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M E M O R A N D U M

TO: Med Kopczynski, Chairman
Technical Advisory Committee

FROM: Suzanne H. Schmith
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SUBJECT: Declaratory Statements

DATE: August 6, 1998

This memo is in response to questions which arose during the July 20th meeting of the Technical Advisory Committee regarding the practical difference between advisory opinions and declaratory statements and the Florida Building Commission's authority to issue advisory opinions as opposed to declaratory statements.

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules or orders over which an agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statute, rule or order applies to the petitioner's particular circumstances. There are conflicting court opinions regarding whether a petition for declaratory statement must raise an issue that is unique to the petitioner or whether a declaratory statement is appropriate even if it may apply similarly to a class of persons.

A petition seeking a declaratory statement must be filed with the agency clerk and must meet the content requirements of Rule 28-105.002, Florida Administrative Code. The agency has 90 days from the date of filing to act on the petition, by either denying the request or issuing the declaratory statement. An agency headed by a collegial body may only take action on a petition for declaratory statement at a duly noticed public meeting. Both the petition for declaratory statement and the agency's action regarding the petition must be noticed in the Florida Administrative Weekly.

In chapter 98-287, Laws of Florida, the legislature specifically replaced the authority of the Board of Building Codes and Standards to issue certain advisory opinions with authority for the commission to issue declaratory statements. Effective July 1, 1998, the commission is authorized to issue declaratory statements, rather than advisory opinions, regarding the following issues:

New technologies, techniques and materials which have been tested where necessary and found to meet the objectives of the State Minimum Building Codes and the Florida Manufactured Building Act of 1979.

The interpretation, enforcement, administration, or modification by local governments of the State Minimum Building Codes and the Florida Manufactured Building Act of 1979.

A state agency's interpretation and enforcement of the specific model code adopted by the agency to regulate building construction or relating to the conformity of new technologies, techniques and materials to the objectives of that model code.

Provisions relating to classification of threshold buildings, required documentation for permitting of new buildings or additions, and documentation required prior to issuance of a CO.

Effective January 1, 2001, the commission is authorized to issue declaratory statements, rather than advisory opinions, regarding the following issues:

New technologies, techniques and materials which have been tested where necessary and found to meet the objectives of the Florida Building Code.

The interpretation, enforcement, administration, or modification by local governments of the Florida Building Code.

Relating, generally, to part VII of ch. 553, which will be titled, "Florida Building

Code."

A state agency's interpretation and enforcement of the specific provisions of the Florida Building Code or relating to the conformity of new technologies, techniques and materials to the objectives of the Florida Building Code.

While the legislature replaced authority to issue advisory opinions with requirements for declaratory statements on a broad range of issues, the law retains limited authority for the commission to act outside of processes governed by the Administrative Procedures Act (APA).

First, the law contemplates that the commission may issue interpretations of the code, separate from issuing declaratory statements. Subsection 553.73(5), Florida Statutes, effective January 1, 2001, directs the commission, when conducting 3-year updates of the code, to consider "changes made by the adopting entity of any selected model code for any model code incorporated in the Florida Building Code by the commission, *the commission's own interpretations*, declaratory statements, appellate decisions, and approved statewide and local technical amendments." However, the law does not provide direction as to the circumstances under which the commission may issue such interpretations.

Second, the law contains specific authority for the commission to issue nonbinding recommendations regarding the compliance of local amendments to the technical provisions of the Florida Building Code (subsection 553.73(4)(b)9., Florida Statutes, effective January 1, 2001).

Third, the APA exempts from the definition of a rule, "agency legal opinions prior to their use in connection with agency action" (section 120.52(15)(b), Florida Statutes). Therefore, the commission may request and receive staff legal opinions without being required to initiate formal rulemaking procedures.

In summary, while the commission may issue interpretations and recommendations outside of the formal processes required by the APA, the authority to do so is limited and remains to be resolved through either the legislative or judicial process. In the interim, the commission should act through the formal processes of rulemaking or declaratory statements, where applicable, especially when its actions will affect the substantial interests of third parties.