

STATE OF FLORIDA BUILDING COMMISSION

IN RE:

SECTION 10.8, FLORIDA BUILDING CODE

CASE NO. _____

LOWER TRIBUNAL (BOAF
PANEL) PETITION NO. 217

_____ /

**AMERICAN COUNCIL OF ENGINEERING COMPANIES OF FLORIDA’S PETITION
REQUESTING A PROCEEDING TO APPEAL INTERPRETATION 217 ISSUED BY
THE PANEL BELOW AND INCORPORATED MEMORANDUM OF LAW**

American Council of Engineering Companies of Florida (“ACEC-FL”), by and through the undersigned counsel and pursuant to *Fla. Stat.* § 553.775(3)(c)(7), *Fla. Stat.* § 120.569, and the uniform rules of procedure¹, hereby petitions the Florida Building Commission and appeals Interpretation No. 217 rendered by the panel below (hereinafter the “Panel”), and in support thereof states:

I. IDENTIFICATION OF AFFECTED AGENCIES AND STATEMENT OF ULTIMATE FACT.

1. This petition affects the Florida Building Commission, created and located within the Department of Business and Professional Regulation, whose address is 2601 Blair Stone Road, Tallahassee, FL 32399.

2. On or about December 31, 2020, the City of Gainesville Department of Sustainable Development Building Division (“Gainesville”), whose address is P.O. Box 490, Station 9,

¹ Pursuant to §553.775(3)(c)(7), *Florida Statutes*, this appeal shall be initiated in accordance with chapter 120 and the uniform rules of procedure. Specifically, this appeal regarding a decision determining substantial interests is initiated pursuant to Rule 28-106.301, *Florida Administrative Code*.

Gainesville, FL 32627-0490, issued a Building Division Administrative Policy regarding Section 110.8 of the Florida Building Code (the “Policy”). The Policy is attached hereto as Exhibit A.

3. On or about April 9, 2021, ACEC-FL submitted Petition No. 217 (the “Petition”) to the Florida Building Commission pursuant to *Fla. Stat.* § 553.775(3)(c). The Petition, Statement in Support of Petition, and Gainesville’s Response are attached hereto as Composite Exhibit B.

4. On or about May 19, 2021, the Petition was accepted by the Florida Building Commission.

5. On or about June 2, 2021, the Panel conducted a meeting and rendered a determination based upon Section 110.8 of the Florida Building Code. The determination, titled Florida Building Code Binding Interpretation Report Number 217 (“Interpretation 217”) is attached hereto as Exhibit C.

6. On or about June 15, 2021, ACEC-FL was notified on the Florida Building Code Information System that Interpretation 217 was issued.

7. No material facts are in dispute.

II. EXPLANATION OF HOW THE PETITIONER’S SUBSTANTIAL INTERESTS ARE AFFECTED

8. ACEC-FL, whose address is P.O. Box 750, Tallahassee, FL 32302-0750, is an organization comprised of professional engineers that represents the professional and business interests of professional engineers, in private practice in Florida, and their companies. Since its creation in 1973, ACEC-FL is considered as one of the preeminent advocates for consulting engineers within the state of Florida. As such, ACEC-FL has a duty to its members to protect their members’ interests.

9. ACEC-FL enters this Appeal on behalf of its members, whose substantial interest in contracting with owners to perform private provider services and threshold inspection services

are affected by Interpretation 217, which improperly grants local building officials the arbitrary discretion to decide whether an otherwise qualified private entity can perform both private provider services and required threshold inspections on the same threshold building.

10. Prior to Gainesville's adoption of the Policy, and the subsequent publication of Interpretation 217, qualified private engineers were permitted to contract with owners to perform private provider services and threshold inspections on the same threshold building. Therefore, ACEC-FL, on behalf of its members, is a substantially affected person with standing to appeal Interpretation 217.

III. STATEMENT OF INTERPRETATION THAT PETITIONER CONTENDS REQUIRES REVERSAL

11. Section 110.8.6 of the Florida Building Code provides:

The building department may allow a special inspector to conduct the minimum structural inspection of threshold buildings required by this code, Section 553.73, Florida Statutes, without duplicative inspection by the building department. The building official is responsible for ensuring that any person conducting inspections is qualified as a building inspector under Part XII of Chapter 468, Florida Statutes, or certified as a special inspector under Chapter 471 or 481, Florida Statutes. Inspections of threshold buildings required by Section 553.79(5), Florida Statutes, are in addition to the minimum inspections required by this code.

12. The question submitted to the Panel below was:

Does section 110.8 of the Florida Building Code prohibit a fee owner of a threshold building from selecting a qualified private entity to perform both private provider services and required threshold inspections on the same threshold building?

13. The Panel issued an answer as follows:

No. As per Section 110.8.6, the building official has the authority to allow a qualified private entity to perform both private provider services and required threshold inspections on the same threshold building.

IV. STATEMENT OF THE RELIEF SOUGHT BY PETITIONER

ACEC-FL thus respectfully requests:

14. A hearing pursuant to chapter 120 and the uniform rules of procedure, as prescribed by *Fla. Stat.* § 553.775(3)(c)(7).

15. A final order from the Florida Building Commission pursuant to *Fla. Stat.* § 553.775(3)(c)(7), binding upon all jurisdictions subject to the Florida Building Code, that Section 110.8 does not prohibit the fee owner of a threshold building from selecting a qualified private entity to perform both private provider services and required threshold inspections on the same threshold building, and that the local building official does not have the authority to prohibit a qualified private entity from performing both private provider services and required threshold inspections on the same threshold building.

MEMORANDUM OF LAW

a. Interpretation 217 improperly makes Section 110.8.6 of the Florida Building Code more stringent than Fla. Stat. § 553.791.

The Panel’s conclusion that Section 110.8.6 gives local building officials the discretion to prohibit an otherwise qualified private entity from performing both private provider services and threshold inspections on the same threshold building places the Florida Building Code in direct conflict with *Fla. Stat.* § 553.791. Section 553.791(15)(a), *Florida Statutes*, provides that “[a] local enforcement agency, local building official, or local government may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.”

A private provider is a person licensed as a building code administrator under part XII of Chapter 468, *Florida Statutes*, as an engineer under Chapter 471, *Florida Statutes*, or as an architect under Chapter 481, *Florida Statutes*. § 553.791(1)(j), *Florida Statutes*. The only

limitations placed on a person meeting the definition of a private provider stated above are: (i) that person may only perform building code inspection services that are within the disciplines covered by that person's licensure or certification; and (2) that person may not provide building code inspection services as a private provider upon any building designed or constructed by that person or that person's firm. § 553.791(3), *Florida Statutes*. Additionally, nothing in § 553.791, *Florida Statutes*, can be construed as granting arbitrary discretion to local building officials to prohibit an otherwise qualified private entity from performing private provider services.

There is nothing in § 553.791, *Florida Statutes*, which prohibits a qualified person from performing private provider services if that qualified person also performed threshold inspections. Therefore, any prohibition by a local building official on that basis would be an adoption or enforcement of a law, rule, procedure, policy, qualification, or standard more stringent than those prescribed by § 553.791, *Florida Statutes*. Thus, Interpretation 217 which gives that authority to local building officials is in direct conflict with Florida Law.

b. Section 110.8.6 of the Florida Building Code does not allow the local building official to prohibit a fee owner from selecting a qualified person to perform private provider services.

Section 110.8.6 provides that the "building department may allow a special inspector to conduct the minimum structural inspection of threshold buildings required by [the Florida Building Code], Section 553.73, *Florida Statutes*, without duplicative inspection by the building department." The panel, interpreting the language of this provision in a vacuum, determined that this provision also gives local building officials the authority to prohibit, a qualified person to perform both private provider services and required threshold inspections on the same building. This interpretation is contrary to the Florida Statutes, as discussed above, and is contrary to the plain language of the Florida Building Code.

Fee owners, or their contractors, may choose to use a private provider to provide building code inspection services with regard to the building or structure which they own. Section 110.8.6 is silent as to both private providers and fee owners. The plain language of Section 110.8.6 provides that the local building official may allow the special inspector to conduct the required minimum inspections of threshold buildings without duplicative inspection. Section 110.8.6 does not address or allow a local building official to prohibit a qualified person, chosen by the fee owner or their contractor, from conducting building code inspection services if that person also served as special inspector. Such an interpretation changes the meaning of the plain language of the Florida Building Code and constitutes a new rule or a defacto statutory amendment, for which certain procedures² are required pursuant to *Fla. Stat. § 553.73(1)(a)*. However, such rulemaking procedures are irrelevant here as local building officials would be unable to enforce such a new rule or amendment under § 553.791(15)(a), *Florida Statutes*, as discussed in section “a” above.

c. The panel erred in excluding relevant Florida Statutes from its decision-making process.

During the proceedings below, the Panel improperly failed to consider any text other than the text of Section 110.8 of the Florida Building Code. When presented with § 553.791, *Florida Statutes*, the panel declined to consider the language of that statute.

First, even if the Panel’s decision-making process is confined to the language of the Florida Building Code, § 553.791, *Florida Statutes*, is part of the Florida Building Code. “The [Florida Building Commission] shall adopt...the Florida Building Code which shall contain or incorporate by reference all *laws* and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such law and rules, except as otherwise provided in [*Fla. Stat. §*

² Section 120.54, *Florida Statutes*, governs rulemaking procedures for government agencies.

553.73].” § 553.73(1)(a), *Florida Statutes* (emphasis added). Section 553.791, *Florida Statutes*, is a law which pertains to and governs the design, construction, and erection of buildings, structures, and facilities as well as the enforcement of such laws and rules. Therefore, § 553.791, *Florida Statutes*, is considered a part of the Florida Building Code and, as such, should be properly considered when interpreting the Florida Building Code.

Second, even if § 553.791, *Florida Statutes*, had not been incorporated by reference into the Florida Building Code, relevant Florida Statutes should not be ignored when interpreting the Florida Building Code. Ignoring relevant Florida Statutes creates the possibility, such as in the instant case, that provisions of the Florida Building Code will be interpreted to contradict the laws which govern the Florida Building Code and its creation. Thus, relevant Florida Statutes, such as § 553.791, *Florida Statutes*, must be considered by the Florida Building Commission, and its interpretations panel, when interpreting the language of the Florida Building Code.

- d. There is no provision, in the Florida Building Code or the Florida Statutes, which prohibits a qualified person from performing both private provider services and required threshold inspections on the same threshold building.**

A special inspector is a licensed architect or registered engineer who is certified under Chapter 741 or Chapter 481 of the Florida Statutes to conduct inspections of threshold buildings. § 553.71(9), *Florida Statutes*. While the “special inspector may not serve as a surrogate in carrying out the responsibilities of the building official, the architect, or the engineer of record,” the private provider is also not a “surrogate” for the building official. There is nothing in § 553.791, *Florida Statutes*, which appoints a private provider as a surrogate or substitute for the building official. In fact, private providers and building officials have separate and distinct roles with separate duties and responsibilities under § 553.791, *Florida Statutes*. The fee owner hires a private provider solely to provide building code inspection services with regard to that specific building. §

553.791(2), *Florida Statutes*. While building officials often perform those services, a local building official is “the individual within the governing jurisdiction responsible for direct regulatory administration *or supervision* of plans review, enforcement, and inspection...” § 553.791(g), *Florida Statutes* (emphasis added). Under § 553.791(9), *Florida Statutes*, even when a private provider has been hired by the fee owner, the private provider must provide notice to the local building official of the date and time of any inspections and the local building official may visit the building site as often as necessary to verify that the private provider is performing all required inspections. Therefore, a special inspector cannot be said to be serving as “a surrogate in carrying out the responsibilities of the building official” when that special inspector is also the private provider. Nothing in Section 110.8 of the Florida Building Code restricts an otherwise qualified professional from fulfilling the duties of special inspector and private provider on the same project. In both roles, the professional owes his or her duty to the authority having jurisdiction.

- e. **The role and responsibilities of the local building official, private provider, and special inspector are unaffected when an owner selects one qualified private person or entity to provide both inspection services or when an owner selects separate qualified private persons or entities to provide those same services.**

Gainesville’s Policy, and the interpretation by the Panel allowing such a Policy to be enacted, appears to be predicated on the idea that there is some practical difference between: (1) a circumstance where the same private person or entity serves as both the private provider and special inspector on the same threshold building; and (2) a circumstance where different private persons or entities compensated by the fee owner serve as the private provider and special inspector on the same threshold building. However, neither the building official’s role nor the quality and scope of the services performed by the private persons or entities are different in one circumstance as compared to the other. Pursuant to §§ 553.79 and 553.791, *Florida Statutes*, the local building

official has certain obligations and responsibilities when special inspectors and private providers are hired by the owner. The local building official's important supervisory role is unaffected by whether the special inspector and private provider are the same person or entity or two different private persons or entities. There is no less access and no less oversight granted to the local building official under either scenario. In any event, the local building official must be notified of all required inspections and may visit the building site *as often as necessary* through the process in order to be prepared to issue a certificate of occupancy within the prescribed time period.

Furthermore, just as the local building official's role remains the same in both circumstances above, the scope and quality of inspection services remains unchanged as well. In each of those scenarios, each of the following remains distinct and unchanged: (1) the necessary qualifications of each person or entity serving as a special inspector and/or private provider; (2) the scope of each inspection; (3) the person to whom the special inspector and private provider owe their respective duties, which in both cases is the authority having jurisdiction; and (4) the party responsible for selection and payment of the special inspector and private provider, which in both cases is the owner of the building.

Therefore, there is no logical reason for Gainesville's Policy or Interpretation 217 which improperly grants local building officials the authority to implement such policies. Accordingly, for the all of the reasons stated above, we respectfully request that the Florida Building Commission, upon a hearing pursuant to Section 553.775(3)(c)(7), issue a final order in accordance with the Statement of the Relief Sought by Petitioner.

**WRIGHT, FULFORD, MOORHEAD
& BROWN, P.A.**

/s/ Curtis L. Brown

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Attorneys for ACEC-FL

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2021 a true and correct copy of the foregoing was filed with the office of the clerk of Florida Building Commission and that copies have been furnished to all other parties pursuant to Fla. Admin. Code r. 28-106.104.

/s/ Curtis L. Brown

CURTIS L. BROWN

EXHIBIT A



City of Gainesville

Department of Sustainable Development
Building Division

Building Division Administrative Policy

ISSUED: December 31, 2020

SUBJECT: Special Inspectors / Threshold Inspections

CODE SECTION: FBC - Building - Section 110.8 Threshold Building

Whereas, Florida Statute 468.604(1) determines that compliance with the Florida Building Code is the responsibility of the local building official, thus resulting in the issuance of a Certificate of Occupancy or a Certificate of Completion upon approval of all inspections required by 2020 FBC - Building, 7th edition Chapter 1 - Scope and Administration.

Whereas, Florida Statute 553.79(5)(a) mandates the enforcing agency to require a special inspector to perform structural inspections on a threshold building pursuant to a structural inspection plan prepared by the engineer or architect of record.

Whereas, Florida Statute 553.79(5)(b) establishes the special inspector shall be responsible to the enforcement agency.

Whereas, Florida Statute 553.79(5)(a) establishes the special inspector may not serve as a surrogate in carrying out the responsibilities of the building official.

Whereas, Florida Statute 553.791(2)(a) provides the fee owner the option to contract with a private provider for building code inspection services, as defined in Florida Statute 553.791(1)(d).

Therefore, it is the determination of the building department that a private entity may not perform private provider services and provide required threshold inspection services on the same threshold building within the jurisdiction of the City of Gainesville, Florida.

Pursuant to Florida Statute 553.775, any substantially affected person may appeal this decision to the Florida Building Commission.

John Freeland, Building Official
City of Gainesville

**COMPOSITE
EXHIBIT B**

FLORIDA DEPARTMENT OF
Business & Professional Regulation

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Florida Building Codes
USER: Allen Douglas, The American Council of Engineering Companies of Florida, Petitioner

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Petition #	217
Do you have a Local Board of Appeals	No
If Yes, have they rendered a decision on this issue	No
County	Alachua
Jurisdiction	City of Gainesville
<hr/>	
Building Official	John Freeland
Address/Phone/Email	PO Box 490 Station 9 Gainesville, FL 32 (352) 334-5050 freelandjc@cityof
<hr/>	
Petitioner Name	American Council
Address/Phone/Email	P.O. Box 750 Tallahassee, FL 32 (850) 224-7121 allen@fleng.org
<hr/>	
Petitioner Representative's Name	Curtis Brown
Address/Phone/Email	505 Maitland Ave Suite 1000 Altamonte Spring (407) 425-0234 cbrown@wfmblaw
<hr/>	
Building Code Version	2020
Sub Code	Building
Chapter & Topic	Chapter 1 - Scope
Section	110.8
<hr/>	
If permitted, date of permit application	
<hr/>	

On December 31, 2020, the City of Gainesville Department of Sustainable Development Built Administrative Policy regarding special inspectors and threshold inspections:

Building Division Administrative Policy

ISSUED: December 31, 2020
 SUBJECT: Special Inspectors / Threshold Inspections
 CODE SECTION: FBC - Building - Section 110.8 Threshold Building

Whereas, Florida Statute 468.604(1) determines that compliance with the Florida Building Code building official, thus resulting in the issuance of a Certificate of Occupancy or a Certificate of inspections required by 2020 FBC - Building, 7th edition Chapter 1 - Scope and Administration

Whereas, Florida Statute 553.79(5)(a) mandates the enforcing agency to require a special inspector on a threshold building pursuant to a structural inspection plan prepared by the engineer or architect

Whereas, Florida Statute 553.79(5)(b) establishes the special inspector shall be responsible for the

Whereas, Florida Statute 553.79(5)(a) establishes the special inspector may not serve the responsibilities of the building official.

Whereas, Florida Statute 553.791(2)(a) provides the fee owner the option to contract with a private inspection services, as defined in Florida Statute 553.791(1)(d).

Therefore, it is the determination of the building department that a private entity may not provide required threshold inspection services on the same threshold building within the jurisdiction.

Pursuant to Florida Statute 553.775, any substantially affected person may appeal this decision.

John Freeland, Building Official
 City of Gainesville

Enter statement of the interpretation that the petitioner contends should be given to the provision of the code and a statement supporting the petitioner's interpretation

Does section 110.8 of the Florida Building Code prohibit the fee owner of a threshold building to perform both private provider services and required threshold inspections on the same threshold building?

Petitioner contends that section 110.8 of the Florida Building Code regarding threshold buildings prohibits private entities to perform private provider services and provide threshold inspection services on the same threshold building.

Petitioner's statement in support of this interpretation is attached.

Date	Attached File
03/24/2021	Pet_ID_217_PET_Interp_Statement in Support of Petitioner's Int

Enter local building official response by providing a statement admitting or denying the statement.

Time Waiver Granted



Date Extended To

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Statement in Support of Petitioner's Interpretation

There are three primary reasons why this interpretation should be given to Section 110.8. First, there is no mention of private providers within Section 110.8 of the Florida Building Code. Interpreting this section to restrict or otherwise affect a fee owner's ability to contract with a private provider under Fla. Stat. § 553.791 when there is no reference to private providers would be arbitrary and contrary to the plain language of Section 110.8. An interpretation which is arbitrary and contrary to the plain language of Section 110.8 would alter the section's meaning. Any interpretation which alters the meaning of the plain language of the code is an amendment rather than an interpretation. Amendments to the Florida Building Code must be made pursuant to Fla. Stat. § 553.73(3) and cannot be made through interpretations under Fla. Stat. § 553.775.

Second, the Florida Statutes do not prevent private entities from performing private provider services and threshold inspection services on the same building. Fla. Stat. § 553.79(5)(a) mandates the enforcing agency to require a special inspector to perform structural inspections on a threshold building. Fla. Stat. § 553.791(2)(a) provides fee owners the option to contract with private providers for building code inspection services. Neither Fla. Stat. § 553.79, Fla. Stat. § 553.791, nor any other section of the Florida Statutes restricts a private entity's ability to perform private provider services and threshold inspection services on the same building. Any rule or interpretation of these Florida Statutes to the contrary by the Florida Building Commission or a local building official would constitute an invalid exercise of delegated authority under Fla. Stat. § 120.52(8)(c) which prohibits agencies from implementing rules that enlarge, modify, or contravene the specific provisions of the language of the enabling statute being carried out or interpreted through rulemaking.

Finally, the interpretation given by the City of Gainesville Building Department created a continuing violation of Fla. Stat. § 553.791(15) which states that a “local enforcement agency, local building official, or local government may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.” Fla. Stat. § 553.791 does not prevent private entities from performing private provider services on threshold buildings. Therefore, the City of Gainesville Building Department’s December 31, 2020 policy creating a more stringent standard for qualification as a private provider is in continuing violation of Florida Statute.

For the foregoing reasons, this commission should adopt an interpretation of Florida Building Code Section 110.8 which allows private entities to perform private provider services and threshold building inspections on the same threshold building.

CITY OF GAINESVILLE BUILDING DEPARTMENT

Position #1 - The Intent and Requirements of the Florida Threshold Program

For four decades, the Florida Threshold Program and the special inspector have been an integral part of the inspection process that worked closely with local building officials. These 3rd party engineers provided independent structural inspections, while being directly responsible to the building official with the common goal of avoiding the type of disaster where the collapse of the Harbour Cay Condominium in Cocoa Beach on March 27, 1981, resulted in eleven workers being killed and 23 others injured.

This common goal of protecting the workers during construction and providing for safe and structurally sound buildings, in tandem with building code inspections, has served the industry well over the years. These parallel, yet distinctly separate, inspection programs provide important checks and balances in the inspections of Threshold Buildings and are equally important as professional inspection programs.

The building code inspections performed by the building departments and “building code inspection services” performed by the private providers, as defined in FS 553.791(1)(d), are the same service and should be viewed the same in performance and scope regardless of the entity performing the inspections. These functions are, and should continue to be, separate from the independent threshold program and the threshold inspections performed by the special inspector as required by FS 553.79(5). The Florida Statutes further specify the separate and distinct function of “building code inspection services” by “building inspectors” versus “special inspectors”:

FS 553.791 1(d) - “Building code inspection services” means those services described in s. 468.603(5) and (8) involving the review of building plans as well as those services involving the review of site plans and site work engineering plans or their functional equivalent, to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes.

FS 468.603 (5)(a) - “Building inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed in accordance with the provisions of the governing building codes and state accessibility laws.

FS 553.71 (9) - “Special inspector” means a licensed architect or registered engineer who is certified under chapter 471 or chapter 481 to conduct inspections of threshold buildings.

Combining Threshold Inspections with minimal building code inspection services by building inspectors, including under private provider structural inspections, by the same company, would compromise this long standing independent arrangement established in the *Laws of Florida Chapter 84-365 (FS 553.79)*.

*FS 553.79 (5)(a) During new construction or during repair or restoration projects in which the structural system or structural loading of a building is being modified, the enforcing agency shall require a **special inspector to perform structural inspections on a threshold building** pursuant to a structural inspection plan prepared by the engineer or architect of record. The structural inspection plan must be submitted to and approved by the enforcing agency before the issuance of a building permit for the construction of a threshold building. The purpose of the structural inspection plan is to provide specific inspection procedures and schedules so that the building can be adequately inspected for compliance with the permitted documents. The special inspector may not serve as a surrogate in carrying out the responsibilities of the building official, the architect, or the engineer of record. The contractor's contractual or statutory obligations are not relieved by any action of the special inspector. The special inspector shall determine that a professional engineer who specializes in shoring design has inspected*

the shoring and reshoring for conformance with the shoring and reshoring plans submitted to the enforcing agency. A fee simple title owner of a building, which does not meet the minimum size, height, occupancy, occupancy classification, or number-of-stories criteria which would result in classification as a threshold building under s. 553.71(12), may designate such building as a threshold building, subject to more than the minimum number of inspections required by the Florida Building Code. [emphasis added.]

FS 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 to the enforcement agency. The inspector shall be a person certified, licensed, or registered under chapter 471 as an engineer or under chapter 481 as an architect. (FBC-B 110.8.3) [emphasis added.]

When the private provider contracts for “Building inspector” services as defined in FS 468.603(5)(a), and when also performing threshold inspections, this places the special inspector and the building official’s professional relationship in a compromised position for ensuring compliance with FS 553.79 (5)(b) and with 61G15-35.004 of the Florida Administrative Code.

FAC 61G15-35.004

(3) Special Inspectors shall be in responsible charge of the work of the Authorized Representative, including reviewing reports and spot checks.

(4) Special Inspectors shall institute quality assurance procedures to include but not be limited to requiring unscheduled visits, utilization or relevant check lists, use of a Daily Inspection Report and insuring that the Special Inspector or the Authorized Representative is at the project whenever so required by the inspection plan.

This combined inspection practice would be the first step in diluting the Threshold Program and altering the original intent of the Legislature, for public safety reasons, to require independent structural inspections and still provide accountability to the local building official.

Position #2 - Statutory Compliance Issues

The statutory provisions which created the threshold program in 1983 and the private provider program in 2002 make no reference or changes to the statutory language in either program and continue to be separate and distinct requirements. In other words, the private provider program under FS 553.791 makes no mention of and does not alter in any way the separate and distinct threshold program under FS 553.79(5); rather, FS 553.791 merely provides an alternative private provider program for “building code inspection services” by “building inspectors.” If the Legislature intended FS 553.791 to alter the separate function of “special inspectors” for threshold buildings, it would have specified as much in FS 553.791. The Legislature didn’t specify that change and therefore did not intend it.

The City’s position is this legal concept applies - Expressio unius est exclusio alterius - which means that the express inclusion of items in a statute means that those not listed are excluded.

See *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); "It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius." See also *McFadden v. State*, 737 So. 2d 1073 (Fla. 1999).

The Attorney General's office has issued opinions stating it is a fundamental principle of statutory construction that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.

Position #3 - Authority Solely Granted to the Local Building Official

FBC 110.8.6 - *The building department **may** allow a special inspector to conduct the minimum structural inspection of threshold buildings required by this code, Section 553.73, Florida Statutes, without duplicative inspection by the building department. [emphasis added.]*

Though FBC-B 110.8.6 is permissive (not a requirement) and grants discretion to the **building department**, and not private providers or special inspectors, to accept the special inspector’s inspection for those required building related inspections in FBC Chapter 1 (FS 553.73), the Gainesville building department does not allow this practice and separate inspections and recordation is required by the Gainesville building official.

When the decision is made by the special inspector to combine threshold and private provider inspections, it is a violation of FS 553.79(5)(a); and when decided by the private provider, a violation of their limitations to only provide “building code inspection services” as defined in FS 553.791. With a local building official employed by the jurisdiction, the private provider cannot act as the local building official.

FS 553.79 (5)(a) The special inspector may not serve as a surrogate in carrying out the responsibilities of the building official, the architect, or the engineer of record. (FBC-B 110.8.1)

FS 553.791(1)(d) “Building code inspection services” means those services described in s. 468.603(5) and (8) involving the review of building plans as well as those services involving the review of site plans and site work engineering plans or their functional equivalent, to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes.

FS 468.603(5) “Categories of building code inspectors” include the following:

(a) *“Building inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed in accordance with the provisions of the governing building codes and state accessibility laws.*

FS 468.603 (8) “Plans examiner” means a person who is qualified to determine that plans submitted for purposes of obtaining building and other permits comply with the applicable building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes.

Position #4 – The Structural Inspection Plan & the Special Inspector

Pursuant to FS 553.79 (5)(a), the structural inspection plan must be submitted to and approved by the enforcing agency before the issuance of a building permit for the construction of a threshold building. If the structural inspection plan and the notice by the special inspector, as required by FAC 61G15-35.004, fails to demonstrate compliance, including the use of authorized representative by the special inspector and specifically sub-sections (3) & (4), in the implementation of independent threshold inspections and compliance with FS 553.79 (5)(b), the building official has the right and responsibility to reject the structural inspection plan until the fee owner of a threshold building has selected a special inspector that is independent and directly, without encumbrance, responsible to the enforcement agency.

Position #5 – Potential Conflicts

FS 553.791 requires the fee owner to complete a form acknowledging their intent to use a private provider. All such services shall be the subject of a written contract between the private provider, or the private provider’s firm, and the fee owner or the fee owner’s contractor, upon written authorization of the fee owner. Clearly the fee owner’s contractor, on behalf of the fee owner, has the ability to contract directly with the private provider for services.

FS 553.79 requires the fee owner of a threshold building to select and pay all costs of employing a special inspector; this appears to indicate the owner is required to contract directly with the special inspector.

Under the scenario of an entity contracting with the fee owner’s contractor as a private provider for “Building code inspection services” at the same time that entity is contracting with the fee owner for “Threshold Inspection Services”, there does exist a potential “Conflict of Interest.”

Position #6 – Issuance of the Certificate of Occupancy

During the construction process, the building official is to ensure compliance with the Florida Building Code and to faithfully perform these responsibilities without interference from any person - FS 468.604 (1). The building official, as a public employee, is also bound by the oath of FS 876.05.

The local building official is charged with the duty of issuing a Certificate of Occupancy upon completion of a threshold building. When the plan reviews and the inspections are performed by his/her delegated plans examiner or inspector, there is a level of confidence of compliance with the FBC.

The Gainesville building department’s positions #1-5, as expressed above, can place the building official in an unenviable position of signing a Certificate of Occupancy when he/she has had little control or oversight of the construction process. The integrity of the private provider and threshold programs is paramount in the local building official having the professional confidence in signing the Certificate of Occupancy.

It has been clearly established through documents submitted to the public record that private providers send out the same “designated representative” to act as the inspector in both roles, (private provider inspection services and threshold special inspector services) simultaneously. This practice is unacceptable to the City of Gainesville as it clearly erodes any protections that have long been provided by the Threshold statute, and is ultimately an unacceptable public safety concern.

BUILDING DEPARTMENT CONCLUSION

The Gainesville building department’s policy in question is borne out of the concern that the Threshold Program is being adversely affected by the private sector and the desire to place profit above life safety. It appears the private sector is exceeding the intent of the Threshold Program, as initially created by the Laws of Florida Chapter 83-160.

As amended in the *Laws of Florida Chapter 84-365*, “the special inspector shall be responsible to the enforcement agency.” No statutory changes in the Threshold Program that allows the building department or the private provider to perform or combine the duties of the special inspector in the performance of required threshold inspections have been approved by the Florida Legislature or the Florida Administrative Code, since the creation of the Threshold Program under the Laws of Florida Chapter 83-160.

Since the building department is required to have a special inspector to perform structural inspections on a threshold building, and the private provider is performing the building/structural inspections normally performed by the building department, this 3rd party separation would apply to the special inspector and the private provider as related to building/structural inspections. This maintains the original intent of the Laws of Florida Chapter 83-160, which established the threshold program with the specific intent to address public health, safety, and welfare.

(5)(a) The enforcing agency shall require a special inspector to inspect all structural components of a threshold building which components are related to the public health, safety, or welfare. The inspector shall be present during any time when such components of such building are being constructed.

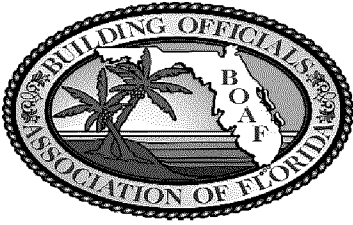
And, to the intent of the Laws of Florida Chapter 84-365, as amended the following year, to include the critical relationship between the special inspector and the enforcement agency.

(b) The fee owner of a threshold building shall pay all costs of employing a special inspector, but the special inspector shall be responsible to the enforcement agency. The inspector shall be a person certified licensed or registered under the building

The Threshold Program pre-dates the private provider option established in the Laws of Florida Chapter 2002-295. If it is the intent of the Florida Building Commission and the private provider industry to dilute the Threshold Program, consideration should be given to the fee owners of potential threshold buildings to the practice of duplicative inspection services and the financial cost associated with this “double dipping” practice of combined services and the lack of independent threshold inspections.

The jurisdictional building official looks to the support of the State of Florida, the Florida Building Commission and BOAF in supporting their efforts to ensure public safety and a safe “built environment” and to document the permitting and inspection process with professional certainty and integrity in the Public Record.

EXHIBIT C



Florida Building Code Binding Interpretation

Report Number 217

Date: June 2, 2021

Report: 217

Code Edition: 7th Edition (2020) Florida Building Code

Florida Building Code - Building Section 110.8

Text of code provisions:

110.8.6 The building department may allow a special inspector to conduct the minimum structural inspection of threshold buildings required by this code, Section 553.73, Florida Statutes, without duplicative inspection by the building department. The building official is responsible for ensuring that any person conducting inspections is qualified as a building inspector under Part XII of Chapter 468, Florida Statutes, or certified as a special inspector under Chapter 471 or 481, Florida Statutes. Inspections of threshold buildings required by Section 553.79(5), Florida Statutes, are in addition to the minimum inspections required by this code.

Appeal question requesting a response:

Does section 110.8 of the Florida Building Code prohibit the fee owner of a threshold building from selecting a qualified private entity to perform both private provider services and required threshold inspections on the same threshold building?

Answer:

No. As per Section 110.8.6, the building official has the authority to allow a qualified private entity to perform both private provider services and required threshold inspections on the same threshold building.

NOTICE:

The Building Officials Association of Florida, in cooperation with the Florida Building Commission, and the Florida Department of Business & Professional Regulation, provides this interpretation of the Florida Building Code in the interest of consistency and application of the Building Code statewide. This interpretation is binding and not subject to acceptance and approval by the local building official.