

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

**IN RE: PETITION FOR A NON-BINDING
ADVISORY OPINION BY JACK A BUTLER**

Agency Clerk No. _____

_____ /

ADDITIONAL INFORMATION

Petitioner Jack A. Butler hereby submits this additional information in support of his Petition for a Non-binding Advisory Opinion before the Florida Building Commission (“Commission”). The information and arguments provided in this document supplement and support the main body of the Petition included on the required Form #61G20-2.003NBAO, effective April 2022, as specified in Rule 61G20-2.003(4), F.A.C.

JURISDICTION

Petitioner asserts this Petition is filed pursuant to, and conforms with, the requirements of §553.73(4)(l), Fla. Stat. Petitioner further asserts that the Commission has jurisdiction over this matter under §§553.73(4)(i) and 553.73(4)(l), Fla. Stat., and Rule 61G20-2.003, F.A.C.

The referenced Paragraph (i) says, “In addition to paragraphs (f) and (g), the commission may review **any amendments** adopted under this subsection and make nonbinding recommendations related to compliance of such amendments with this subsection” [*emphasis added*]. Petitioner asserts that the reference to “this subsection” is to §553.73(4), Fla. Stat., in its entirety. Indeed, the statute itself clarifies in §553.73(2), Fla. Stat., that §553.73(4), Fla. Stat., is a subsection when it is included in a list of those subsections of the statute that may not be viewed

as authorizing any amendment that will impose “provisions related to personnel.” Thus, *any* amendment—administrative or technical—would be subject to Commission review and the local adoption process described in that subsection.

The statute provides no guidance as to how such a review might be initiated by a substantially affected person; however, the subsection offers two other forms of relief to address the needs of a substantially affected person. The first is for a clearly identified local technical amendment, which would be subject to the challenge process referenced in Paragraphs (f) and (g) in that subsection. The second is provided by the provisions of §553.73(4)(1), Fla. Stat., which apply when an amendment has been identified by a local government as administrative in nature (or is presented as being unrelated to the FBC) but a substantially affected person believes it to actually be a local technical amendment.

In the latter case, §553.73(4)(1), Fla. Stat., notably says, “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.” The subject local amendments were adopted by ordinance and, therefore, meet the criteria given in the statute for the Commission to review them. The subject form provided by Rule 61G20-2.003(4), F.A.C. is for this type of request and was used for this Petition.

Unlike a petition for declaratory statement, the Commission has no option to deny the requested review and must issue its non-binding opinion, which does not require the local government to take any subsequent action. In addition to informing the local government, the intent of this review process appears to be to advise the petitioner as to a future course of action; i.e., using the challenge process found in §§553.73(4)(f) and (g), Fla. Stat.

The standard form provided on the Commission’s website is also being used by the Petitioner here to facilitate the review being sought under the provisions of §553.73(4)(i), Fla. Stat., which direct the Commission to review any local amendment and make similar non-binding recommendations regarding the local government’s compliance with the adoption requirements specified in §553.73(4), Fla. Stat. Therefore, whether the Commission ultimately decides the subject local amendments are administrative or technical in nature, Commission review and subsequent issuance of a non-binding opinion are proper.

QUESTIONS POSED

The subjects of this Petition are local amendments adopted by the Broward County Board of Rules and Appeals (“BORA”) that impose new requirements for construction documents to be prepared by a registered design professional. (See Exhibit A for the full text of the subject amendments.) This Petition poses two related but independent questions about those amendments:

1. Are the subject amendments, implicitly classified as administrative amendments by BORA, actually technical amendments that are subject to additional requirements prior to and following adoption?
2. Did BORA properly follow the local amendment adoption procedure described in §553.73(4), Fla. Stat., when the subject amendments were adopted as part of a larger package of amendments?

These two questions must be answered in the order they are posed since there are separate requirements for adopting local administrative and technical amendments; however, there are four core prerequisite issues to be resolved first:

1. What are the relevant local amendment adoption processes required by Florida Statutes?
2. What is an amendment to the FBC?
3. What is a local administrative amendment?

4. What is a local technical amendment?

Each of these questions will be addressed below, where Petitioner will propose definitions for adoption by the Commission in conducting its review of the subject local amendments.

LOCAL AMENDMENT ADOPTION PROCESSES

Florida law establishes the ability for local governments to adopt amendments to the FBC. In §553.73(4)(a), Fla. Stat., “Local governments may adopt amendments to the administrative provisions of the Florida Building Code, subject to the limitations in this subsection.” Technical amendments may be adopted by local governments under the provisions of §553.73(4)(b), Fla. Stat., which says, “Local governments may, subject to the limitations in this section and not more than once every 6 months, adopt amendments to the technical provisions of the Florida Building Code that apply solely within the jurisdiction of such government and that provide for more stringent requirements than those specified in the Florida Building Code.” The paragraph then lists three conditions that must be met before a local government can adopt a technical amendment:

1. The local governing body determines, following a public hearing which has been advertised in a newspaper of general circulation at least 10 days before the hearing, that there is a need to strengthen the requirements of the Florida Building Code. The determination must be based upon a review of local conditions by the local governing body, which review demonstrates by evidence or data that the geographical jurisdiction governed by the local governing body exhibits a local need to strengthen the Florida Building Code beyond the needs or regional variation addressed by the Florida Building Code, that the local need is addressed by the proposed local amendment, and that the amendment is no more stringent than necessary to address the local need.
2. Such additional requirements are not discriminatory against materials, products, or construction techniques of demonstrated capabilities.
3. Such additional requirements may not introduce a new subject not addressed in the Florida Building Code. [from §553.73(4)(b), Fla. Stat.]

These are not the only prerequisite requirements for adopting a local technical amendment, however. Prior to considering the adoption of any local technical amendment, §553.73(4)(f), Fla. Stat., requires the local government to establish a “countywide compliance

review board” to hear challenges to an adopted local technical amendment by a substantially affected person. This paragraph and the following §553.73(4)(g), Fla. Stat., describe the process and remedy for a local technical amendment challenge. Notably, the latter paragraph says, “The local government adopting the amendment that is subject to challenge has the burden of proving that the amendment complies with this subsection in proceedings before the compliance review board and the commission, as applicable.”

All local amendments require the local government to prepare a fiscal impact statement under the provisions of §553.73(4)(h), Fla. Stat., which says, in part, “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.” Although the paragraph says that the *content* of the fiscal impact statement “may not be used as a basis for challenging the amendment for compliance,” the complete absence of a fiscal impact statement would be a breach of the required procedure.

Petitioner asserts that the general requirements for the fiscal impact statement are contained in §120.541, Fla. Stat., which is part of the Florida Administrative Procedures Act (APA). Petitioner additionally asserts that the intent of the fiscal impact statement guidance in §553.73(4)(h), Fla. Stat., is to clarify what is required in the statement of regulatory costs specified in §120.541(2), Fla. Stat. For example, where §120.541(2)(b), Fla. Stat., calls for “A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by

the rule,” §553.73(4)(h), Fla. Stat., says such affected people are “property and building owners and industry.”

Further supporting Petitioner’s contention that the APA applies to the fiscal impact statements required by §553.73(4)(h), Fla. Stat., is the specific reference to FBC amendments in §120.541, Fla. Stat.:

- (3) If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.
- (4) Subsection (3) does not apply to the adoption of:
 - (a) Federal standards pursuant to s. 120.54(6).
 - (b) Triennial updates of and **amendments to the Florida Building Code which are expressly authorized by s. 553.73** [*emphasis added*].
 - (c) Triennial updates of and amendments to the Florida Fire Prevention Code which are expressly authorized by s. 633.202

Local amendments are among those “expressly authorized by s. 553.73,” Fla. Stat. Their exclusion from the additional review process stated in §120.541(3), Fla. Stat., clearly indicates that the remaining requirements for fiscal impact statements apply. This conclusion is supported by the local technical amendment review procedure given in §553.73(4)(g), Fla. Stat., which involves a hearing by an administrative law judge operating in accordance with the APA, and the basic premise of the APA rule challenge process, which says that any administrative hearing conducted to review a rule “shall be *de novo* in nature” (from §120.56(1)(e), Fla. Stat.). The general requirement for a *de novo* review, which involves a complete hearing of the matter rather than a simple review of the existing record, is to eliminate any bias to adopt the agency’s opinion. This is consistent with the requirement given in §553.73(4)(g), Fla. Stat., that the burden of proof regarding the validity of a local technical amendment is on the local government.

To summarize, both local administrative and technical amendments are subject to the limitations in §553.73(4), Fla. Stat. Both amendment types require a fiscal impact statement to be

prepared and publicized prior to adoption and are repealed when the Commission adopts a new version of the FBC. Local technical amendments have many additional procedural requirements, starting with establishing a countywide compliance review board before the first such amendment may be considered. Each local technical amendment must go through a justification process that includes an individualized assessment of the need for the amendment and three content tests that must be passed by the proposed amendment. There are also limits on the frequency and manner of adopting local technical amendments and a detailed review/challenge process involving the countywide compliance review board, the Commission, and the Division of Administrative Hearings (DOAH).

WHAT IS AN AMENDMENT?

It may seem that asking the question, “What is an amendment?” would be completely unnecessary, but it goes to heart of the amendment adoption process. Petitioner asserts that the subject local amendments were part of a comprehensive set of edits to the FBC in an attempt by BORA to create what it calls the “South Florida Building Code – Broward Edition.” The subject edits consist of deletions (strikethrough text) and additions (underlined text) covering many different topics. BORA appears to believe that these numerous edits constitute a single local amendment. Petitioner asserts that these many different edits construct numerous separate amendments, each subject to the adoption process contained in §553.73(4), Fla. Stat.

Petitioner proposes that the true definition of *amendment* is “a set of one or more deletions and/or additions addressing a single logical change to the FBC.” An amendment may apply to only a single subject, but may result in extensive edits to the FBC. It is not the number of edits, but the limitation of an amendment to a single definable subject or action, that serves as

the core of the proposed definition. Applying this definition results in the three subject BORA additions to the FBC being clearly shown to be three separate local amendments.

There is a practical aspect to the proposed definition since it is consistent with the requirement in §553.73(4)(h), Fla. Stat., for a fiscal impact statement. Relevant to two of the subject local amendments, one of which is imposed on “buildings and/or structures (except single-family residences), alterations, repairs, improvements, replacements or additions, costing fifteen thousand dollars (\$15,000.00) or more” (*from* §107.3.4.0.1) and the second, which applies to “alterations, repairs, improvements, replacements or additions to a single-family residence, costing thirty thousand dollars (\$30,000.00) or more,” (*from* §107.3.4.0.3) represent completely separate affected populations of potential building permit applicants (a.k.a., “property and building owners and industry”). These are also separate from the population impacted by the third subject local amendment, which requires that all “plans and/or specifications for work that is preponderantly of architectural nature shall be prepared by and bear the impress seal of an Architect” (*from* §107.3.4.0.4). Because these amendments affect different populations (although some may be subsets of another), separate fiscal impact statements must be produced to meet the requirement of §553.73(4)(h), Fla. Stat. Three demonstrably different populations again create three separate amendments.

The use of a single-topic definition is also mandated by the local technical amendment adoption and review process, which requires an individualized judgment regarding the need for a change to the FBC and the validity of the proposed change to meet that need based on evidence or data. BORA, through its previous submissions to the Commission, appears to believe that it is sufficient for them to simply declare that Broward County is in a high-velocity wind hazard zone to justify virtually any amendment it may desire to adopt. Such a motivation does not meet the

legislative mandate for an individualized determination of each change and presents no data to demonstrate that the regional accommodations already in the FBC fail to meet local needs.

Petitioner asserts that the subject local additions to the FBC—BORA’s §§107.3.4.0.1, 107.3.4.0.3, and 107.3.4.0.4—constitute three separate amendments. Since each addition impacts a different population of owners and contractors, each must go through its own evaluation and validation process, where a specific local need is defined, alternative solutions are compared, and a fiscal impact statement specific to that population is crafted and considered in the decision-making process. A single legislative act may adopt multiple local amendments, but each such amendment must be separately addressed in the supporting documentation.

WHAT IS A LOCAL ADMINISTRATIVE AMENDMENT?

Most references to the ability for local governments to adopt administrative amendments to the FBC have noted the provision in §553.73(4)(a), 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.” BORA and others have previously stated that the basic requirement is for the amendment to be more stringent than what is required in the statewide FBC. This is not what the statute actually says. What it says is, “Local amendments must be more stringent than the minimum standards described in **this section**” [*emphasis added*]. “This section” is a reference to §553.73, Fla. Stat., not the FBC. This means that any local administrative amendment must address an administrative topic covered in that section of Florida Statutes.

Petitioner further asserts that no administrative amendment may alter the content of the FBC. Even the Commission is not granted the legislative authority to adopt administrative amendments. As noted in §553.73(3), Fla. Stat., “The commission shall use the International

Codes published by the International Code Council, the National Electric Code (NFPA 70), or other nationally adopted model codes and standards for updates to the Florida Building Code. The commission may approve **technical amendments** to the code as provided in subsections (8) and (9)” [*emphasis added*]. The ability for the Commission to adopt technical amendments is subject to four conditions specified in §553.73(3), Fla. Stat., and the requirements of §§553.73 (8), and (9), Fla. Stat., which also limit the scope of Commission amendments to technical topics. A restriction against the Commission’s adopting administrative amendments is consistent with the mission of the Commission, which is primarily to adopt and interpret the FBC. Local governments are tasked with administering, applying, and enforcing the FBC.

Petitioner further asserts that an administrative amendment may only impact the administration of the FBC. Since this is a function limited to local governments, administrative amendments may only impact local governments in their operational performance to fulfill their assigned role to administer the FBC. This understanding is reinforced by the omission in §553.73(4)(a), Fla. Stat., of any jurisdictional limit on an administrative amendment. The language of §553.73(4)(b), Fla. Stat., explicitly limits the geographical area for a local technical amendment to “solely within the jurisdiction of such government.” There is no need to include such language in the provision of §553.73(4)(a), Fla. Stat., which allows a local government to adopt an administrative amendment, because such an amendment is already restricted to the adopting jurisdiction, as it applies solely to the internal operation of that jurisdiction in its administration of the FBC.

The Legislature specifically sought in the wording of several statutory provisions to eliminate any possibility for local governments to adopt technical changes to the FBC through an administrative amendment “loophole.” This conclusion is made obvious by the absence of a

specific appeal process for a substantially affected person to invoke Commission review of a local administrative amendment. (There is a general provision relevant to Commission review of “any amendment,” in §553.73(4)(i), Fla. Stat., but there is no guidance for how such a review might be conducted.) There is not even a requirement for such an amendment to be adopted through a public process. In fact, there is no guidance provided at all regarding how a local administrative amendment is adopted, except for the mandate to provide a fiscal impact statement as part of the legislative process for any local amendment. Even Rule 61G20-2.003(1), F.A.C., excludes local administrative amendments by referencing only those adopted under §553.73(4)(b), Fla. Stat.; i.e., local technical amendments. This is because a local administrative amendment imposes a more stringent requirement only on the local government. The “substantially affected party” is the local government itself. Any other interpretation would imply that the Legislature fully intended for substantially affected persons to have no recourse to resolve concerns about local administrative amendments—a conclusion that is at odds with every other statutory provision, not just in Chapter 553, but also in the APA.

Taking these facts together, the only possible conclusion is that an administrative amendment is one that affects the adopting local government. Thus, Petitioner proposes a definition for *local administrative amendment* as “a change affecting the administration of the FBC by the adopting local government that imposes a more stringent requirement on that local government.”

WHAT IS A LOCAL TECHNICAL AMENDMENT?

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.” However, this is not a useful definition in application since there is no definition provided for “technical change.”

As shown earlier, the Commission may only adopt technical amendments to the source national standard it chooses as the basis for the FBC. By statutory decree, then, *any* amendment adopted by the Commission must be a technical amendment, even when the change occurs in Chapter 1 – Scope and Administration, since there is no legislative authority for the Commission to adopt administrative amendments. This means that any amendment to the FBC itself, including changes to Chapter 1, is a technical amendment that creates a technical change in the requirements imposed on owners and contractors.

For example, the subject BORA amendments that seek to modify Florida law and require construction documents to be prepared by a registered design professional do not modify an administrative process; they are technical amendments that alter what owners and contractors must do and specify something that 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.

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]. This is deliberately specific direction. A plans examiner must cite each conflict with the FBC in its rejection notice for a building permit application. With regard to the subject BORA amendments, this can only be done if they are local technical amendments to the FBC.

Local administrative amendments are explicitly excluded in the scope of plans review by law because such amendments should have no impact on the construction documents being reviewed. The Florida Legislature put the restriction regarding what a plans examiner may review in the statute for a reason, and that is to preclude administrative amendments from having any impact on construction documents. As a result, even if a local government could adopt a local 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. By putting the additional local requirements for signed and sealed construction documents in the FBC and tasking the plans examiner to ensure the requirement is met, BORA has implicitly declared the subject edits to be local technical amendments.

Based on the foregoing, Petitioner proposes that the Commission define a *technical change* as “any modification to the text of the FBC.” If the Commission somehow excludes, say, amendments to the content of FBC Chapter 1 from the definition it ultimately adopts, then the Commission’s own edits to that chapter would be null and void because the Commission cannot adopt an administrative amendment. Since the term ‘local technical amendment’ is defined in the FBC statute, it has to have a consistent meaning throughout Chapter 553. It cannot have one meaning when applied to the Commission and another when applied to local governments.

QUESTION 1

The first question posed by the Petition is whether the subject BORA amendments, implicitly classified as administrative amendments by BORA, are actually technical amendments subject to additional requirements prior to adoption. This question is asked under the authority of §553.73(4)(1), Fla. Stat. Petitioner has demonstrated that he is a substantially affected party in that any plans and specifications he may prepare for construction occurring in a jurisdiction subject to the listed BORA amendments would be rejected since he is not a registered design professional. However, the actual topic or action of the subject local amendments is not relevant to the question posed, only to establishing Petitioner's standing. Petitioner seeks no Commission opinion as to the validity or usefulness of any specific BORA amendment. Question 1 seeks only the Commission's opinion as to whether the subject amendments are local technical amendments, which is the purpose of the review authorized in §553.73(4)(1), Fla. Stat. Petitioner argues that *any* alteration to the statewide FBC is a technical amendment and asks the Commission to declare the subject edits as forming three local technical amendments.

QUESTION 2

The second question posed in the Petition is whether BORA properly followed the local amendment adoption procedure described in §553.73(4), Fla. Stat., when the subject amendments were adopted as part of a larger package of amendments. If the first question results in a classification of the subject changes as local administrative amendments, then the process review authorized by §553.73(4)(i), Fla. Stat., is to determine whether BORA prepared and considered the mandatory fiscal impact statement for each of the three subject amendments. If, instead, the Commission agrees with Petitioner that the subject amendments are technical in nature, then the procedural review will be more extensive and include confirming there was an

evidentiary local determination of need, an evaluation of less stringent alternative solutions for meeting that need, fiscal impact analyses, and other factors and processes that apply to local technical amendments.

Petitioner asserts the Commission has already reviewed and rejected the subject amendments as not being consistent with the requirements for an amendment in accordance with the law:

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. (*from* §553.73(4)(e), Fla. Stat.)

In each triennial review period while the subject BORA (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.). BORA has asserted previously that the subject amendments address such concerns. The Commission apparently disagrees, which is why the BORA amendments never made it into the FBC and must 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. (See Exhibit B.)

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 under various conditions. 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, so we need to adopt it again." As a result, BORA appears to have ignored the repeated Commission rejections of its local amendments and adopted a local ordinance containing many so-called administrative amendments to the statewide version of the FBC as a routine action without performing the statutorily required fiscal analyses. This situation is being repeated for the next FBC release, as BORA is currently going through the process of adopting the same amendments with slight modifications for the 2023 Edition. (See Exhibit A.)

It is useful to note that the subject local amendments—indeed, all amendments adopted by any local government—were repealed by the Commission on or before May 22, 2023. That was the date the revised FBC was published. Under the requirements of §553.73(4)(e), Fla. Stat., which relevantly says the Commission must either "adopt such amendment as part of the Florida

Building Code or rescind the amendment,” and §553.73(7)(e), Fla. Stat., which notably says, “A rule updating the Florida Building Code in accordance with this subsection shall take effect no sooner than 6 months after publication of the updated code,” the Commission must complete its decision-making process regarding adoption or rescission of local amendments by the time the new version is published; i.e., May 20, 2023, in the current cycle. According to Dictionary.com, ‘rescind’ means “to abrogate; annul; revoke; repeal; to invalidate (an act, measure, etc.) by a later action or a higher authority” [from <https://www.dictionary.com/browse/rescind>]. At the instant the Commission decides not to adopt a local amendment, it is rescinded and ceases to be enforceable by the local government. There is no “do nothing” or “let it stay in place until the new FBC takes effect” option. Contrary to the statement by staff in Exhibit B that local amendments are “considered repealed as of the effective date of the 8th Edition (2023) FBC,” they are actually repealed at a much earlier date. There is no statutory authority for the Commission to allow a rescinded local amendment to remain in effect. There is also no requirement in statute or rule for a local amendment to be submitted on a special form for the Commission review to be initiated.

The notification requirement in §553.73(7)(e), Fla. Stat. (“The commission shall immediately notify the respective local government of the rescission of any amendment”) is consistent with the decision’s timing during the process of creating the next triennial FBC version. This notification should instruct the local government to stop enforcing the amendment. Assuming individualize notices were not transmitted at an earlier date, the publication of the new rule serves as the date of notification for purposes of determining the rejection of local amendments that are not incorporated into the final version. The effective date of the new version is not the threshold for the repeal of local amendments; at the latest, it is the date the final

form of the next version is set; i.e., when the Commission has demonstrated its determination that a local amendment was not adopted for inclusion in the FBC. Unless a local government subsequently re-adopts the amendments to the 2020 FBC that were not included in the 2023 FBC, then they no longer exist because the Commission rescinded them by omitting them from the new version.

Rescission of the subject BORA amendments does not render the questions posed in this Petition moot. By their nature, the reviews authorized in §§553.73(4)(i) and (l), Fla. Stat., are retrospective in effect. They evaluate a past action by the local jurisdiction and are meant to inform a future action. There is no cut-off date or other limit imposed on the Commission reviews mandated in §§553.73(4)(i) and (l), Fla. Stat., nor is there an “unless...” clause in the statutory command that says the Commission *shall* issue an opinion when asked about the process used to adopt a local amendment. As shown in Exhibit A, BORA is in the process of adopting very similar local amendments for the 2023 FBC. The Commission’s non-binding opinion as to the process used to adopt the amendment previously, which is the same as that being used now, will be very timely.

CONCLUSION

The Petition seeks the Commission’s non-binding opinion regarding three subject amendments and the adoption process provided in §553.73(4), Fla. Stat. Petitioner is a substantially affected person who is acting for himself. The Petition poses two questions:

1. Are the subject local amendments administrative or technical?
2. Was the proper adoption process followed, as required by the type of local amendment?

In order to answer these questions, the Commission must first determine what is an amendment so it may decide whether the subject edits create one amendment or three. The

Commission must then decide how to distinguish between administrative and technical amendments and apply those criteria to the subject amendments to decide which type they are. Lastly, the Commissions must compare the actual adoption process used by BORA to the statutorily prescribed process for that type of amendment. Petitioner proposes definitions and other guidance for the Commission to employ in completing these tasks.


Petitioner asserts that BORA did not follow the required procedure. Under the provisions of §553.73(4)(g), Fla. Stat., the burden of proof is on the local government to prove that it did. Although the instant action is not being brought under that statute, the principle applies here based on APA requirements for any review of agency actions.

Given previous rulings by the Commission, it is useful to say what the Petition does not seek. The Petition does not seek the Commission's opinion on the specific amendments, only its judgment as to whether the required adoption procedure was followed. The actual wording or effect of the amendments is not relevant except to the extent that it allows the Commission to see them as separate amendments and to classify them as either administrative or technical in nature. Petitioner does not seek the Commission's opinion regarding the legal foundation for such amendments, nor does he seek advice as to how he may proceed in challenging these amendments.

The sole purpose of the Petition is for the Commission to advise Petitioner as to the type of amendment for the three local amendment additions listed in Exhibit A and whether the proper adoption process was followed. Petitioner believes that local technical amendments are being adopted without adhering to the statutory process. One result is that there is no evaluation of the fiscal impacts of a local amendment on the people and businesses it will affect.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Charles M. Kramer, BORA Attorney, at Benson, Mucci & Weiss, P.L., 5561 North University Avenue, #102, Coral Springs, FL 33067, ckramer@BMWlawyers.net via electronic mail, and to Mr. Andrew J. Myers, Broward County Attorney, at 115 South Andrews Avenue, Fort Lauderdale, FL 33301, ameyers@broward.org, via electronic mail and U.S. Certified Mail.

 _____ October 30, 2023

JACK A. BUTLER, PETITIONER
301 Avalon Road, Winter Garden, Florida 34787
407-717-0247, abutler@mpzero.com

EXHIBIT A

FULL TEXT OF THE SUBJECT BORA AMENDMENTS

The applicable portion of the comprehensive set of local amendments adopted by BORA for the 7th Edition (2020) are given below. These edits are unchanged for the anticipated 8th Edition (2023).

107.3.4 Design professional in responsible charge. ~~Reserved.~~

107.3.4.0.1 General Requirements for Professional Design. For buildings and/or structures (except single-family residences), alterations, repairs, improvements, replacements or additions, costing fifteen thousand dollars (\$15,000.00) or more, as specified herein, the plans/or specifications shall be prepared and approved by, and each sheet shall bear the impress seal of an Architect or Engineer. For any work involving structural de-sign, the Building Official may require that plans and/or specifications be prepared by and bear the impress seal of an Engineer, regardless of the cost of such work.

Exception: Roofing as set forth in FBC Chapter 15.

...

107.3.4.0.3 For alterations, repairs, improvements, replacements or additions to a single-family residence, costing thirty thousand dollars (\$30,000.00) or more, as specified herein, the plans and/or specifications shall be prepared and approved by, and each sheet shall bear the impress seal of an Architect or Engineer. For any work involving structural design, the Building Official may require that plans and/or specifications be prepared by and bear the impress seal of an Engineer, regardless of the cost of such work.

107.3.4.0.4 Plans and/or specifications for work that is preponderantly of architectural nature shall be prepared by and bear the impress seal of an Architect, and such work that involves extensive computation based on structural stresses shall, in addition, bear the impress of seal of an Engineer.

The source document was downloaded from the www.floridabuilding.org website containing local amendments as file CodeID_7592_8cd7_Broward County amendms.FBC.7ED-2020-Building - Chapter1.pdf. The transmittal memo from Broward County is dated October 12, 2020. The earliest version of these local amendments available online has an effective date of March 15, 2012 (<https://www.broward.org/CodeAppeals/Documents/CHI-Amend.Effect1-20-15.pdf>). Although the threshold construction values are lower, the wording is virtual identical to that of the latest amendments.

According to the agenda package for the BORA meeting to be held on October 12, 2023, one item was the first reading of the proposed amendments for the new edition of the Florida Building Code; however, instead of being presented as a set of amendments to the statewide code, they are presented as amendments to the current, locally amended version of the FBC that is enforced by BORA member jurisdictions:

107.3.4 Design professional in responsible charge.

107.3.4.0.1 General Requirements for Professional Design. For buildings and structures (except single-family residences), alterations, repairs, improvements, replacements, or additions costing fifteen thousand dollars (\$15,000.00) or more, ~~as specified herein,~~ the plans or specifications shall be prepared and approved by, and each sheet shall bear the impressed seal of an architect or engineer. For any work involving structural design, the Building Official may require that plans and specifications be prepared by and bear the impressed seal of an engineer, regardless of the cost of such work.

Exception: Roofing as set forth in FBC, Chapter 15.

...

107.3.4.0.3 For alterations, repairs, improvements, replacements, or additions to a single-family residence costing thirty thousand dollars (\$30,000.00) or more, ~~as specified herein,~~ the plans and specifications shall be prepared and approved by an architect or engineer, ~~and~~ ~~e~~Each sheet shall bear the impressed seal of an architect or engineer. For any work involving structural design, the Building Official may require that plans and specifications be prepared by and bear the impressed seal of an engineer, regardless of the cost of such work.

107.3.4.0.4 Plans and specifications for work that is preponderantly of architectural nature shall be prepared by and bear the impressed seal of an architect, and such work that involves extensive computation based on structural stresses shall, in addition, bear the impressed seal of an engineer.

This excerpt was taken from the document titled as the meeting agenda and made available online at <https://www.broward.org/CodeAppeals/Documents/October%202012,%202023.pdf>. The package did not include a fiscal impact statement. The supplied justification in the staff report reads, in its entirety:

Reasons

The 8th Edition of the Florida Building Code will become effective on December 31, 2023. The staff has reviewed BORA's current Chapter, revised the Code or Florida Statute references when needed, and made necessary changes. An effort was made to correct grammatical issues and make Chapter 1 more reader-friendly without changing the meaning of the code sections. The changes have been reviewed by BORA's legal counselor, Mr. Charles Kramer, Esq., and his recommended corrections were included.

EXHIBIT B

NOTIFICATION SENT TO LOCAL GOVERNMENTS

Commission staff supplied the following document purported to be an email sent to local government building officials regarding the process of having local amendments adopted as edits to the 2023 version of the FBC. No transmission date or distribution list was provided; however, based on the wording, it was distributed sometime between January 4 and February 15, 2022:

SUBJECT: The 8th Edition (2023) Update to the Florida Building Code

This is to inform you that according to Section 553.73(4)(e), Florida Statutes, local amendments to the Florida Building Code (FBC) adopted by your jurisdiction are subject for review by the Florida Building Commission (the Commission) every third year and are effective until the adoption by the Commission of the new edition of the Florida Building Code. In reviewing local amendments, the Commission is required by law to review and consider local amendments for inclusion in the FBC for regional or statewide applications. Furthermore, the code change process for the new edition (8th “2023”) of the FBC has commenced as of January 4, 2022. The deadline for submitting code changes to the 8th Edition (2023) FBC is February 15, 2022.

In order for a local amendment to be considered by the Commission for regional or statewide application, the amendment must be submitted by the respective local government no later than February 15, 2022 as a proposed code change using the code amendment on-line process. All of the information necessary to submit a modification is available from our website at www.floridabuilding.org.

With exception to those technical amendment which were adopted pursuant to Section 553.73(5), Florida Statutes, if a local amendment is not adopted by the Commission for either regional or statewide application, then such amendment is considered repealed as of the effective date of the 8th Edition (2023) FBC (the projected effective date for the 8th Edition (2023) FBC is December 31, 2023). However, repealed amendments could be considered for readoption by the respective local government pursuant to the provisions of Section 553.73(3)(4)(a), Florida Statutes. Thank you for your assistance and interest in the Florida Building Code. Should you have any questions, please call us at 850-487-1824.

Building Codes and Standards
Mo Madani, Technical Director

[From an email sent to Petitioner on September 18, 2023, by Mr. W. Justin Vogel, Chief Legal Counsel, Florida Building Commission, Office of Codes & Standards]