nonresponsive threshold inspector. But what if the owner's contract with the threshold inspector is *unenforceable*? What if, when the owner threatens to fire the threshold inspector for rejecting the technically nonconforming rebar, the inspector reminds the owner that he can't be fired? The threshold inspector is, after all, statutorily "responsible" to the building official, not the owner. The building official may threaten to withhold a certificate of occupancy if the owner threatens the threshold inspector. Must the owner accept the threshold inspector's edicts at the risk of alienating the building official? What if the threshold inspector unilaterally decides he needs more money to do his job? Does the owner have to pay whatever is demanded? The threshold inspector may assert that if the legislature had wanted the threshold inspector to be responsible to both the owner and the building

official, the legislature would have said so. The building official, like the owner, may view the threshold inspector as his agent. Under current Florida law, however, for whom the threshold is an agent is unclear.

In January 1998, the Florida Board of Building Codes and Standards published a written "order."¹⁰ It states the building official ("or permitting jurisdiction") may remove a threshold inspector from a project for the nonperformance of his duties.¹¹ This appears to conflict with the owner's statutory right to select and obligation to pay the threshold inspector. The board stated:

Although the [Florida Building Codes Act] does not squarely state that the Building Official or the permitting jurisdiction may remove the special inspector from a project, the centerpiece of the whole scheme is a requirement that the special inspector must represent in writing to the Building Official "prior to the issuance of the certificate of occupancy" that the structural system of the building is in conformity with all pertinent drawings and specifications.¹²

Thus, according to the board, the building official has the right to fire the threshold inspector. What if the owner disagrees?

Does Sovereign Immunity Exist?

In Florida, the publicly employed building inspector is protected by sovereign immunity. *Trianon Park Condo. Assoc. v. Hialeah*, 468 So. 2d 912 (Fla. 1985). Does sovereign immunity also extend to the privately employed threshold inspector? In *Trianon*, the city building official was allegedly negligent in his inspections of a condominium project. The condominium owners sued the city for the inspector's negligence. The Florida Supreme Court held that the city's sovereign immunity protected it from tort claims arising from the exercise of police powers, such as building inspections.

If the threshold inspector were an agent of the building official, he might also have a claim to sovereign immunity. A sovereign's agent also enjoys sovereign immunity if he is a "true" agent. *Dorse v. Armstrong World Industries, Inc.*, 1513 So. 2d 1265 (Fla. 1987). Whether there is a true agency between the building official and the threshold inspector may depend on the degree of control the building official has over the threshold inspector. *Id.* That the statute makes the threshold inspector "responsible" to the building official may not be viewed by courts as, ipso facto, creating an agency relationship. Had the legislature intended to make the threshold inspector the agent of the building official, it could have simply and clearly stated so. On the other hand, if the building official can fire the threshold inspector, perhaps the building official has the right of control.

If the threshold inspector is the building official's agent, the owner may have no cause of action against the threshold inspector. In such event, the owner could not enforce his contract because it would be void ab initio. The threshold inspector may be a rogue, unresponsive to the owner who selects and pays him.

The threshold inspector may undergird his assertion of independence from the owner by noting that a public agency cannot contract out its inherent police powers, powers possessed only by a sovereign. *P.C.B. Partnership v. City of Largo*, 549 So. 2d 738 (Fla. 2d DCA 1989). This assertion presumes that threshold inspections are an obligation of the building official, rather than an independent obligation of the project owner. A paradox arises. How can the threshold inspector have become the threshold inspector if the contract that makes him the threshold inspector was never legally binding?! The very contract by which the threshold inspector became the threshold inspector may be a legal illusion. This runs contrary to the apparent intent of the statute. How can the owner select and pay the threshold inspector without the legal mechanism of a contract?

In the real world, such a debate would be unlikely *during* the course of construction since the owner could stop paying the inspector. A threshold inspector raising the issue before contract signing would never be selected as the threshold inspector. But, after construction is complete, the threshold inspector may assert sovereign immunity as a defense to an owner's breach of contract claims.

These arguments are not merely academic. The answers bear on whether the threshold inspector can be held financially responsible for fulfilling his contractual commitments to an owner or whether the threshold inspector is an independent voice protecting the public weal. No Florida cases address whether a threshold inspector enjoys sovereign immunity as a building official's "agent."

The threshold inspector's conflict of interest can be resolved. The better-reasoned approach is *not* to treat the threshold inspector as the building official's agent (the board's opinion notwithstanding). The legislature made the threshold inspector "responsible" to the building official. Responsibility alone does not amount to agency.¹³ The legislature could have used the word "agency" if that was the intent. Making the threshold inspector the agent of the building official, cloaked with sovereign immunity, risks turning on its head the relationship between the owner and the threshold inspector.

Moreover, the threshold inspector's duties are not true police powers delegated by the building official. The building official's inspection obligations are independent of and broader than the threshold inspections.¹⁴ Threshold inspections were intended to be conducted by private persons.¹⁵ Reliance on opinions of independent, private professionals occurs on every construction project. For example, the building official is statutorily obligated to require, on all threshold buildings, that the architect or engineer of record provide a written statement that the plans and specifications comply with the building codes.¹⁶ The provision of these statements is hardly the exercise of a police power. The project architect and engineer, like the threshold inspector, typically are hired and paid by the owner. No one suggests the building official has the right to remove the engineer or architect, even though, as with the threshold inspector, the "centerpiece of the whole scheme" is the independent licensed professional's written representation to the building official. This does not make the architects and engineers the building officials' agents, entitled to sovereign immunity from the owner's breach of contract claims. Otherwise, construction and design law in Florida would be in a state of chaos.

Even if a threshold inspector were deemed a building official's agent, sovereign immunity should not bar the owner's breach of contract claims. When a sovereign enters into a contract, it waives sovereign immunity for the obligations of that contract.¹⁷ Since it is unlikely that an owner will select and pay a threshold inspector without a written contract, the threshold inspector will have waived sovereign immunity vis-à-vis the owner. This approach may even benefit the threshold inspector who could claim immunity from third party tort claims while remaining liable for his contractual commitments.

The Florida Legislature should clarify whether the threshold inspector owes responsibilities to both the building official and the owner. The legislature should also clarify whether the threshold inspector is the building official's agent entitled to sovereign immunity. Neither the owner nor the threshold inspector should be left in doubt about the enforceability of their contract. The threshold inspector should serve one master, not two masters with conflicting interests. This conflict can be eliminated with the following minor change to the Florida Building Codes Act, §553.79(5)(b):

The fee owner of a threshold building shall select and pay all costs of employing a special inspector, but the special inspector shall ~~be responsible~~ provide a certification to the enforcement agency pursuant to s. 553.79(7)(a).

This eliminates the confusion stemming from the existing language making the threshold inspector "responsible" to the enforcement agency.

Meanwhile, on construction projects throughout the state, threshold inspectors perform their chameleonic duties without any certainty about whom they serve. That more frequent litigation over the threshold inspectors' responsibilities does not occur is a credit to their professionalism and their tolerance for ambiguity. q

¹ *Hurricane Andrew Causes Reassessment of States' Building Codes*, Building Design & Construction, Vol. 33, No. 11 (Nov. 1992); and *Building Performance: Hurricane Andrew In Florida*, Report of Federal Emergency Management Agency (Dec. 21, 1992).

² "Special inspector" is the technically accurate title, but "threshold inspector," being more descriptive, has gained a dialectical foothold in the construction industry.

³ Fla. Stat. §553.79(5) (1998 supplement).

⁴ The construction is inspected against a special inspection plan prepared by the engineer or architect of record and submitted to the building official prior to issuance of a building permit. Fla. Stat. §553.79(5)(a) (1998 supplement).

⁵ Fla. Stat. §553.71(7) (1998 supplement).

⁶ The threshold inspector supplements, but does not supplant, the building official's structural inspections. Advisory No. 1998-1, Florida Board of Building Codes & Standards (now the Florida Building Commission). The scope of the building inspector's inspections are also much broader than just structural components, and include, among other things, electrical, mechanical, plumbing, and handicap access.

⁷ Fla. Stat. §553.79(7)(a) (1998 supplement).

⁸ Fla. Stat. §553.79(5)(b) (1998 supplement).

⁹ *Id.* In the case of public construction, the owner is a public entity which, having waived its sovereign immunity, acts much like a private owner.

¹⁰ The Florida Board of Building Codes and Standards was recently renamed the Florida Building Commission. Fla. Stat. §553.71(1) (1998 supplement).

¹¹ State of Florida Board of Building Codes and Standards, Final Order, Jan. 1998, *In Re the Matter of Charles Danger*, No. DCA 97-DEC-08.

¹² *Id.*

¹³ *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990) (there must be the element of control).

¹⁴ See *supra* note 6.

¹⁵ Fla. Stat. §553.79(5)(b) and (c) (1998 supplement).

¹⁶ Fla. Stat. §553.79(7)(d) (1998 supplement).

¹⁷ *Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So. 2d 4 (Fla. 1984).

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