STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA BUILDING COMMISSION

RESPONSE TO PETITION FOR NON-BINDING ADVISORY OPINION BY JACK A. BUTLER

The Broward County Board of Rules and Appeals, by and through undersigned counsel hereby files this its Response to Petition for Non-Binding Advisory Opinion by Jack A. Butler and states as follows.[1]

JURISDICTION

The Petitioner, Jack A. Butler, has filed a Petition requesting a non-binding advisory opinion and asserts jurisdiction is proper under Florida Statutes §§553.73(4)(i); 553.73(4)(1), and Rule 61G20-2.003, F.A.C.

I. Petitioner's initial flawed analysis leads to flawed argument and incorrect conclusion.

Petitioner states that:

> 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

[1] Respondent notes that Broward County was also served with a copy of the Petition for Non-Binding Advisory Opinion ("Petition") however the applicable statute F.S. §553.73(4)(l)(3) determines that: "3.The petitioner shall serve the petition on the local government's general counsel or administrator by certified mail, return receipt requested, and send a copy of the petition to the commission, in accordance with the commission's published directions. The local government shall respond to the petition in accordance with the form by certified mail, return receipt requested, and send a copy of its response to the commission, within 14 days after receipt of the petition, including Saturdays, Sundays, and legal holidays." Respondent states that pursuant to §553.73(e), which defines "local government" and "local governing body" to mean the board or agency with responsibility for enforcement, interpretation, and regulation of the FBC, Special Act 71-575, and Broward County Charter Section 9.02, that the Broward County Board of Rules and Appeals is the governing body with respect to the interpretation, supervision and promulgation all local building codes and responsibility for this Response lies solely with BORA.

> to Commission review and the local adoption process described in that subsection.

This statement is misleading where it cites text from statutes out of context. More specifically, F.S. §553.73(2) reads as follows:

> 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…

See F.S. §553.73(2)

Petitioner attempted the same angle of defective argument in a previous Petition for Declaratory Statement from the FBC, DS 2023-037 and the argument remains defective. "Words, phrases, clauses, sentences and paragraphs of a statute may not be construed in isolation, rather, the sentence must be read in the context of the entire provision." *See* Trafalgar Woods Homeowners Association, Inc. v. City of Cape Coral,248 So.3d 282(Fla. 2d DCA 2018). *See also* Fla. Dep't of Envtl. Prot. v. Contract Point Florida Parks, LLC, 986 So.2d 1260, 1265 (Fla. 2008) (stating that every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts); Angelo's Aggregate Materials, Ltd. v. Pasco County, 118 So.3d 971, 975 (Fla. 2d DCA 2013) ("**ordinances are subject to the rules of construction applicable to statutes**").

Building construction standards are established by chapter 553, which adopts the building codes, however the language of F.S. §553.73(2) is limited to contractors or their "workforce." Florida Statutes §553.73(2) references a subset of persons ("workers") employed by a contractor who are engaged in work at the site of actual construction. For purposes of statutory construction, the doctrine of *ejusdem generis* is actually an application of the broader maxim "*noscitur a sociis*" which means that general and specific words capable of analogous meaning when associated together take color from each other so that the general words are restricted to a

sense analogous to the specific words. *See* Quarantello v. Leroy, 977 So.2d 648,653 (Fla. 5th DCA 2008).

In the case of F.S. §553.73(2) the words of the Statute contain language of joinder but also of limitation. More specifically, the statute is directed at "personnel, supervision and training of same, or any other professional qualification requirements" not for everyone, but for "contractors or their workforce." These are basic rules of the English language and construction of sentences. This is the most common sense reading of the sub-section of the statute and to assert otherwise is simply lacking in common sense. "Courts are not required to abandon either their common sense or principles of logic in statutory interpretation." *See* School Bd. of Palm Beach County v. Survivors Charter Schools, Inc., 3 So.3d 1220 (Fla. 2009).

Conversely, Petitioner's preferred interpretation is inapposite to both logic and common sense. When read in its entirety the statute provides an entirely different meaning than that ascribed by Petitioner. "A statute should be given a reasonable interpretation; no literal interpretation should be given which leads to an unreasonable or ridiculous conclusion." *See* Johnson v. Presbyterian Homes of Synod of Fla., Inc., 239 So.2d 256, (Fla. 1970). "The law favors rational, sensible construction of statutes": *See* City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983).

The underlying goal in Petitioner's campaign is to have certain sections of the Florida Building Code and the local Broward County Amendments declared in conflict with the statutes but the underlying argument cannot be attended and Petitioner's goals cannot be accomplished when its first step wrongfully attempts to lead the Commission down an errant path.

II. Procedure for appeal through BORA

Petitioner claims that: "[t]he statute provides no guidance as to how such a review might be initiated by a substantially affected person" however the process for challenge is set forth in the Florida Building Code, Broward County Amendments ("FBCBCA") at §1113.11 Procedure for Appeals which states:

> Any person aggrieved by anyone enforcing this Code who desires to appeal to this Board shall first contact the Secretary of the Board for a date for his Appeal to be heard. A notice of Appeal shall be sent to the governing body of the jurisdiction wherein the dispute arose and said notice shall contain the following:13.11:

The protocol and procedure for review of a Code section in Broward County is first through BORA, which is an administrative, quasi-judicial body created by Special Act of Legislature 71-575.

Under the power of Special Act 71-575, the Board of Rules and Appeals has the authority to make special amendments to the Florida Building Code by and through the provisions of the Charter of Broward County. As such, governing action and determinations of the Broward County Board of Rules and Appeals while acting within its scope of authority, are authorized by Special Act of the Florida legislature and have the power of State law. BORA's authority to interpret the Code and oversee the enforcement agencies (municipal building departments) is thus legislatively granted. The County Charter was thus amended by the Charter Review Commission, to establish the Broward County Board of Rules and Appeals as an arm of county government with legislative authority. The authority given to the legislature by the Florida Constitution, art. 3, § 20, to prescribe the powers of municipalities and provide for their government, is not subject to implied limitations proposed by Petitioner, that would curtail the

real intent and purpose of the authority expressly conferred. See City of Jacksonville v. Bowden, 64 So. 769 (Fla. 1918).

A petitioner who challenges the rulings of BORA will typically file a petition for first tier certiorari in the 17th Circuit Court of Appeals, and subsequently, for second tier certiorari in the Fourth District Court of Appeals if necessary to carry a challenge forward.

III. Non-binding advisory opinions and interpretation of statutes by agency charged with oversight.

Petitioner cites F.S. §553.73(4)(1), for the premise that "[i]f 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."

Respondent respectfully states that Florida Statutes F.S. §553.73(5) determines that "the commission's "advisory opinion is non-binding and is not a declaratory statement under s.120.565." Respondent shows the Commission the case of Gretna Racing, LLC v. Department of Business and Professional Regulation, 178 So.3d 15 (Fla. 5th DCA 2015) where the court stated:

> An agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous; the agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.

See Gretna Racing at 28. *See also* Orange Park Kennel Club, Inc. v. State, Dep't of Bus. & Prof'l Reg., 644 So.2d 574, 576 (Fla. 1st DCA 1994).

In conjunction with same, Respondents show the Commission F.S. §553.73(1)(e) which states:

> (e) Subject to the provisions of this act, responsibility for enforcement, interpretation, and regulation of the Florida Building Code shall be vested in a specified local board or agency, and the words "local government" and "local governing body" as used in this part shall be construed to refer exclusively to such local board or agency.

It is unquestionable that BORA is the agency which administers and oversees all matters pertaining to the Florida Building Code, Broward County Amendments. *See* Section 9.02 Broward County Charter attached hereto as Exhibit "A." See also Special Act of Legislature 71-575.

IV. Petitioner's agenda

Petitioner has stated in its previous Petition for Declaratory Statement DS 2023-037, that its purpose for same was to guide "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." *See* DS2023-037 at pg. 21. Petitioner affirms its purpose for seeking a non-binding opinion in the present case is future litigation against Broward County where he states:

> 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.** *See* Petition at pg 2.

RESPONSE TO QUESTIONS POSED

Petitioner states that it questions 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. Respondent states that: 1) the local amendments are neither new, having been in place since publication of the 2010 (Fourth Editions) of the Florida Building Code which became effective on March 15, 2012 and; 2) contain the same language set forth in the state version of the Florida Building Code. (*See* FBC at §107.1 and FBC BCA at §107.1.1). The requirements are neither "new" nor solely the adoption by BORA but rather, well-established and in accordance with state law.

Petitioner questions whether: 1) the administrative amendments are actually technical and therefore subject to additional requirements and; 2) whether BORA followed the local amendments adoption procedure when the amendments were adopted. However, Petitioner declares that four (4) core prerequisite issues must be resolved before addressing the questions.

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

Petitioner provides lengthy discourse on the proposed questions and throughout same, provides the Commission with its preferred definitions of Statute and Code which it encourages the Commission to adopt in its non-binding advisory. Respondents addresses each of these as set forth below.

RESPONSE TO "LOCAL AMENDMENT ADOPTION PROCESS"

I. Technical amendments and general protocol for adoption of all code amendments.

Petitioner's copying of F.S. §553.73(4)(b) is questionable. More specifically, the nature of technical amendments is established in F.S. §553.73(2) and despite F.S. §553.73 being repeatedly referenced by Petitioner, the defining nature of a technical provision, and thereby the

unquestionable nature of a technical amendment as set forth in §553.73(2), is never acknowledged by Petitioner.

Florida Statutes §553.73(2) specifically states:

> **Technical provisions** to be contained within the Florida Building Code **are restricted to requirements related to the types of materials used and construction methods and standards employed** in order to meet criteria specified in the Florida Building Code.

See F.S. §553.73(2)

Inasmuch as F.S. §553.73(4)(l) specifically states *inter alia*:

> (l) 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**

See §553.73(4)(l)

It is difficult to reconcile how such clear, defining language could have been missed in the twenty-five (25) pages of Petition and Additional Information filed by Petitioner. Fortunately, Respondent is able to show the Commission statutory language relevant to addressing many of Petitioner's questions and prerequisite issues.

With respect to fiscal impact statements Respondent agrees with Petitioner's admission that "[l]ocal amendments are among those "expressly authorized by s. 553.73," Fla. Stat." However, Petitioner's speculation that "[t]heir exclusion from the additional review process

stated in §120.541(3), Fla. Stat., clearly indicates that "the remaining requirements for fiscal impact statements apply," cannot be attended.

First of all, BORA is not a "state agency" but rather was created by special act of legislature so that the "rule" set forth in 120.541(3) does not apply to amendment of local codes by BORA.

Second, a "rule" is defined under the APA as:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

A local code amendment such as those which are the subject of the Petition for Non-Binding Advisory Opinion, is none of these things.

Petitioner then incorrectly claims that:

> "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(l)(e), Fla. Stat.)... 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.

See Petition at pg.6

The fact of the matter is that the local amendments which Petitioner is challenging are administrative amendments- although Petitioner improperly attempts to characterize them as technical amendments from the inception of argument. This is evident from the first sentence in Petitioner's "Questions Posed" which states:

> 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 Petition at pg. 3.

Respondent has shown the Commission that **"[t]echnical provisions to be contained within the Florida Building Code are restricted to requirements related to the types of materials used and construction methods and standards employed**." There is nothing in the requirement for a registered design profession to prepare and sign documents which presupposes a change in the technical standards addressing the strength of materials, soil mechanics, modulus of elasticity, hydraulic gradients, wind loads, ASTM standards, or any one of the thousands, of technical provisions. Petitioner cannot torture the acts of preparation and signing into a change in the technical provisions of the code through misrepresentation of statutory language or other articulated *leger de main.*

Petitioner provides lengthy discourse with respect to preparation of fiscal impact statement under the provisions of F.S. §553.73(4)(h), and further 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 has declared the Local Amendment Adoption Process to be a "core prerequisite issue," however Petitioner sets forth the Amended code provisions in its Exhibit "A" and specifically states;

> The applicable portion of the comprehensive set of local amendments adopted by **BORA for the 11th Edition (2020) are given below. These edits are unchanged for the anticipated 8th Edition (2023).**

See Petitioner's Exhibit "A" attached to Petition for Non-Binding Advisory Opinion

Respondent shows the Commission F.S. §120.541(1)(f) wherein is stated:

> (f) An agency's failure to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative **may not be raised in a proceeding challenging the validity of a rule pursuant to s. 120.52(8)(a) unless:**
>
> 1. **Raised in a petition filed no later than 1 year after the effective date of the rule; and**
>
> 2. Raised by a person whose substantial interests are affected by the rule's regulatory costs.

This being the case, Petitioner appears to be attempting a challenge to the current Broward County Amendments based on an allegation that BORA failed to provide a financial impact statement for proposed amendments in the year 2000. Even if this were a well-considered challenge, which it is not, Petitioner cannot challenge the validity of the code change where it is three(3) years late.

Petitioner concludes by stating that:

> "To summarize, both local administrative and technical amendments are subject to the limitations in §553.73(4), Fla. Stat."

Respondent states that Petitioner misrepresentation that the BORA local amendments are actually technical amendments can be traced back to its misinterpretation of F.S. §553.73(2) and its partial, out of context citation of the language therein. (*Supra*). The code's use of the term "workforce" does not contemplate persons outside of the pool of persons on the site of construction and under the direction of the contractor. Petitioner cannot shoehorn its desired interpretation into a legal prerogative with a partial reading or misinterpretation of Florida Statute. Statutes must be read in their entirety to determine their meaning and when read in their entirety, the Statutes afford no relief for Petitioner. *See* Charles v. Southern Baptist Hospital of

Florida, Inc., 209 So.3d 1199 (Fla. 2017). *See also* Florida Dept. of Environmental Protection v. Contract Point Florida Parks, LLC, 986 So.2d 1260 (Fla. 2008).

Petitioner is improperly attempting to read statutes in a piecemeal fashion in effort to create its desired interpretation. However, a statute should be given a reasonable interpretation; no literal interpretation should be given which leads to an unreasonable or ridiculous conclusion." *See* Johnson v. Presbyterian Homes of Synod of Fla., Inc., 239 So.2d 256, (Fla. 1970). "The law favors rational, sensible construction of statutes": *See* City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983).

RESPONSE TO "WHAT IS AN AMENDMENT?"

Petitioner incorrectly states that the 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." For clarification, the applicable code for Broward County is called the "Florida Building Code, Broward County Amendments." *See* **Exhibit "B"** attached hereto.

Following Hurricane Andrew in 1992, building codes in Florida were updated and made more stringent. The first post-Andrew code, the South Florida Building Code, was enacted in 1994. In 2002, the Florida Building Code or FBC, which is based on the 2000 IBC and IRC, was adopted statewide and the term "South Florida Building Code" has not been in use for 23 years. Petitioner's confusion may stem from the fact that the language contained in Special Act 71-575 enacted in 1971-and which was the enabling legislation for BORA - references the South Florida Building Code a total of twenty-one (21) times. Further to that, Section 9.02 of the Broward County Charter states that:

> (1) It shall be the function of the Broward County Board of Rules and Appeals to exercise the powers, duties,

> responsibilities, and obligations as set forth and established in Chapter 71-575, Laws of Florida, Special Acts of 1971, as amended by Chapter 72-482 and 72-485, Laws of Florida, Special Acts of 1972; Chapter 73-427, Laws of Florida, Special Acts of 1973; Chapters 74-435, 74-437, and 74-448, Laws of Florida, Special Acts of 1974; and Chapter 98-287, as amended by Chapter 2000-141, Laws of Florida, **or any successor building code to the Florida Building Code applicable to the County, as amended.**

See Section 9.02 (1) Broward County Charter

As readily determinable from the Broward County Charter, the enabling legislation under Special Act 71-575, is applicable to **"any successor code."** Even if Petitioner was correct as to the designation of the current code (which he is not) the name given to the Broward County Amendments is irrelevant.

Petitioner states:

> 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.

Respondent states that the logical fallacy of "begging the question" or "circular reasoning" occurs when an argument's premise assumes the truth of the conclusion, instead of supporting it. In other words, the assumption of Petitioner's position to be correct is premised on its definition of what is correct. Just as with its previous defective argument and attempting to cite code section out of context and in isolation, Petitioner trolls a red herring with its single subject argument.

The truth is that the single subject requirement under the state constitution only applies to chapter or session laws. Furthermore, reenacted statutes by way of adoption or as a portion of the Florida Statutes, are not subject to challenge on the grounds that they violate the single subject

requirement. *See* Department of Highway Safety and Motor Vehicles v. Critchfield, 805 So.2d 1034 (Fla. 5th DCA 2002). See also Florida Constitution, Art. 3, § 6. Even if Petitioner's arguments addressed reenacted sections of Florida statutes- which they do not- or the code amendments encompassed more than a single subject- which they do not - any readopted code sections are precluded from the single subject requirement.

Webster's Dictionary defines an "amendment" as:

> a. the process of altering or amending a law or document (such as a constitution) by parliamentary or constitutional procedure rights that were granted by amendment of the Constitution;
>
> b: an alteration proposed or effected by this process

Black's Law dictionary defines an "amendment" as:

> To change or modify for the better, To alter by modification, deletion or addition.

Petitioner claims that local amendments to the Florida Building Code, e.g., §107.3.4.0.1), §107.3.4.0.3, and §107.3.4.0.4, constitute three (3) separate amendments - despite the fact that they pertain to the same subject. Petitioner is misinformed where from a legislative perspective, an "amendment" to a law or ordinance may consist of many changes and the breadth of an amendment to a local code is not limited by Petitioner's definition or favored protocol.

Florida Statutes §166.041(2), provides *inter alia*:

> (2) Each ordinance or resolution shall be introduced in writing and shall embrace but one subject **and matters properly connected therewith.** The subject shall be clearly stated in the title. No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection.

See Florida Statutes §166.041(2),

Ordinances to revise or amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection. *See* Parsons v. City of Jacksonville, 295 So.3d 892 (Fla. 1st DCA 2020).

In order to fully inform the government and the public about proposed changes, "it is required that when a specific section or subsection is being amended it should be republished with the proposed amendment so that an examination of the Act itself will reflect the changes contemplated, as well as their impact on the amended statute. *See* Auto Owners Ins. Co. v. Hillsborough Cty. Aviation Auth., 153 So. 2d 722, 725 (Fla. 1963); City of Hallandale v. Zachar, 371 So. 2d 186, 188–89 (Fla. 4th DCA 1979). BORA has complied with all of these requirements and the evidence is clear from the records. *See* FBC Broward County Amendments **§107.3.4 Design professional in responsible charge**.

There is nothing in the extensive precedent established by the Florida Courts, or the plain language of the code amendments that supports Petitioner's determination that the referenced amendments encompass anything more than a single subject. Petitioner's mistaken premise that multiple subjects are contained within the amendments cannot attended where the amendments embrace "one subject ana l matters properly connected therewith." The Broward County Amendments are readily understandable from the meaning of the provisions and address only one subject. The Broward County Amendments require that a registered design professional prepare and stamp plans based on readily identifiable parameters, which are neither arbitrary, capricious, nor in violation of any right under law.

RESPONSE TO "WHAT IS A LOCAL ADMINISTRATIVE AMENDMENT?"

Petitioner states:

> BORA and others have previously stated that the basic requirement is for the amendment to be more stringent that 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).

While BORA appreciates Petitioner's recitation of what it believes that statute "actually says," Petitioner is incorrect. What the statute "actually says" is:

> Local governments may adopt amendments to the administrative provisions of the Florida Building Code, subject to the limitations in this subsection.

A review of §553.73(4)(a)-(l) and all subsections attendant thereto yields nothing which would indicate a prohibition on administrative amendments with respect to a requirement that only registered, design professionals may prepare drawings for submission based on cost parameters. This is in fact, a more stringent requirement as specifically required under §553.73(4).

Petitioner states that "[e]ven the Commission is not granted the legislative authority to adopt administrative amendments." Well of course it doesn't, those powers were never granted to the Commission. Conversely, those powers are the realm of local government. *See* §553.73(4)(a).[2]

Petitioner's position that "administrative amendments may only impact local governments in their operational performance to fulfill their assigned role to administer the FBC" is grossly in error and the claim that the absence of a jurisdictional limit in §553.73(4)(a) somehow inferentially creates a restriction to application solely within the confines of governmental

[2] That being the case, this would seem to address Petitioner's argument that the Broward County Amendments were never adopted by the Commission- because "[e]ven the Commission is not granted the legislative authority to adopt administrative amendments." *See* Petition at pgs. 15-17.

operations is specious. There is nothing in the Florida Statues or the Florida Building Code to support such a position and it cannot be attended here.

Petitioner's renewed, but still incorrect, argument with respect to the absence of any appeal process for parties affected by administrative amendments, has already been addressed (*supra*). Petitioner's supposition that "a local administrative amendment imposes a more stringent requirement only on the local government. The "substantially affected party" is the local government itself..." and the ensuing line of rationale is without precedent. The matter will be heard by BORA if Petitioner so chooses. The Petition for appeal can be found at: https://www.broward.org/CodeAppeals/Documents/Policy%2095-01%20Appeal%20Application.pdf

RESPONSE TO "WHAT IS A LOCAL TECHNICAL AMENDMENT?"

Petitioner states that:

> 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."

Respondent agrees that "this is not a useful definition in application" in large part because that is not the definition of a technical amendment as provided under the Florida Statutes. Respondent once again directs the Commission to §553.73(2) which specifically states:

> **Technical provisions to be contained within the Florida Building Code are restricted to requirements related to the types of materials used and construction methods and**

standards employed in order to meet criteria specified in the Florida Building Code.

See F.S. §553.73(2)

Respondent would suggest that any of the over 12,800 standards set forth in the American Society for Testing and Materials, all of the Miami-Dade NOA material compliances, as well as fundamental aspects of applied engineering practice such as statics, dynamics, hydraulics, strength of materials, soil mechanics, structural load analysis, wind loads, steel and concrete design fundamentals would be a good place to start a review of technical provisions. All of these items, and many more, are part of the basic requirements related to the types of materials used and construction methods and standards employed.

The educational background and training of a person preparing plans for submittal to the local building authority will not affect the types of materials used or the construction methods and standards employed. The educational background and training of a person is part of the administrative process in that it provides assurance that the person preparing the documents understands what kind of materials must be used, understands what kind of standards are employed , and knows what of construction methods will be used. There is a world of difference between specifying a person with an understanding of material specifications, and actually calling out those specifications.

This is the very definition of "administration" under the fact pattern presented and none of these factors have any effect whatsoever on a change in material specifications or construction methods employed**, hence they are not technical amendments.**

Petitioner proposes that "the Commission define a technical change as "any modification to the text of the FBC." Respondent states that the Florida legislature has already provided a

definition of technical provisions and an amendment to such technical provisions would then be a "technical change." Otherwise, it is an administrative amendment.

Respondent proposes that the Commission make a determination that the definition of "technical provisions" as provided under Florida Statute §553.73(2) is clear and that no further advisory on the subject is necessary.

RESPONSE TO QUESTION 1

Petitioner states:

> "Petitioner seeks no Commission opinion as to the validity or usefulness of any specific BORA amendment. **Question I 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.**"

The three (3) subject amendments are set forth in Petitioner's "Exhibit A" and are confirmed herein as follows:

> **107.3.4 Design professional in responsible charge.**
>
> **107.3.4.0.1** General Requirements for Professional Design. For buildings and/or structures (except single- family residences), alterations, repairs, improvements, replacements or add it io ns, 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 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.
>
> **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.

See Florida Building Code, Broward County Amendments, 2020, §§107.3.4.0.1; 107.3.4.0.3 and 107.3.4.0.4.

A thorough review of the three (3) code amendments show that all of them pertain to protocols which trigger education and training requirements of the person(s) who prepare drawings for commercial and residential structures. As previously noted,

> **Technical provisions** to be contained within the Florida Building Code **are restricted to requirements related to the types of materials used and construction methods and standards employed** in order to meet criteria specified in the Florida Building Code.

See F.S. §553.73(2)

The plain language rule and precedent of the Florida courts determine that the word "materials" refers to a physical element and "types of materials" would mean materials of certain specification. This would include grades of steel, concrete of certain compressive strength, gauge of rebar, strength and composition of trusses or vertical supports, etc. *See* Department of Transp. v. Blackhawk Quarry Co. of Florida, Inc., 528 So.2d 447 (5th DCA 1988)("cemented coquina shell is a base material for road construction"); Tallahassee Variety Works v. Brown, 106 Fla. 599 (Fla. 1932) (paint and millwork are construction materials used in the building of a house);

Whitaker v. City of Belle Glade, 638 So.2d 186 (Fla. 5th DCA 1994)(concrete posts and rebar are construction materials).

The plain language rule and precedent of the Florida courts determine that the words "construction methods" refers to the manner in which a job is undertaken and completed, such as the use of caissons for constructing bridge supports or pump lift stations as opposed to dry excavation. *See* Town of Longboat Key v. Carl E. Widell and Son, 362 So.2d 719 (Fla. 2d DCA 1978). *See also* Vorndran v. Wright, 367 So.2d 1070 (3d DCA 1979) (failure to use adequate safety measures is part of the method of construction).

The plain language rule and precedent of the Florida courts determine that the words "standards" when used in the context of construction refers to uniformly adopted and accepted application of materials in conjunction with the design of a project or project component. *See* Transportation Engineering, Inc. v. Cruz, 152 So.3d 37 (Fla. 5th DCA 2014)("DOT had specific "Design Standards," derived from national standards, governing the design and construction of guardrails and emergency crossovers. Design Standard Index 700 required a clear zone of 36 feet for areas where the speed limit exceeds 55 miles per hour. The clear zone is an area next to the road, generally free of obstructions, where drivers can attempt to regain control of errant vehicles. Design Standard Index 400 required "crash cushions" as end treatments for guardrail openings (like those in an emergency crossover) located inside the clear zone (where they are more likely to be struck by fast-moving vehicles, causing injury to passengers).

As is clear from the case law, technical amendments pertain to the "how, where, and why" of a construction project- not the "who" of a project.

None of the Broward County Amendments are technical in nature and the answer to Petitioner's "Question 1" is that "[T]he subject amendments are NOT local technical amendments.

RESPONSE TO QUESTION 2

Petitioner states:

> 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.

Petitioner's QUESTION 2 also contains an alternative theory of review if the BORA amendments are deemed technical in nature. Respondent will not respond to Petitioner's alternative theory of technical amendment review as the issue has been clearly addressed.

Petitioner "*asserts that 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.*" Contrary to Petitioner's assertions there is no rejection of BORA amendments by the Commission and Petitioner is incapable of producing proof of same. An adoption of amendments for every local government only requires that BORA and the Commission comply with the conditions set forth in §553.73(4)(a) and (d), *to wit*:

> 4(a) ...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 and must be transmitted to the commission within 30 days after

> enactment. The local government shall make such amendments available to the general public in a usable format…

And,

> (d) Any amendment to the Florida Building Code shall be transmitted within 30 days after adoption by the local government to the commission. The commission shall maintain copies of all such amendments in a format that is usable and obtainable by the public. Local technical amendments are not effective until 30 days after the amendment has been received and published by the commission.

See §553.73(4)(a) and (d)

Respondent is uncertain what measure Respondent has relied upon to make the statement that:

> The Commission apparently disagrees, which is why the BORA amendments never made it into the FBC and must keep being adopted as local amendments.

See Petition at pg 15.

Respondent states that: 1) local amendments are not published in the FBC unless those amendments are determined to be applicable to the entire state. That is why they are called "local amendments;" 2) BORA had been resubmitting all code amendments prior to the publication of the updated FBC based on the premise that all amendments, technical or administrative, must be renewed every third year. The facts is that requirement to re-submit or renew every third year was actually only applicable to technical amendments and this is supported by §553.73(4)(e) which states:

> (e) 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.

See §553.73(4)(e)

Respondents notes that Petitioner cites the identical provisions in a misguided effort to show that BORA's amendments were either rejected or rescinded. However, a closer read of the statute shows that it directly conditions rescission on consistency with paragraph 9(a). Reviewing paragraph 9(a) we see that it states:

> (9)(a) **The commission may approve technical amendments to the Florida Building Code** once each year for statewide or regional application upon a finding that the amendment:
>
> 1. Is needed in order to accommodate the specific needs of this state.
>
> 2. Has a reasonable and substantial connection with the health, safety, and welfare of the general public.
>
> 3. Strengthens or improves the Florida Building Code, or in the case of innovation or new technology, will provide equivalent or better products or methods or systems of construction.
>
> 4. Does not discriminate against materials, products, methods, or systems of construction of demonstrated capabilities.
>
> 5. Does not degrade the effectiveness of the Florida Building Code.
>
> The Florida Building Commission may approve technical amendments to the code once each year to incorporate into the Florida Building Code its own interpretations of the code which are embodied in its opinions, final orders, declaratory statements, and interpretations of hearing officer panels under s. 553.775(3)(c), but only to the extent that the incorporation of interpretations is needed to modify the code to accommodate the specific needs of this state. Amendments approved under this paragraph shall be adopted by rule after the amendments have been subjected to subsection (3).

In so saying, there is no protocol for review of administrative amendments. Petitioner's claims that administrative amendments were rescinded or rejected because of a failure to comply with a review, that is specifically confined to technical provisions, is specious.

Petitioner also states that "*No fiscal impact statement was included as required by §553.73(4)(h) Fla. Stat., nor is the scientific consideration or technical justification of an amendment documented.*" The fact of the matter is that the amendments in question were drafted in 2019 and 2020, then properly incorporated into the Broward County Amendments in March of 2020. At the time of drafting and the time of incorporation there was no requirement for fiscal impact statements to be submitted with administrative amendments. On July 1, 2021, the Florida legislature passed HB 402-2021 into law which changed the language of the previous statute.

As far as Petitioner claiming a failure on the part of BORA to prepare "required technical analyses" in conjunction with local amendments, Respondent states that no "technical analyses," nor "scientific consideration," nor "technical justification" is required for an administrative amendment. Respondent shows the Commission §553.73(2) which specifically states:

> Technical provisions to be contained within the Florida Building Code are restricted to requirements related to the types of materials used and construction methods and standards employed in order to meet criteria specified in the Florida Building Code.

See F.S. §553.73(2) (*Supra*)

BORA never "*ignored the repeated Commission rejections of its local amendments*" because the Commission never rejected any amendments. Neither were the administrative amendments repealed under §553.73(4)(e) which specifically refers to technical amendments. The Code Amendments were not rescinded by default as suggested by Petitioner where the final

version of the 2023 Florida Building Code is scheduled for publication on December 31, 2023. Until that time, the 2023 Code is not in effect and thereby not "published."

Petitioner states that:

> Rescission of the subject BORA amendments does not render the questions posed in this Petition moot.

Respondent states that the BORA amendments were never rescinded.

Petitioner states that:

> 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.

Respondent states that §§553.73(4)(i) and (l) both pertain to technical provisions/ amendments to the FBC. None of the amendments addressed in Petitioner's pleadings and incorporated exhibits meet the substantive criteria for technical amendments and the question is moot. *See* F.S. §553.73(2) (*Supra*)

RESPONSE TO CONCLUSION

Petitioner states in conclusion that it is seeking the Commission's non-binding opinion regarding three (3) subject amendments and the adoption process provided in F.S. §553.73(4). *To wit:*

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

Respondent states that the answer to #1 is "The subject local amendments are administrative."

Respondent states that the answer to #2 is "Yes. The proper adoption process was followed where the previous code amendment process was initiated and completed under F.S. §553.73(4), Florida Building Code, Broward County Amendments, 2020. At the time there was full compliance with §553.73(4)(a), (d), and all other applicable provisions under law. The law changed with the advent of HB 491-2021 which went into effect on July 1, 2021- fifteen (15) months later.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following recipients via electronic mail and /or U.S. Certified Mail: Agency Clerk's Office, Department of Business and Professional Regulations, 2601 Blair Stone Rd., Tallahassee, FL 32399 (AGC.Filing@myfloridalicense.com), Mo Madani, Building Codes and Standards Office, Department of Business and Professional Regulations, (mo.madani@myfloridalicense.com), W. Justin Vogel, Office of the General Counsel, Department of Business and Professional Regulation (wjustin.vogel@myfloridalicense.com) and Jack Allison Butler, 301 Avalon Road, Winter Garden Florida 34787, abutler@mpzero.com on this 16th day of November, 2023.

BY /s/ Charles M. Kramer.

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