

November 11, 1998

Mr. Rusty Carroll
Chief Structural Code Compliance Officer
Broward County Board of Rules and Appeals
955 S. Federal Highway, Suite 401
Ft. Lauderdale, Florida 33316

Dear Mr. Carroll:

Thank you for your recent correspondence and telephone inquiry regarding use of declaratory statements by the Florida Building Commission. You indicated that, in Broward County, contractors and other licensees sometimes attempt to "do an end run" around pending litigation or dispute with a building official, by requesting an interpretation of the building code from your department. Your letter raises the concern with the same misuse of the declaratory statement process by petitioners to the Florida Building Commission.

Unlike local governments, the commission is governed by the Florida Administrative Procedures Act (APA), or chapter 120 of the Florida Statutes, in the conduct of its business. Chapter 120 is implemented by the Uniform Rules of Procedure in chapter 28 of the Florida Administrative Code. Rule 28-105.001, F.A.C., which provides the purpose and use of declaratory statements, indicates that a declaratory statement is "not an appropriate means for determining the conduct of another person." Rather, a declaratory statement must describe the **potential** impact to the petitioner of the application of some specific statute, rule or order. Fla. Admin. Code R. 28-105.001. As such, the commission has denied, and will continue to deny, petitions for declaratory statement which constitute such an improper use of the declaratory statement.

However, as you indicated during our telephone conversation, it may not be clear from the face of a petition for declaratory statement that such a dispute exists or that litigation is pending. The petition may be an attempt to collaterally attack the local building official, when it appears to be a legitimate petition for clarification. As you described, the statewide commission will not be in a position similar to a local jurisdiction which is aware, or can quickly determine by a telephone call, whether such a dispute exists in that jurisdiction.

In response, I maintain that the rule requirements for a petition for declaratory statement will enable the commission to screen out petitions which constitute an abuse of the APA. Rule 28-105.002, F.A.C., requires that the petition describe how the statutes, rules or orders in question may substantially affect the petitioner in his or her particular set of circumstances. When petitions do not meet this requirement, they are, and will continue to be, routinely dismissed with leave to amend the petition to be more specific. Usually the amended, specific petition reveals an existing dispute about which the commission may inquire further. However, if additional procedures are needed, the commission may choose to require that petitions reveal the name and address of all parties in interest if the declaratory statement will affect others.

The commission will begin the rulemaking process in the spring of 1999. I invite you to become involved in this process to ensure that your interests are addressed. Thank you for your interest and for raising this issue

of importance to the commission. If you need additional information or have further questions, please contact me again.

Sincerely,

Suzanne H. Schmith
Staff Attorney
Florida Building Commission

cc: G. Steven Pfeiffer, Commission Chairman