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M E M O R A N D U M

TO: Members of the Code Enforcement TAC

FROM: Suzanne H. Schmith, Commission Staff Attorney
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SUBJECT: Local Government Authority to Form Boards of Appeal and
Authority of Florida Building Commission to Sanction Local
Governments for Failure to Enforce Building Code

DATE: 7/9/99

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This memorandum addresses two issues on which the Code Enforcement TAC requested a legal opinion.

What is the Source of Local Government Authority to Form Boards of Appeal?

Section 108 of the first draft of the Florida Building Code provides for the establishment of a Construction Board of Adjustment and Appeals by local governments. Chapter 553, Florida Statutes, contemplates the formation of such boards in section 553.73(9)(b) ("Any decision made by the local fire official and the local building official may be appealed to a local administrative board . . . having fire safety responsibilities") and section 553.77(1)(h) ("The commission shall . . . [h]ear appeals of the decisions of local boards of appeal regarding interpretation decisions of local building officials"). §§ 553.73(9)(b) & 553.77(1)(h), Fla. Stat.

(1998 Supp.) The formation of such boards is not inconsistent with this law or with any law of which we are aware.

Constitutional and statutory sources of authority for local governments to form boards of appeal are as follows:

Municipalities are granted broad home rule powers under article VIII, section 2(b) of the Florida Constitution: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const.

Chapter 166, Florida Statutes, the Municipal Home Rule Powers Act, essentially vests in cities the authority contained in article VIII, section 2(b), and instructs that "the provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited." § 166.021(4), Fla. Stat. (1998 Supp.). A municipality could create a board of appeals because it is not expressly prohibited by the constitution or by statute.

Charter counties have powers similar to municipalities. As stated in the Florida Constitution, article VIII, section 1(g), charter counties "shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VIII, § 1(g), Fla. Const. Noncharter counties are more restricted than municipalities and charter counties, and, as described in article VIII, section 1(f) of the Florida Constitution, "shall have such power of self-government as is provided by general or special law." Art. VIII, § 1(f), Fla. Const.

Section 125.01, Florida Statutes, outlines the powers and duties of counties and applies to both charter and noncharter counties. It provides that "[t]he legislative and governing body of a county shall have the power to carry on county government," to the extent this power is not inconsistent with general or special law, and includes the power to "adopt, by reference or in full, and enforce building, housing, and related technical codes and regulations." § 125.01(1)(i), Fla. Stat. (1997). A county could create a board of appeals because such action would not be inconsistent with any present law.

Does the Florida Building Commission Have the Authority to Sanction a Local Government for Failure to Enforce the Florida Building Code?

The Florida Building Code's enabling legislation clearly requires local governments to enforce the contents of the code. *See* § 553.80(1), Fla. Stat. (1998 Supp.). However, the law creates no direct method for the Florida Building Commission ("commission") to compel local governments to adhere to this statutory responsibility or to sanction local governments for failure to enforce the building code. Despite the fact that the commission does not possess such authority, the following remedies are possible methods of forcing proper implementation of the code by a local government:

Gubernatorial Actions Against Municipal and County Officers. The Governor has constitutional authority to initiate judicial proceedings in the name of the state against any county or municipal officer to enforce compliance with any duty or restrain any unauthorized act. *See* Art. IV, § 1(b), Fla. Const. The Governor may suspend from office any county officer for neglect of duty. *See* Art. IV, § 7(a), Fla. Const. Such suspensions are prosecuted by the Governor or his or her designate before the Senate or a select committee of the Senate. The Governor may also suspend from office any appointed municipal official for neglect of duty. *See* § 112.51(1), Fla. Stat. (1997). Presumably, either the commission or a private citizen could petition the Governor to exercise this authority.

Injunction by a third party. It may be possible for an affected party to seek an injunction prohibiting the issuance of a building permit that is not in compliance with the Florida Building Code. Such an action must be filed in the appropriate circuit court by a party who would suffer identifiable injury from the permit's issuance that is distinct from the suffering of other residents in the area. *See* Metropolis Pub. Co. v. Miami, 129 So. 2d 913 (Fla. 1930); Fla. Jur. 2d, Building, Zoning, and Land Controls § 29. This is not an action the commission could pursue and is dependent on the initiative of an appropriately affected citizen.

Writ of Prohibition. A successful writ of prohibition action could stop the issuance of a permit that is not in compliance with the Florida Building Code. The writ is normally associated with actions against a lower court, but it can be enforced against any official or board exercising quasi-judicial power even if it is not technically a court. *See* State ex rel. Sbordy v. Rowlett, 170 So. 2d 311 (Fla. 1936); Grissom v.

State, 104 So. 2d 55 (Fla. 2DCA 1958). The issuance of a permit that is not in compliance with the Florida Building Code fulfills the requirement that the action must be an abuse of jurisdiction and beyond the ministerial duties of the officer who is exercising quasi-judicial power. Like the third party injunction, an action for writ of prohibition must be brought by a person or entity who has a clear right being infringed by the official action, and so could not be brought by the commission.