

Summary of Issue:

Petitioner is a building official seeking clarification about their authority to require private providers to show proof of insurance before carrying out building code inspection services. The Petitioner also notes that Form # 61G20-2.005-2002-01 contains references to outdated insurance requirements for private providers.

Relevant Provisions:

553.791(15), Florida Statutes (2004): A private provider may perform building code inspection services under this section only if the private provider maintains insurance for professional and comprehensive general liability with minimum policy limits of \$1 million per occurrence relating to all services performed as a private provider, including tail coverage for a minimum of 5 years subsequent to the performance of building code inspection services.

553.791(15), Florida Statutes (2005): A private provider may perform building code inspection services on a building project under this section only if the private provider maintains insurance for professional liability covering all services performed as a private provider. Such insurance shall have minimum policy limits of \$1 million per occurrence and \$2 million in the aggregate for any project with a construction cost of \$5 million or less and \$2 million per occurrence and \$4 million in the aggregate for any project with a construction cost of over \$5 million. Nothing in this section limits the ability of a fee owner to require additional insurance or higher policy limits. For these purposes, the term "construction cost" means the total cost of building construction as stated in the building permit application. If the private provider chooses to secure claims-made coverage to fulfill this requirement, the private provider must also maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services. The insurance required under this subsection shall be written only by insurers authorized to do business in this state with a minimum A.M. Best's rating of A. Before providing building code inspection services within a local building official's jurisdiction, a private provider must provide to the local building official a certificate of insurance evidencing that the coverages required under this subsection are in force.

553.791(17), Florida Statutes (2023): A private provider may perform building code inspection services on a building project under this section only if the private provider maintains insurance for professional liability covering all services performed as a private provider. Such insurance shall have minimum policy limits of \$1 million per occurrence and \$2 million in the aggregate for any project with a construction cost of \$5 million or less and \$2 million per occurrence and \$4 million in the aggregate for any project with a construction cost of over \$5 million. Nothing in this section limits the ability of a fee owner to require additional insurance or higher policy limits. For these purposes, the term "construction cost" means the total cost of building construction as stated in the building permit application. If the private provider chooses to secure claims-made coverage to fulfill this requirement, the private provider must also maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services. The insurance required under this subsection shall be written only by insurers authorized to do business in this state with a minimum A.M. Best's rating of A. Before providing building code inspection services within a

local building official's jurisdiction, a private provider must provide to the local building official a certificate of insurance evidencing that the coverages required under this subsection are in force.

553.791(4), Florida Statutes (2023): A fee owner or the fee owner's contractor using a private provider to provide building code inspection services shall notify the local building official in writing at the time of permit application, or by 2 p.m. local time, 2 business days before the first scheduled inspection by the local building official or building code enforcement agency that a private provider has been contracted to perform the required inspections of construction under this section, including single-trade inspections, on a form to be adopted by the commission. This notice shall include the following information:

(a) The services to be performed by the private provider.

(b) The name, firm, address, telephone number, and e-mail address of each private provider who is performing or will perform such services, his or her professional license or certification number, qualification statements or resumes, and, if required by the local building official, a certificate of insurance demonstrating that professional liability insurance coverage is in place for the private provider's firm, the private provider, and any duly authorized representative in the amounts required by this section.

553.791(16), Florida Statutes (2023): (a) A local enforcement agency, local building official, or local government may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.

(b) A local enforcement agency, local building official, or local government may establish, for private providers and duly authorized representatives working within that jurisdiction, a system of registration to verify compliance with the licensure requirements of paragraph (1)(n) and the insurance requirements of subsection (17).

553.791(1)(n), Florida Statutes (2023): "Private provider" means a person licensed as a building code administrator under part XII of chapter 468, as an engineer under chapter 471, or as an architect under chapter 481. For purposes of performing inspections under this section for additions and alterations that are limited to 1,000 square feet or less to residential buildings, the term "private provider" also includes a person who holds a standard certificate under part XII of chapter 468.

468.621, Florida Statutes (2023): (1) The following acts constitute grounds for which the disciplinary actions in subsection (2) may be taken: ... (j) Performing building code inspection services under s. 553.791 without satisfying the insurance requirements of that section.

471.033, Florida Statutes (2023): (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken: ... (1) Performing building code inspection services under s. 553.791, without satisfying the insurance requirements of that section.

481.225, Florida Statutes (2023): (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken: ... (1) Performing building code inspection services under s. 553.791, without satisfying the insurance requirements of that section.

Petitioner’s Question:

If a Private Provider chooses to secure “claims-made” coverage to fulfill the insurance requirement of 553.791(17) can a Building Official require a 5-year supplemental ERP also known as “tail-coverage” to meet the 553.791(17) requirement of “maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services”?

Staff’s Suggested Answer:

Addressing first the discrepancy between Form # 61G20-2.005-2002-01 and section 553.791(17), Florida Statutes (2023), the Commission observes that in 2005 changes were made to the statutory provisions pertaining to the types and amounts of insurance coverage required to be secured by private providers, and no corresponding changes were made to the form, which still cites requirements from the 2004 statute. The Commission has begun the process of amending the form via rulemaking to reflect the statute’s current requirements.

Petitioner asks whether he may require private providers who utilize claims-based insurance coverage to demonstrate that they have procured at least five years of future coverage, and asserts that it has a “statutory responsibility to ensure Private Providers maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services.”

The statute does not confer such a duty on Petitioner, but rather provides that “[a] local enforcement agency, local building official, or local government may establish, for private providers and duly authorized representatives working within that jurisdiction, a system of registration to verify compliance with the licensure requirements of paragraph [553.791](1)(n) and the insurance requirements of subsection [553.791](17)” (emphasis provided). Section 553.791(16)(a), Florida Statutes (2023). It is thus left to the discretion of the local authorities whether to verify compliance with all of the insurance requirements; it is not a mandatory duty.

If a local authority does choose to create a system to verify compliance with the insurance requirements, it is subject to the limitations of section 553.791(16)(a), Florida Statutes (2023), which states that local authorities “may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.”

As for those requirements, section 553.791(17), Florida Statutes (2023), provides that

A private provider may perform building code inspection services on a building project under this section only if the private provider maintains insurance for professional liability covering all services performed as a private provider. Such insurance shall have minimum policy limits of \$1 million per occurrence and \$2 million in the aggregate for any project with a construction cost of \$5 million or less and \$2 million per occurrence and \$4 million in the aggregate for any project with a construction cost of over \$5 million. Nothing in this section limits the ability of a fee owner to require additional insurance or higher policy limits.... If the private provider chooses to secure claims-made coverage to fulfill this requirement, the private provider must also maintain coverage for a minimum of 5 years

subsequent to the performance of building code inspection services... Before providing building code inspection services within a local building official's jurisdiction, a private provider must provide to the local building official a certificate of insurance evidencing that the coverages required under this subsection are in force. (Emphasis provided).

The provisions most relevant to Petitioner's inquiry are those requiring private providers to provide a certificate of insurance evidencing that the coverages required are "in force," and the additional requirement that those choosing to secure claims-made coverage "must also maintain" coverage for five years after performing building code inspection services.

The requirement that private providers have professional liability insurance "in force" before providing building code inspection services is universal, and not tied to the type of insurance that they obtain. Black's Law Dictionary (11th ed. 2019), defines "in force" to mean "in effect; operative; binding," and the certificate of insurance that the private providers are required to furnish appears to be intended to demonstrate that insurance coverage is *currently* in effect.

Private providers who elect to secure claims-made insurance are subject to a separate, additional requirement that they "also maintain" coverage for an additional five years subsequent the performance of any building code inspection services. Stated slightly differently, a private provider utilizing claims-made insurance must essentially "maintain" insurance coverage for at least five years subsequent to the *last* building code inspection service that they provide.

Petitioner states that "requiring a 5-year ERP rider also known as a 'tail-coverage' meets this requirement." A private provider could possibly choose to meet their insurance coverage obligations in this manner, though for a provider engaging in an ongoing course of business it appears that the "envelope" of future coverage would routinely become out of date as new inspections were performed, each resetting the five-year time frame for maintaining their coverage.

It does not appear that the statute was intended to compel private providers to pre-obtain this five year envelope of coverage, as it provides that they must "maintain" insurance for the requisite amount of time. The most pertinent definition for "maintain" in Black's Law Dictionary (11th Ed. 2019) is "to continue (something)." Webster's Third New International Dictionary of the English Language, Unabridged, 1362 (2002), defines "maintain" to mean "to keep in a state of repair, efficiency, or validity [;] preserve from failure or decline." In both instances, to "maintain" something connotes an active and ongoing element of continuation, preservation, or upkeep. If a private provider who had procured claims-made insurance were to carry continuous coverage, renewed on a periodic basis for a minimum of five years after performing building code inspection services, it does not appear that they would run afoul of the statutory requirement that they "maintain" coverage for the specified duration of time.

Petitioner argues that it would "not be possible" to ensure that a private provider who elects to use claims-based coverage is maintaining coverage for five years after performing building code inspection services. On its face, it does not appear that this would be "impossible" to verify, though it would undoubtedly be much less *convenient* for the local jurisdiction than requiring the private provider to show they have obtained this coverage in advance. The statute does not specify how

the private provider must “maintain” their coverage, however, and local jurisdictions are prohibited from imposing more stringent requirements. *See* section 553.791(16)(a), Florida Statutes (2023). It would appear that there are other mechanisms available to Petitioner to verify compliance with the insurance requirements, such as requiring private providers to periodically update or confirm the status of their insurance coverage.

Petitioner expresses concern about what may happen if a private provider “loses coverage or simply goes out of business.” While this may be a legitimate public policy concern, it is one that is most properly addressed to the Legislature.

The Legislature could have prohibited the use of claims-made insurance, or explicitly required that a future envelope of coverage be in place at all times. This is not what the statute currently prescribes, however. The Legislature created other enforcement mechanisms, such as making the performance of building code inspections as a private provider without satisfying the insurance requirements grounds for license discipline. *See* sections 468.621(1)(j), 471.033(1)(l), and 481.225(1)(l), Florida Statutes (2023). Furthermore, the statute explicitly states that fee owners may require additional insurance or higher limits if they wish to, and requires fee owners to acknowledge that they may require insurance beyond the minimum amounts required by statute. *See* sections 553.791(4)(c), 553.791(17), Florida Statutes (2023).

Accordingly, the answer to Petitioner’s question is no; it may not require private providers who choose to secure claims-made coverage to provide a five-year supplemental extended reporting period rider.