STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA BUILDING COMMISSION

IN RE: PETITION FOR DECLARATORY STATEMENT BY
JACK A BUTLER

Agency Clerk No. **DS 2023-037**

_____/

AMENDED MEMORANDUM IN SUPPORT OF PETITION

Petitioner Jack A. Butler hereby submits this Amended Memorandum in support of his Petition for Declaratory Statement before the Florida Building Commission.

JURISDICTION

Plaintiff asserts this Petition is filed pursuant to, and conforms with, the requirements of Rule 28-105.002, F.A.C. Petitioner further asserts that the Florida Building Commission ("Commission") has jurisdiction over this matter under §120.565, Fla. Stat., and Rule 28-105.001, F.A.C., in that the Commission has the general power to interpret the Florida Building Code (FBC) under provisions of Chapter 553.72(3), Fla. Stat., which says, "It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. 120.536(1) and 120.54 and enforced by authorized state and local government agencies."

The Florida Legislature provided specific powers related to this Petition in §553.775(3), Fla. Stat., by directing the Commission to issue declaratory statements upon petition by a substantially affected person. The options therein provided that are relevant to this Petition are:

> (a) Upon written application by any substantially affected person or state agency or by a local enforcement agency, the commission shall issue declaratory statements

pursuant to s. 120.565 relating to the enforcement or administration by local governments of the Florida Building Code or the Florida Accessibility Code for Building Construction.

(b) When requested in writing by any substantially affected person or state agency or by a local enforcement agency, the commission shall issue a declaratory statement pursuant to s. 120.565 relating to this part and ss. 515.25, 515.27, 515.29, and 515.37. Actions of the commission are subject to judicial review under s. 120.68.

...

(d) Upon written application by any substantially affected person, contractor, or designer, or a group representing a substantially affected person, contractor, or designer, the commission shall issue or cause to be issued a formal interpretation of the Florida Building Code or the Florida Accessibility Code for Building Construction as prescribed by paragraph (c).

...

(f) Upon written application by any substantially affected person, the commission shall issue a declaratory statement pursuant to s. 120.565 relating to an agency's interpretation and enforcement of the specific provisions of the Florida Building Code or the Florida Accessibility Code for Building Construction which the agency is authorized to enforce. This subsection does not provide any powers, other than advisory, to the commission with respect to any decision of the State Fire Marshal made pursuant to chapter 633.

In addition, §553.73(4)(i), Fla. Stat., says "the commission may review any amendment adopted under this subsection," which provides the duty and authority to the Commission to review local administrative and technical amendments.

DECLARATORY STATEMENTS

Florida law provides the authority for administrative agencies to issue "a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances" (§120.656(1), Fla. Stat.). Any such petition "shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances." (§120.656(2), Fla. Stat.)

The Commission has the specific statutory authority through §553.775(3)(a), Fla. Stat., to "issue declaratory statements pursuant to s. 120.565 relating to the enforcement or administration of the Florida Building Code." Thus, the Commission is the administrative agency designated in Florida law as the one established to provide declaratory statements in response to petitions filed in accordance with Chapter 28-105, F.A.C.

Rule 28-105.001, F.A.C., relevantly says, "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 the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances." The facts of the Petition, as expanded by this Memorandum, establish that it is not filed for resolving purely hypothetical issues, but for addressing a particular set of existing circumstances affecting Petitioner and his future behavior.

The relief offered by a declaratory statement is meant to address a current or pending crisis that is particular to the circumstances of the petitioner. The Commission has previously referenced *Fla. Optometric Ass'n v Dep't of Bus. & Prof'l Regulation, Bd. Of Opticianry*, 567 So.2d 928, 937 (Fla. 1st DCA 1990) as limiting the scope of declaratory statements to instances "where the petition has clearly set forth specific facts and circumstances which show that the questions presented relate only to the petitioner and his particular set of circumstances." The Commission has also quoted *Sutton v. Dep't of Envtl. Prot.*, 654 So.2d 1047, 1048 (Fla. 5th DCA 1995), which said, "A declaratory statement cannot be issued for general applicability."

However, the enabling legislation in §553.73, Fla. Stat., and elsewhere is broadly stated in terms of the topics and applicability of declaratory statements that may be issued by the

Commission. For example, in §553.775(2), Fla. Stat., the Legislature fully anticipated that declaratory statements and code interpretations issued by the Commission would broadly apply—even to the Commission itself and other parties—when it directed:

> Local enforcement agencies, local building officials, state agencies, and the commission shall interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission, except that conflicts between the Florida Fire Prevention Code and the Florida Building Code shall be resolved in accordance with s. 553.73(11)(c) and (d).

Supporting a broader application of the relief provide by declaratory statements, the Florida Supreme Court, ruling in *Florida Dep't of Bus. and Professional Regulation, Div. of Pari-mutuel Wagering v. Investment Corp. of Palm Beach*, 24 Fla. Law Weekly S250, 1999 WL 1018661 (Fla. 1999), said the requirement for a question to deal solely with "petitioner's particular circumstances" does not mean that the answer provided need apply only to that person. It means only that the actual matter in controversy must exist. The Court held that the phrase, "petitioner's particular circumstances," is synonymous to "a particular set of facts." The Court said, "By providing for publication of notice when the petition is filed, the Legislature clearly understood that the answer to a petition for declaratory statement may very well have impact on others who are regulated by the agency." (*Id.*, quoting Judge Cope in 714 So.2d at 592-94.)

The Court also found that the mere belief on the part of an administrative agency that its declaratory statement will apply to other persons similarly situated and may even lead to subsequent rulemaking does not preclude the need for the declaratory statement itself:

> [I]t is sensible for courts to encourage agencies to be responsive to specific questions and then anticipate whether a broader application may occur in the future and take action accordingly. Agency rules established in that manner are pre-empting later disputes rather than simply engaging in crisis management and reacting to endless inquiries each tailored to a petitioner's 'particular set of circumstances.' One approach should not and now does not absolutely foreclose the other. (*Id.*)

Reinforcing this conclusion, the Court found the statute anticipated that the particular set of circumstances described in a petition for declaratory statement would apply to others in requiring public notice of any such petition:

> [I]n *Chiles*, 711 So. 2d at 154-55 (explaining that declaratory statements may help parties avoid costly administrative litigation, while simultaneously providing 'useful guidance to others who are likely to interact with the agency in similar circumstances'). The First District also interpreted the notice provision in the declaratory statement statute as "account[ing] for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties." *Id.* at 155. (*Id.*, at 22.)

This more recent ruling by the Florida Supreme Court trumps the conclusions of earlier inferior courts referenced by the Commission in prior orders denying petitions for declaratory statement, such as in the instance of *Excel Electrical Group, LLC*. (DS 2019-022, Feb. 16, 2018). It is sufficient for the specified circumstances to apply to Petitioner without regard to the possibility that the declaratory statement may also affect other persons similarly situated. Any need for rulemaking identified by the administrative agency in the course of responding to a petition for declaratory statement does not abrogate the need to provide an answer to the petition.

Thus, as a matter of law, the Petition meets the purpose and use requirements of Rule 28-105.001, F.A.C. In addition, the Petition meets the requirements of §120.565(2), Fla. Stat., and Rule 28-105.002, F.A.C., for the form and content of a petition for declaratory statement; and the Commission is the appropriate agency for considering this Petition and rendering a declaratory statement on the subject in answering the questions posed in the Petition. The questions posed are particular to Petitioner's situation, even though they may apply to others.

STANDING OF PETITIONER

Petitioner Jack A. Butler is a Florida Certified Residential Contractor holding Certificate No. CRC1328041 and co-owner and managing member of Butler & Butler, LLC, a Florida-

registered for-profit company organized in March 2002 and in continuous operation since then. Among other services, Petitioner and his firm provide residential design and construction services to clients in Central Florida. Petitioner was recently named the 2023 Designer of the Year by the American Institute of Building Design (AIBD) and is contemplating expanding his firm's design services market to include all of the State of Florida. Petitioner is also a certified planner and a former local government manager who provides advisory services to local governments within Florida. Such services include drafting county and city ordinances. The topic of such ordinances is frequently land development codes, including local ordinances that relate to regulating the building permitting process. Petitioner has been approved as "Exam Eligible" for certification as a building code administrator by the Florida Building Code Administrators and Inspectors Board and is currently preparing to take the exam sequence.

As a volunteer in professional associations, Petitioner is the Chair of the AIBD Codes and Standards Committee, a member of the Codes & Standards Committee of the North American Deck and Railing Association, and AIBD's designated member on the International Code Commission's Affiliated Industries Committee. Petitioner frequently provides guidance to members of these associations on the interpretation and application of building codes across the United States. It was during such activities that Petitioner became aware of the example local administrative amendment adopted by Broward County that is referenced in the Petition. Petitioner is additionally a member of the Building Officials Association of Florida, the American Planning Association, and the American Institute of Certified Planners.

As demonstrated here and in the Petition, Petitioner is a party with substantial interests in the questions placed before the Commission for resolution with regard to the meaning and application of certain statutory and code requirements and is, thus, a substantially affected person

under the requirements of §120.565(1), Fla. Stat. Petitioner further asserts that the circumstances giving rise to the Petition are current and continuing, and apply directly to Petitioner.

QUESTION 1

The Petition asks whether Florida law precludes the adoption by local governments of ordinances creating FBC amendments that modify Florida Statutes related to when construction documents must be prepared by a registered design professional. Petitioner seeks a declaratory statement from the Commission that local FBC amendments, such as the subject modification adopted by Broward County and thereby also applying to several municipalities, is in direct conflict with the provisions of Chapters 471, 481, 489, and 553, Fla. Stat., and that State law triumphs over the local ordinance that adopted the subject administrative FBC amendments. This question does not seek Commission review of the local jurisdiction's interpretation of relevant statutes or the FBC. It seeks the Commission's own interpretation.

Relevant to Question 1, the FBC includes references to the exemptions provided in Florida Statutes for the preparation of construction documents by registered and non-registered persons, as applied under Florida law. For example, FBC-Building in §101.2 says that "Detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories above grade plane in height with a separate means of egress, and their accessory structures not more than three stories above grade plane in height, shall comply with the Florida Building Code, Residential" and are otherwise exempt from the scope of FBC-Building. This is equivalent to the licensed practice of architecture exemptions in Chapter 481, Fla. Stat. In turn, FBC-Residential includes a listing for "Design Professional" in §R202, one that notably does not

appear in FBC-Building, but provides no explicit definition, instead pointing to the definition of registered design professional given later in that section:

> DESIGN PROFESSIONAL. See "Registered design professional."
>
> REGISTERED DESIGN PROFESSIONAL. An individual who is registered or licensed to practice their respective design profession as defined by the statutory requirements of the professional registration laws of the state or jurisdiction in which the project is to be constructed. This includes any registered design professional so long as they are practicing within the scope of their license, which includes those licensed under Chapters 471 and 481, Florida Statutes.

By inference, §R202 defines the term 'Design Professional' as someone who provides design services but is not registered or licensed by the State.[1] The references to Chapters 471 and 481 implicitly includes their exemptions to registration.

Similarly, the Florida Legislature recognized that there were non-registered design professionals interacting with the FBC, not only in the professional practice chapters of Florida Statutes, but also in the enabling legislation for the FBC, where it directed the Commission to "develop and publish an informational and explanatory document which contains descriptions of the roles and responsibilities of the licensed design professional, residential designer, contractor, and local building and fire code officials" (*from* §553.77(2), Fla. Stat.). In the context of the FBC and the exemptions given in Chapter 481, Fla. Stat., the term "residential designer" identifies a design professional, such as Petitioner, who is not registered in the State of Florida but may nevertheless provide design services for the types of residential construction listed as being exempt from licensure as an architect in §481.229(1)(b), Fla. Stat.

In correspondence dated February 3, 2023, with another AIBD member and provided to the Petitioner, Mr. Charles M Kramer, Esq., B.C.S., with the firm of Benson, Mucci & Weiss,

[1] It is important to note here that the term 'Jurisdiction' used in the definition of Registered Design Professional is defined in the FBC as "The governmental unit that has adopted this code under due legislative authority." That governmental unit is the State of Florida since the FBC is adopted by the Commission and not by the various local government entities that may apply and enforce it. This means the professional registration laws of the adopting jurisdiction are those given in Florida Statutes, not local ordinances.

P.I., representing the Broward County Board of Rules and Appeals ("BORA") wrote, "We state that local municipalities located in Broward County have the authority to require that architectural plans submitted for permitting are prepared, signed, and sealed by a licensed architect" *[from a letter addressed to Mr. B.D. Frank in response to Mr. Frank's earlier letter to BORA]*. Mr. Kramer supported this conclusion, in part, by stating that the primary requirement of such local FBC amendments is that they conform to the requirements of §553.73(4), Fla. Stat. which relevantly says, "Local governments may adopt amendments to the administrative provisions of the Florida Building Code, subject to the limitations in this subsection. Local amendments must be more stringent than the minimum standards described in this section."

The problem with his reliance upon this provision is that doing so misrepresents the scope of this authority. The last sentence in the quoted amendment authority is controlling: local amendments can only address FBC content; i.e., the subject of "this section." The exemptions provided in the relevant portions of Florida Statute Chapters 471, 481, and 489 are not contained in the FBC and, thus, are not topics that can be addressed by local amendments.

Mr. Kramer also stated that "there is no general statutory prohibition to a municipality requiring an Architect's stamp and seal approving the plans as a pre-condition of acceptance. Express preemption of local ordinances or orders by state law requires a specific legislative statement; it cannot be implied or inferred." He goes on to reference three Florida court decisions as justification. [*from Page 4 of the subject letter.*]

Petitioner disagrees with the conclusion that there is no such prohibition. The exemption from licensure is provided in §481.229(1)(b), F.S., which says the person who makes plans and specifications for, or supervises the erection, enlargement, or alteration of "[a]ny one-family or two-family residence building, townhouse, or domestic outbuilding appurtenant to any one-

family or two-family residence, regardless of cost" does not need to be a licensed architect. BORA and its attorney appear to believe this provision of Chapter 481 can be overridden by action of local governments because there is no statement of legislative intent blocking such action; however, there actually is such a legislative prohibition. In §481.231(2), Fla. Stat., the Florida Legislature explicitly prohibits a local government from trying to modify the requirements for licensure related to the preparation of construction documents associated with a building permit application:

> **481.231 Effect of part locally.—**
> (1) This part does not repeal, amend, limit, or otherwise affect any specific provision of any local building code or zoning law or ordinance that has been duly adopted, now or hereafter enacted, which is more restrictive, with respect to the services of registered architects or registered interior designers than this part; provided, however, that a licensed architect shall be deemed registered as an interior designer for purposes of offering or rendering interior design services to a county, municipality, or other local government or political subdivision.
> (2) Counties or municipalities which issue building permits shall not issue permits if it is apparent from the application for the building permit that the provisions of this part have been violated; provided, however, that **this subsection shall not authorize the withholding of building permits in cases involving the exceptions and exemptions set out in s. 481.229**. [*emphasis added*]

The plain reading of this limit on local governments and their building officials makes its application to the subject local administrative amendments clear: The BORA amendments to require registered design professionals violate this State pre-emption by authorizing the building official to withhold building permits when the construction documents have not been prepared, signed, and sealed by a Florida-licensed architect. If it is impermissible for the building official to withhold approval of a building permit when the construction documents were prepared in a manner consistent with the exemptions provided in §481.229, Fla. Stat., then it is impermissible for a local jurisdiction to adopt an administrative amendment to the FBC that authorizes such an

action. This means BORA cannot require registered design professionals to prepare construction documents through an FBC amendment or any other local ordinance.

There are two often-referenced instances where local amendments to the FBC are required to be more restrictive or stringent than those contained in the FBC adopted by the Commission. Both appear to be commonly misapplied. The phrase, "more restrictive, with respect to the services of registered architects," in §481.231(1), Fla. Stat., means that a conforming local ordinance may impose more requirements on licensed architects, such as to require architects of high-rise buildings to have additional credentials. It does not mean that the local ordinance can modify the language of §481.229(1), Fla. Stat., and ignore the prohibition of §481.231(2), Fla. Stat., so as to require licensure under other conditions.

The second instance is in §553.79(4), Fla. Stat., which says "The Florida Building Code, after the effective date of adoption pursuant to the provisions of this part, may be modified by local governments to require more stringent standards than those specified in the Florida Building Code, provided the conditions of s. 553.73(4) are met." Paragraph (a) of that referenced s. 553.73(4), Fla. Stat., says, "Local amendments must be more stringent than the minimum standards described in this section." This means the amendment must be more stringent than contained in the FBC (i.e., the subject of that section), which itself is required to comply with all Florida Statutes. The FBC and Chapter 553, Fla. Stat., do not set the standard for who may prepare construction documents. That standard is set in other Florida Statutes. The requirement that local amendments be more stringent than what is contained in the FBC does not mean that local amendments must be more stringent than other Florida laws. It means, for instance, that a county or city may adopt a local administrative amendment to, say, reduce the time for responding to a building permit application from the statutory 10 days to seven days.

While these facts should be dispositive of the issue with a conclusion of law by the Commission that local FBC amendments cannot modify Florida Statutes, there are relevant Attorney General Opinions (AGOs) and Florida court cases that reinforce this conclusion. The first of these is AGO 94-84, which responded to a series of related questions posed by Monroe County regarding its ability to place restrictions on owner/builders. In that opinion, the Attorney General concluded that while a local government may regulate the quality and character of work performed by contractors—including an owner/builder—through a system of permits, fees, and inspections intended to ensure conformance with State and local building regulations, the county could not alter the licensing requirements or exemptions provided in statute. In answer to one of the specific questions posed, the Attorney General wrote that "a local government through its building code may not prohibit that which is allowed or allow that which is prohibited by state law."

Supporting this conclusion was a case reference in Footnote 3: "*City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *pet. for rev. den.*, 408 So. 2d 1092 (Fla. 1981)." Under the heading of "Conflict," the Court found that when a local ordinance conflicted with the provisions of a State statute, it must be stricken. It provided the following legal foundation for this conclusion:

> One impediment to constitutionally derived legislative powers of municipalities occurs when the municipality enacts ordinances which conflict with state law. *City of Miami Beach v. Fleetwood Hotel, Inc., supra; see* Fla. St. U. L. Rev. 137, 148-49 (1975); *cf. City of Miami Beach v. Frankel,* 363 So.2d 555 (Fla. 1978) (Authority granted by general law can be restricted by general law). Municipal ordinances are inferior to state law and must fail when conflict arises. *Rinzler v. Carson,* 262 So.2d 661 (Fla. 1972); *City of Miami Beach v. Fleetwood Hotel, Inc., supra; City of Wilton Manors v. Starling,* 121 So.2d 172 (Fla. 2d DCA 1960); 1979 Op. Att'y Gen. Fla. 079-71 (August 10, 1979); 1975 Op. Att'y Gen. Fla. 075-164 (June, 9, 1975); 3 Fla. St. U.L. Rev. 137, 148-49 (1975). *Contra* 1976 Op. Att'y Gen. Fla. 076-212 (November 10, 1976).
>
> In *Rinzler v. Carson, supra,* the court declared:

> Municipal ordinances are inferior in stature and subordinate to the laws of the state. Accordingly, an ordinance must not conflict with any controlling provision of a state statute, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. **A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.** 23 Fla. Jur., Municipal Corporations, Section 93, p. 116; *State ex rel. Baker v. McCarthy* (1936) 122 Fla. 749, 166 So. 280; *Wilton Manors v. Starling* (1960, Fla.App.), 121 So.2d 172; *Baltimore v. Sitnick,* 254 Md. 303, 255 A.2d 376. In order for a municipal ordinance to prohibit that which is allowed by the general laws of the state there must be an express legislative grant by the state to the municipality authorizing such prohibition. McQuillin, Municipal Corporations, Vol. 5, Section 15.20. 262 So.2d at 668. [*emphasis added*]

This ruling applies equally to county governments and provides caselaw support for the above earlier interpretation of §481.231(2), Fla. Stat.: The State has authorized persons other than registered architects to prepare the construction documents needed to secure a building permit for constructing or modifying a one- or two-family residence or townhouse, including the direction that a local government cannot withhold a building permit because the construction documents were prepared under the provisions of a statutory exemption. The court ruled that the language of §481.231(2), F. S., specifically forbids a local government from countermanding the exemptions in §481.229, F. S.

Another applicable AGO is 94-105, which says:

> This office in Attorney General Opinion 73-263 (interpreting the predecessor statutes to section 481.231 and section 471.037, Florida Statutes) concluded that a local government's building code could be more restrictive with respect to the services provided by registered architects and registered engineers, only to the extent that the provisions thereof are not in conflict with general law regulating such professions and do not operate to deny any rights granted to such a profession by the licensing statute. **Thus, in the case of a statutory exemption from the licensure requirements for an architect or engineer for a specified project, the city could not require such licensure before issuing a building permit.** However, this does not preclude the city from requiring the project to meet the building and safety standards that would otherwise be applicable. [*emphasis added*]

Another useful case reference is *Thomas v. State*, 614 So. 2d 468 (Fla. 1993). This case was related to a violation of a local regulation governing bicycles, which the State had permitted in §316.008, Fla. Stat. The violation led to a search that discovered a concealed weapon for which the cyclist had no permit. In its judgment for that case, which found that the local bicycle regulation was in conflict with Florida Statutes, the Florida Supreme Court wrote the following in its opinion, thereby repeating its earlier judgment in *Rinzler v. Carson, supra*:

> Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute. As this Court stated in *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972), '[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.' Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law.

Less than a year ago, the appellate decision in *Feldman v. Fla. Dep't of Bus. & Prof'l Regulation*, No. 1D21-2997 (Fla. Dist. Ct. App., Dec. 12, 2022) confirmed the exemption in §481.229(1)(b), Fla. Stat., for designing and supervising the construction of one- and two-family homes. Plaintiff Enrique Feldman claimed that this exemption meant he was entitled to provide architectural services so that he could truthfully advertise that he is an "architect" even though he was not licensed by the State as an architect. While the Court upheld the Board of Architecture's finding that Feldman was guilty of the unlicensed practice of architecture, it confirmed that the statutory exemption for one- and two-family homes does not require the design service provider to be registered as an architect. The court found:

> Subsection (1) [of §481.229, Fla. Stat.] clearly states that the listed services in (a)-(c) of that subsection do not require the service provider to be qualified as an architect. As such, anyone—whether a non-architect or architect—is permitted to 'make plans and specifications for, or supervise the erection, enlargement, or alteration' of the types of listed structures. Feldman may provide such services. But doing so doesn't transform him, as the service provider, into an architect; to the contrary, the subsection merely carves out a subset of specified services that don't require a qualified architect.

In addition to the exemptions in Florida Statutes Chapters 471, 481, and 489, the Florida Legislature explicitly forbids the Commission and local governments from including anything regarding professional qualifications in the FBC:

> Provisions relating to the personnel, supervision or training of personnel, or any other professional qualification requirements relating to contractors or their workforce may not be included within the Florida Building Code, and subsections (4), (6), (7), (8), and (9) are not to be construed to allow the inclusion of such provisions within the Florida Building Code by amendment. This restriction applies to both initial development and amendment of the Florida Building Code. (*from* §553.73(2), Fla. Stat.)

This prohibition is wide ranging, applying equally to the original FBC and any subsequent versions, as well as to all amendments, whether adopted by the Commission or a local government. The example BORA amendment impermissibly imposes "other professional qualification requirements." In this context, Petitioner asserts that the phrase "contractor or their workforce" includes design professionals and others involved in preparing construction documents for a contractor to seek a building permit. Supporting this conclusion is §489.103(11), Fla. Stat., which exempts from licensure under that Chapter "any person exempted by the law regulating architects and engineers, including persons doing design work as specified in s. 481.229(b)"; i.e., residential designers. Such an exemption recognizes that non-registered design professional can be considered as part of a contractor's workforce.

When rejecting a building permit application, the local building official has the duty to "identify the specific plan or project features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the permit applicant." [*from* FBC–Residential, §105.6 *in furtherance of* §553.792, Fla. Stat.] For exempt residential projects, Florida law does not permit the building official to reject the application simply because of who prepared the construction documents. In the case of the subject BORA amendments, Florida law precludes a plans examiner from applying local

administrative amendments to the FBC when evaluating construction documents for conformance with the code. In §468.604(3), Fla. Stat., addressing the duties of a plans examiner, the Legislature declared, "It is the responsibility of the plans examiner to conduct review of construction plans submitted in the permit application to assure compliance with **the Florida Building Code and any applicable local technical amendment to the Florida Building Code**" [*emphasis added*]. Local administrative amendments are thus explicitly excluded in the scope of plans review by law. As a result, even if a local government could adopt a local FBC administrative amendment requiring that plans and other construction documents be prepared only by a registered design professional, which Petitioner asserts it cannot, the plans examiner would not be able to reject the documents due to the absence of such a certification.

Registered architects are not the only State-licensed professionals listed in relevant Florida Statutes. In addition to Chapter 481, Fla. Stat., regarding the exemptions for licensure as an architect, the Petition references Florida Statute Chapters 471, which applies to the engineering profession, and 489, which is part of the regulatory structure for building contractors, including Petitioner. There are relevant provisions in each chapter.

Subsection 471.003(2)(a), Fla. Stat., notably includes an exemption from licensure for:

> Any person practicing engineering for the improvement of, or otherwise affecting, property legally owned by her or him, unless such practice involves a public utility or the public health, safety, or welfare or the safety or health of employees. This paragraph shall not be construed as authorizing the practice of engineering through an agent or employee who is not duly licensed under the provisions of this chapter.

As noted in the previously referenced AGO, this exemption accommodates an owner/builder seeking a permit for their own property, but would generally preclude a third party who is not a registered professional engineer to provide engineering services related to preparing construction documents. (There is an exception, discussed below, that keeps this limitation from being

absolute.) There is also a provision that recognizes the potential for crossover between the professions of engineering and architecture, whereby any person licensed in one profession may provide "incidental" services in the other profession.

As with the statutes governing the practice of architecture in Chapter 481, Chapter 471 includes §471.037(2), Fla. Stat., which prohibits a local government from "the withholding of building permits in cases involving the exceptions and exemptions set out in s. 471.003." As a practical matter, this applies mostly to owner/builders, as noted earlier.

Section 489.115(4)(b)2, Fla. Stat., also establishes an exemption for attestations by certain registered contractors to be equivalent to signed and sealed calculations by an engineer related to wind resistance:

> In addition, the board may approve specialized continuing education courses on compliance with the wind resistance provisions for one and two family dwellings contained in the Florida Building Code and any alternate methodologies for providing such wind resistance which have been approved for use by the Florida Building Commission. Division I certificateholders or registrants who demonstrate proficiency upon completion of such specialized courses may certify plans and specifications for one and two family dwellings to be in compliance with the code or alternate methodologies, as appropriate, except for dwellings located in floodways or coastal hazard areas as defined in ss. 60.3D and E of the National Flood Insurance Program.

This provision of Florida law is recognized in FBC-Building §107.3.4.2:

> Certifications by contractors authorized under the provisions of Section 489.115(4)(b), Florida Statutes, shall be considered equivalent to sealed plans and specifications by a person licensed under Chapter 471, Florida Statutes, or Chapter 481, Florida Statutes, by local enforcement agencies for plans review for permitting purposes relating to compliance with the windresistance provisions of the code or alternate methodologies approved by the Florida Building Commission for one- and two-family dwellings. Local enforcement agencies may rely upon such certification by contractors that the plans and specifications submitted conform to the requirements of the code for wind resistance. Upon good cause shown, local government code enforcement agencies may accept or reject plans sealed by persons licensed under Chapters 471, 481 or 489, Florida Statutes.

The subject BORA local administrative amendments ignore all these statutory provisions in the mistaken belief that a local ordinance can override Florida Statutes, even when there is an

explicit prohibition from local governments doing so. Based on a plain reading of the relevant Florida Statutes, applying the clearly stated Legislative intent, and following the published opinions of the Florida Attorney General and caselaw, the only possible conclusion is that the subject local administrative amendments are prohibited by State law and that a declaratory statement to that effect should be issued by the Commission. Petitioner is not asking the Commission in Question 1 to interpret a specific local amendment or to render a verdict on the validity of the example BORA amendment, but seeks a general decision regarding the ability of local amendments to revise Florida Statutes related to licensure of design professionals.

QUESTION 2

Anecdotal evidence reveals that some local jurisdictions apply a broad meaning to the phrase 'special conditions', as it is used in FBC-Building §107.1. If the Commission determines that Florida Statutes and/or the FBC preclude local FBC amendments regarding who may prepare construction documents, it may subsequently be necessary to preclude the ability of a local governments to still apply the requirement through a catch-all "special conditions" trigger. In a way, the example BORA local amendment does so by basing the requirement on a construction-cost threshold rather than any particular physical condition of the site or the elements of proposed construction. In addition to the trigger "special condition" in the subject Broward County amendments, Petitioner is aware of jurisdictions in other states that use building size and/or cost thresholds to classify an application as possessing special conditions and thereby trigger a requirement that construction documents be prepared by a registered design professional.

A declaratory statement by the Commission that local governments must comply with Florida Statutes—a statement that should not be necessary but is apparently required—should not immediately be circumvented by a backdoor mechanism to declare, officially or not, that special conditions exist when an arbitrary construction project cost or size threshold is reached, thereby authorizing the local building official to require construction documents to be prepared by a registered design professional. The Commission should recognize in its declaratory statement that §§481.229(1)(a) and (b), Fla. Stat., specifically prohibit the use of a construction cost threshold as a trigger for residential construction documents to be prepared by a registered design professional.

Petitioner contends that a special condition must be one arising from either a specific characteristic of the construction site, such as poor soils or steep slopes, or the particular design elements of the proposed structure, such as a fenestration that exceeds the proscriptive provisions of a header table in the FBC or its referenced standards.

QUESTION 3

Petitioner further contends that the "additional construction documents" that may be required to address such special conditions are not a wholesale replacement for the regular set of construction documents described in the FBC and which, for specified structures, may be prepared by unregistered design professionals or owner/builders. These additional construction documents could be as complex as a set of foundation plans prepared by a professional engineer to address specific soil conditions or as simple as a professional engineer's letter stating that the proposed design for headers supporting openings that exceed the lengths addressed in FBC load tables are adequate for the intended purpose. To instead order that the entire set of construction

documents must be prepared by a registered design professional due to the presence of a special condition is another backdoor to do what would otherwise be prohibited by law and should be precluded by the Commission's declaratory statement.

QUESTION 4

Question 4 seeks an answer that will guide Petitioner in choosing a future course of action related to the various avenues of relief provided in Florida Statutes, where administrative and technical amendments to the FBC are treated differently. The answer will allow Petitioner to apply the same definitions used by the Commission. A definition for 'Local Technical Amendment' is provided in §553.71(6), Fla. Stat.: "'Local technical amendment' means an action by a local governing authority that results in a technical change to the Florida Building Code and its local enforcement." By extension, a 'Local Administrative Amendment' is implicitly defined as one that does not result in a technical change to the FBC. However, this is not a useful definition in application since there is no definition provided for 'technical change'.

Absent a formal published definition, there appears to be a general assumption that any local ordinance that modifies FBC Chapter 1 Scope and Administration is an administrative amendment. (Local changes to Chapter 2 Definitions may also fall into this classification.) Petitioner argues that such an automatic classification, if it exists in Commission policies and practices, is not supported by the text of this chapter and the nature of local amendments. As demonstrated earlier, plans examiners cannot consider administrative amendments in their code compliance review; therefore, administrative amendments cannot result in any changes to what is contained in a construction document.

For example, the subject BORA amendment that seeks to modify Florida law and require construction documents to be prepared by a registered design professional does not create a procedural modification to an administrative process; it appears to be a technical amendment that alters what must appear on construction documents (stamps, seals, and signatures). Under Florida law, imposing licensure requirements on the persons who create construction documents or modifying what is contained in those documents is a technical amendment specifically because it modifies the requirements to get a permit. Otherwise, the amendment cannot be applied in practice due to the explicit direction given by the Legislature regarding the plans review process in §468.604(3), Fla. Stat., as noted in the discussion of Question 1, above; however, BORA says it is an administrative amendment. The Commission's answer to Question 4 will allow Petitioner to properly identify the class of this amendment.

The Florida Legislature recognized that there could be some confusion regarding the classification of a local amendment as administrative when it may actually be a technical amendment by including the provisions of §553.73(l), Fla. Stat., which supply a mechanism for the Commission to settle the question of classification:

> If a local government adopts a regulation, law, ordinance, policy, amendment, or land use or zoning provision without using the process established in this subsection, and a substantially affected person considers such regulation, law, ordinance, policy, amendment, or land use or zoning provision to be a technical amendment to the Florida Building Code, then the substantially affected person may submit a petition to the commission for a nonbinding advisory opinion. If a substantially affected person submits a request in accordance with this paragraph, the commission shall issue a nonbinding advisory opinion stating whether or not the commission interprets the regulation, law, ordinance, policy, amendment, or land use or zoning provision as a technical amendment to the Florida Building Code. As used in this paragraph, the term "local government" means a county, municipality, special district, or political subdivision of the state.

The Commission's answer to Question 4 will inform Petitioner's future actions regarding any objection he may have regarding the proper classification and resulting appropriate process

used to adopt the subject Broward County local FBC amendment. Petitioner emphasizes that he is not seeking a decision as to whether the example BORA amendment is administrative or technical in nature, but seeks guidance on the general identifying characteristics of each type. The Commission's answer will allow Petitioner to determine whether the process in §553.73(l), Fla. Stat., applies in the instant example.

QUESTION 5

In the course of preparing the Petition, Petitioner sought to fully understand the requirements of §553.73(4), Fla. Stat., as they apply to local administrative amendments. This subsection mixes requirements for local administrative and technical amendments to the FBC, with some paragraphs being clearly addressed to the process to be followed for making technical amendments and others appearing to apply to both types of local amendments. Based solely on the explicit wording and the structural organization of the subsection, it appears to Petitioner that the following paragraphs in §553.73(4), Fla. Stat., apply to both local amendment types: (a); (c); (d); (e); (h); (i); and (j). The paragraphs that apply solely to local technical amendments in §553.73(4), Fla. Stat., seem to be: (b); (f); (g); (k); and (l). There did not appear to be any paragraphs that apply only to local administrative amendments.

If this rubric is correct, then all local amendments, including those classified as administrative, are subject to the fiscal impact statement requirement of ¶(4)(h), which says:

> An amendment adopted under this subsection must include a fiscal impact statement that documents the costs and benefits of the proposed amendment. Criteria for the fiscal impact statement shall include the impact to local government relative to enforcement and the impact to property and building owners and industry relative to the cost of compliance. The fiscal impact statement may not be used as a basis for challenging the amendment for compliance. (§553.73(4)(h), Fla. Stat.)

Petitioner was not able to find examples of local administrative amendments with fiscal impact statements on the Commission's website and asks the Commission to clarify those

portions of the adoption process contained in §553.73(4), Fla. Stat., that apply to local administrative amendments. The Commission's answer to this question will inform Petitioner's future actions regarding any objection he may have about the classification and process used to adopt the subject Broward County local FBC amendment.

QUESTION 6

If the Commission agrees with the assertion Petitioner makes immediately above regarding the process to be followed to adopt a local administrative amendment, then Question 6 asks the Commission to compare the requirements of that process to the record of the process used by BORA to adopt its current 2020 FBC and future 2023 FBC amendments. The BORA record available to Petitioner omits, for example, any reference to a fiscal impact statement.

In the past, the Commission has declined to respond to petitions for declaratory judgment involving local amendments, believing them to be outside the Commission's purview. For example, writing in its Order denying a petition for declaratory statement in the instance of *WRS Development LLC* (DS 2018-002, June 28, 2019), the Commission concluded, "Local amendments are not part of the Florida Building Code, and the Commission has no authority to interpret them." Petitioner respectfully asserts that this conclusion is in conflict with all the controlling Florida Statutes.

An amendment to the FBC changes the FBC regardless of how that amendment is adopted. The word 'amendment' is consistently used in Florida Statutes to refer to changes made by the Commission and local governments. Merriam Webster's Dictionary defines the word as "the process of altering or amending a law or document (such as a constitution) by parliamentary or constitutional procedure" (https://www.merriam-webster.com/dictionary/amendment). The

document being amended through the local adoption process described in §553.73(4), Fla. Stat., is the FBC. The local amendments authorized in §553.73(4), Fla. Stat., are changes to the FBC that differ from those adopted by the Commission only in that they are limited in their geographical scope to the area under the jurisdiction of the adopting local agency.

As referenced earlier, §553.71(6), Fla. Stat., says that a local technical amendment is "an action by a local governing authority that results in a technical change to the Florida Building Code and its local enforcement." If a local technical amendment changes the text of the FBC, then a local administrative amendment must also. There is only one FBC.

It is clearly stated in multiple Florida Statutes that there is a single, unified building code that applies to the entire state:

- The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of **a single, unified state building code, to be called the Florida Building Code**, which consists of a single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state and to the enforcement of such requirements and which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida at the most reasonable cost to the consumer. The Florida Building Code shall be organized to provide consistency and simplicity of use. The Florida Building Code shall be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction. The Florida Building Code shall provide for flexibility to be exercised in a manner that meets minimum requirements, is affordable, does not inhibit competition, and promotes innovation and new technology. The Florida Building Code shall establish minimum standards primarily for public health and lifesafety, and secondarily for protection of property as appropriate. (§553.72(1), Fla. Stat.) [*emphasis added*]

- It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. 120.536(1) and 120.54 and enforced by authorized state and local government enforcement agencies. (§553.72(3), Fla. Stat.)

- The commission shall adopt, by rule pursuant to ss. 120.536(1) and 120.54, 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 laws and rules, except as otherwise provided in this section. (§553.73(1)(a), Fla. Stat.)

- The commission shall incorporate within the Florida Building Code provisions that address regional and local concerns and variations. The commission shall make every effort to minimize conflicts between the Florida Building Code, the Florida Fire Prevention Code, and the Life Safety Code. (*from* §553.73(3), Fla. Stat.)

The plain reading of these provisions means the FBC consists not only of the looseleaf-bound publications created by the Commission, along with published errata and amendments adopted by the Commission. It also includes all the local administrative and technical amendments. All are amendments to the FBC, over which the Commission has complete agency authority.

The BORA amendment document refers to it as being subject to the *South Florida Building Code (SFBC), Broward Edition*. There can be no such code today. It was eliminated by an act of the Florida Legislature (Chapter 2000-141, Laws of Florida), which was codified as §553.898, Fla. Stat.:

> **Preemption; certain special acts concerning general purpose local government repealed.**—Chapter 2000-141, Laws of Florida, does not imply any repeal or sunset of existing general or special laws governing any special district that are not specifically identified by chapter 2000-141. However, **chapter 2000-141 is intended as a comprehensive revision of the regulation by counties and municipalities of the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings. Therefore, any sections or provisions of any special act governing those activities by any general purpose local government are hereby repealed.**" [*emphasis added*]

The referenced SFBC was adopted prior to the effective date of Chapter 2000-141, Laws of Florida, and was thus repealed by that Act pending adoption of the replacement statewide FBC. Once the Commission adopted the original FBC, all other building codes previously adopted by local governments, including the Broward County version of the SFBC, were instantly rendered null and void and may no longer be applied to regulate the construction or modifications of structures anywhere in the state. It would be inconsistent with the stated

legislative intent for local governments to be able to reconstruct old local building codes through a series of FBC local amendments. By its adoption of local amendments to the FBC, BORA is attempting to impermissibly resurrect or reconstruct a separate regional code—an act that is expressly forbidden by Florida Statutes. The Commission has a duty to advise Broward County that the SFBC is no longer valid and cannot be the basis for regulatory efforts at the local level.

As to any remaining argument that the Commission has no jurisdiction to review local amendments, such as the one repeatedly adopted by BORA for Broward County as a succession of amendments to the multiple versions of the FBC, Petitioner asserts the Commission has already reviewed and rejected them in accordance with the law:

> Upon updating the Florida Building Code every 3 years, the commission shall review existing provisions of law and make recommendations to the Legislature for the next regular session of the Legislature regarding provisions of law that should be revised or repealed to ensure consistency with the Florida Building Code at the point the update goes into effect. (*from* §553.77(1)(b))

> An amendment to the Florida Building Code adopted by a local government under this subsection is effective only until the adoption of the new edition of the Florida Building Code by the commission every third year. At such time, the commission shall review such amendment for consistency with the criteria in paragraph (9)(a) and adopt such amendment as part of the Florida Building Code or rescind the amendment. The commission shall immediately notify the respective local government of the rescission of any amendment. After receiving such notice, the respective local government may readopt the rescinded amendment under the provisions of this subsection. (§553.73(4)(e), Fla. Stat.)

In each triennial review period while the subject Broward County amendments have been in effect, the Commission has apparently examined the amendments and rejected them as either unnecessary or improper. This is especially noteworthy because the Commission has been directed by the Florida Legislature to "incorporate within the Florida Building Code provisions that address regional and local concerns and variations" (*from* §553.73(3)(d), Fla. Stat.). The BORA amendments are not in the FBC, which is why they keep being adopted as local

amendments. As noted in the above-quoted §553.73(4)(e), Fla. Stat., and in Rule 61G20-2.003(5), F.A.C., the Commission should have repeatedly notified BORA of its amendments being rejected and rescinded for not conforming to the requirements for FBC amendments.

BORA staff acknowledged this process and its impact on their historical local amendments (but did not mention receiving a Commission-issued notice of rejection) in its memorandum of September 10, 2020, transmitting the proposed 2020 FBC amendments to BORA members:

> All our existing amendments, including Chapter 1, expire when a new building code becomes effective, and therefore they need to be re-adopted, updated, or discarded. The staff has discussed at length and incorporated into the text improvements and addressed issues as deemed appropriate. This final draft has been reviewed by our Legal Counselor Mr. Charles Kramer and his recommended corrections were also included. Most of the changes are an effort to streamline Chapter 1, remove redundancies, consolidate two or more sections into one, and stay close to the Florida statewide Chapter 1. Significant changes are related to an effort to codify BORA adopted policies, or changes in the County's charter." [*This document was an attachment to the BORA agenda for the meeting at which the amendments would be considered on 09/10/2020, where it was referenced as "Staff Report."*]

No fiscal impact analysis was included, as required by §553.73(4)(h), Fla. Stat., nor is the scientific consideration or technical justification of any amendment documented. For example, the local amendment process demands the adopting jurisdiction to identify the local conditions motivating the amendments; in this case, requiring construction documents to be prepared by registered design professionals. It appears that no required technical analyses were conducted since the available BORA records seem to say, "This is what we adopted before, with a few edits." As a result, BORA appears to have ignored the repeated Commission rejections of its local amendments and adopted conflicting local ordinances containing so-called administrative amendments to the statewide version of the FBC as a routine action without performing the statutorily required analyses.

In order to help determine whether such improper local amendments were being routinely adopted by local governments, Petitioner filed a public records request with his city of residence, Winter Garden, which adopted two local technical amendments through City Ordinance 20-15 on February 27, 2020. No documents could be found to supported the city's completion of even a single requirement, even though the ordinance claimed they had been done.

While this small sample is only anecdotal, lack of due process appears to be common. The Commission must condemn this practice. The Commission has the authority, granted by the Florida Legislature in §553.775(2), Fla. Stat., to establish statewide consistency through "declaratory statements and interpretations entered by the commission." The Legislature further directed the Commission to create, maintain, and interpret the FBC so that it "meets minimum requirements, is affordable, does not inhibit competition, and promotes innovation and new technology" in §553.72(1), Fla. Stat.

In accordance with the statutory authority set in §553.73(4)(i), Fla. Stat., Petitioner recognizes that a direct answer to Question 6 would be a nonbinding recommendation related to the compliance of this example with the specified amendment adoption process; however, it is included in this Petition due to the subject matter so that it could serve as a working illustration for applying the process, not as direction to the related local jurisdiction. It also serves as a prime example why the Commission should render an opinion on the scope of local amendments, which appear to be unchecked in defiance of Florida law and the FBC.

As noted by the court in *Mackey v. Household Bank*, F.S.B., 677 So.2d 1295, 1298 (Fla. 4th DCA 1996), "Laws should be enforced with common sense and applied without losing sight of the legislative purpose behind their enactment. To do otherwise is to generate disrespect for the law by creating a morass of technical regulations with no connection to human experience."

The Florida Supreme Court went further by declaring in *Fla. Dept. of Bus. Reg. v. Invest. Corp.*, 747 So. 2d 374 (Fla. 1999), that issuing a declaratory statement "performs a valuable public service in resolving the petition presented and then alerting others via the statute's notice provision as to the agency's position on the discrete issue involved. *See Chiles,* 711 So.2d at 154-55 (explaining that 'the reasoning employed by the agency in support of the declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances')."

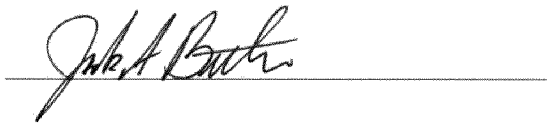
QUESTION 7

Through field application as a contractor over the last 20 years, Petitioner is aware that many elements of FBC-Building are applied to govern the construction and modification of residential structures, which are also governed by the separate FBC-Residential. In the course of researching the various prior questions posed in the Petition, Petitioner became aware of an apparent paradox or circular logic contained in these two documents.

FBC-Building §101.2 says that "Detached one- and two-family dwellings and multiple single-family dwellings (townhouses) not more than three stories above grade plane in height with a separate means of egress, and their accessory structures not more than three stories above grade plane in height, shall comply with the Florida Building Code, Residential" and are otherwise exempt from the scope of FBC-Building. This is very similar wording to the exemptions provided in 481.229(1)(b), Fla. Stat.—a fact noted in the earlier discussion regarding Question 1. In turn, §R101.2.1 of FBC-Residential says, "The provisions of Chapter 1, Florida Building Code, Building, shall govern the administration and enforcement of the Florida

Building Code, Residential." In other words, the two documents point to each other as containing applicable FBC requirements given in its Chapter 1, but neither has such content.

Taken literally, the only provision of FBC-Building that would seem to apply is the statement that any activity covered by FBC-Residential is exempt from the provisions of FBC-Building and is governed only by FBC-Residential, which has no such provisions. The result would be that there is no Chapter 1 content to apply to residential construction under FBC-Residential. Nevertheless, Chapter 1 in FBC-Building contains content specifically addressing the very residential construction it explicitly says is not covered by that document. The answer to this question will inform Petitioner as to how to structure local building ordinances for his clients and better understand the FBC as it applies to the residential projects he designs and builds.



September 20, 2023

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