

**PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BUILDING COMMISSION**

Organization: Collier County, FL Building and Permitting Department
Address: 2800 N. Horseshoe Dr.
Naples, FL 34104

Name: Doug A. Sposito
Title: Deputy Building Official
Building, Plan Review, and Inspections
Phone: 239-252-2599
Fax: 239-252-6415
Email: doug.sposito@colliercountyfl.gov

DS 2023-039

Petitioners Attorney: Derek D. Perry
Title: Assistant County Attorney
County Attorney's Office
Address: 2800 N. Horseshoe Dr.
Naples, FL 34104
Phone: (239) 252-8066
Email: Derek.Perry@colliercountyfl.gov

Preamble

The Collier County Building Official requires a Private Provider to submit a Certificate of Insurance to the Building Official under subsection FS 553.791 (17) to review and ensure the required coverages are in force. We are seeking clarification on certain sections of FS 553.791 to ensure that the Building Official is performing his duties in compliance and the intent of the code. Specifically, there are several industry definitions, FBC adopted forms and Statutory language that require clarification as are more specifically outlined below. The petitioner seeks clarification as a "local enforcement agency" under 553.775(3)(a).

Petitioners question and summary are found on page 12.

Statute(s), Agency Rule(s), Agency Order(s) and/or Code Sections on which the Declaratory statement is sought:

Florida Building Code 2020

Florida Administrative Rules

Form: 61G20-2.005 Alternative Plans Review and Inspection forms Adopted

[Reference Material Home - Florida Administrative Rules, Law, Code, Register - FAC, FAR, eRulemaking \(flrules.org\)](#)

Florida Statute 553.791

House Bill 567 2005

<https://www.flsenate.gov/Session/Bill/2005/567/BillText/er/PDF>

House Bill 0911 2004

<https://www.flsenate.gov/Session/Bill/2004/911/BillText/Filed/PDF>

Senate Bill 1470 2005

<https://www.flsenate.gov/Session/Bill/2005/1470/BillText/c1/PDF>

Senate Bill 442 2005

<https://www.flsenate.gov/Session/Bill/2005/442/BillText/er/PDF>

Staff Analysis H 567 April 1 2005 Local Government Council (post meeting)

<https://www.flsenate.gov/Session/Bill/2005/567/?Tab=Analyses>

Florida Building Commission Special Report, Implementation of Section 553.791,FS Alternative Plan Review and Inspections January 2004

https://floridabuilding.org/fbc/publications/Commission_Special_Report_553_791.pdf

Alternative Plans Review and Inspection Workshop Phase II Recommendations to the Florida Building Commission April 2, 2004

https://consensus.fsu.edu/FBC/APRIWG-M-IIReport_Apr04.pdf

Background:

The Petitioner is the Deputy Building Official for Collier County FL. Collier County has developed and implemented a registration process for Private Providers (PP). As part of that process, the PP is required to submit for review a Certificate of Liability. The PP can supply either a "Per Occurrence" or a "Claims Made" certificate.

When submitting a "Claims Made" Certificate, Collier County requires the PP to include a supplemental Extended Reporting Period (ERP) rider or a "Tail-Coverage" for the minimum of five years subsequent to the "Claims-Made" certificate expiration. We believe this aligns with the Statutory requirement of 553.791(17) and also follows the specific language of the Notice to Builder form prescribed by the State in 553.791(4).

A disparity arises with the slightly different language used in the statute and on the form. The statute strikes the words "including tail" from the language while the form includes it. The Petitioner does not believe the two requirements are at odds with each other.

The phrase "tail-coverage" is industry common practice language to mean a form of Supplemental ERP, Optional ERP, Discovery Period, or simply Extended Reporting Period.

When reviewing the history of the strike (as outlined below in greater detail) the Petitioner believes the Legislature did not intend the removal of the words "including tail" from the language of the Statute to be understood as precluding the Building Official from requiring some form of five-year ERP or "tail-coverage", attached to the submitted certificate, but was meant to give more flexibility to the Building Official in the type of five-year instrument that could be accepted.

In fact the final staff analysis by the Local Government Council on April 1 2005 states the effect of the proposed changes to the amendment was to simply conform claims-made coverage to what was "currently available in the market."

Both the *Florida Building Commission Special Report, Implementation of Section 553.791, FS Alternative Plan Review and Inspections*, January 2004 and the *Alternative Plans Review and Inspection Workshop Phase II Recommendations to the Florida Building Commission*, April 2, 2004 recommended requiring 5 year tail-coverage for claims-made policies, but not requiring tail-coverage for occurrence-based policies.

An amendment (442) to SB 1470-2005 struck the word "tail" as part of a larger amendment.

When the final version of HB 567-2005 was approved, Staff Analysis claimed the Effect of the Proposed Change was to: "conform[s] claims-made coverage requirements to the insurance currently available in the marketplace". The Petitioner believes the intent of the Bill was not to remove the requirement of the additional subsequent 5-year "tail-coverage" for claims-made policies but as stated above, to simply allow the Building Official to accept different insurance instruments that would provide citizens who utilized a PP, the same coverage as prescribed by the law.

The current language of 553.791(17) reads:

"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 Petitioner believes requiring a 5-year ERP rider also known as a "tail-coverage" meets this requirement.

In Depth Review:

The Building Official is required to use the *Notice to Building Official* form adopted by the Commission.

FS 553.791(4) 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.

The Form adopted by the commission is 61G20-2.005-2002-01

61G20-2.005 Alternative Plans Review and Inspection Forms Adopted.

The following form is hereby incorporated by reference and adopted for use in conjunction with utilization of a private provider to perform plan review and inspection and may be obtained at <http://www.flrules.org/Gateway/reference.asp?No=Ref-13619> or at

https://www.floridabuilding.org/fbc/committees/Private_Providers/Private_Providers.htm:

Notice to Building Official of Use of Private Provider, Form Number 61G20-2.005-2002-01, effective October 2021.

Rulemaking Authority 553.791(4), (5) FS. Law Implemented 553.791(4), (5) FS. History—New 1-20-03, Amended 7-21-08, Formerly 9B-3.053, 9N-2.005, Amended 10-18-21.

The Form 61G20-2.005-2002-01 adopted by the Commission specifically requires “tail-coverage” for a minimum of 5 years subsequent to the performance of building code inspection services.

The following attachments are provided as required:

1. Qualification statements and/or resumes of the private provider and all duly authorized representatives.

2. Proof of insurance for professional and comprehensive liability in the amount 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.

FS 553.791 (17) Contains slightly different language. It refers to “claims-made” coverage specifically. It omits the words “including tail” but keeps the “maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services.”

“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 words “including tail” is missing from the language.

FS 553.791 (17) The Private Provider is required to submit the proper insurance to the building official and The Building Official is required to confirm that the insurance meets the requirements of the statute.

“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.”

The following is a history of the words “including tail” being struck from the statutory language. Links to the archived documents can be found on the first page.

History:

The Florida Building Commission Special Report, Implementation of Section 553.791, FS alternative Plan Review and Inspections January 2004 Recommended keeping “tail-coverage” for claims-made policies but removing it for occurrence based policies. (see page 23, bullet 2 of the link below for original copy)

https://floridabuilding.org/fbc/publications/Commission_Special_Report_553_791.pdf

Modify the insurance provisions to read “A private provider may perform building code inspections and plan reviews under this section only if the private provider maintains insurance for professional liability with minimum policy limits of \$1 million per occurrence relating to all of the services performed as a private provider, including tail coverage for a minimum of 5 years for claims-made type policies only. Occurrence based policies are not required to have a 5[year]-tail policy.

(pg 23, bullet 2)

Later that year, the Alternative Plans Review and Inspection Workshop Phase II recommendations to the Florida Building Commission April 2, 2004, also recommended keeping “tail-coverage” for claims-made policies but removing it for occurrence based policies.

https://consensus.fsu.edu/FBC/APRIWG-M-IIReport_Apr04.pdf

Insurance Tail Coverage)—Issue K

The Work Group discussed requiring 5 year tail coverage for claims made policies, and not requiring tail coverage for occurrence based policies but was unable to reach a 75% level of agreement.

At the recommendation of Jim Richmond, DCA attorney, the Commission discussed the issue and made a recommendation.

Commission Actions:

Motion—The Commission voted unanimously, 18 - 0 in favor, to support their earlier action, and to support the language proposed in HB 0911 page 26 which provides requiring 5 year tail coverage for claims-made policies, but not requiring tail coverage for occurrence-based policies.

Commission Actions:

Motion— The Commission voted unanimously, 18 - 0 in favor, to adopt the APRIWG consensus recommendations as amended by the Commission, and to submit them to the Florida Legislature through the DCA lobbyist.

(Page 3)

Florida Building Commission Facilitators report Oct 19 2004 recommended adopting Phase II recommendations.

https://www.floridabuilding.org/fbc/commission/FAC_Report_1004.pdf

Commission Actions: Motion— The Commission voted unanimously, 18 - 0 in favor, to adopt the package of Phase I and Phase II recommendations related to the private provider system authorized in Section 553.791, F.S., and to submit them as part of the Commission's recommendations to the 2005 Florida Legislature. (Pg 6)

Continued on the next page.

The working group supported the language of HB 0911 which didn't make it into law. But please note the slight difference in the language struck between HB 0911 and HB 567 the final bill that did make it into law.

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

HB 0911

2004

718 reviewed by the local enforcement agency's board of appeals, if
719 one exists. Any decision by the local enforcement agency's board
720 of appeals, or local building official if there is no board of
721 appeals, may be appealed to the commission pursuant to s.
722 553.775 ~~553.77(1)(h)~~, which shall consider the matter at the
723 commission's next scheduled meeting.

724 (14) No local enforcement agency, local building official,
725 or local government may adopt or enforce any laws, rules,
726 procedures, policies, or standards more stringent than those
727 prescribed by this section.

728 (15) A private provider may perform building code
729 inspection services under this section only if the private
730 provider maintains insurance for professional ~~and comprehensive~~
731 ~~general~~ liability with minimum policy limits of \$1 million per
732 occurrence covering ~~relating to~~ all services performed as a
733 private provider. If the private provider chooses to secure
734 claims-made coverage to fulfill this requirement, the private
735 provider must also maintain, including tail coverage for a
736 minimum of 5 years subsequent to the performance of building
737 code inspection services. Occurrence-based coverage shall not be
738 subject to any tail coverage requirement.

739 Section 7. Paragraph (d) of subsection (1) of section
740 553.80, Florida Statutes, is amended, and subsection (7) is
741 added to said section, to read:

742 553.80 Enforcement.--

743 (1) Except as provided in paragraphs (a)-(f), each local
744 government and each legally constituted enforcement district
745 with statutory authority shall regulate building construction
746 and, where authorized in the state agency's enabling

HB 0911 only strikes the word "including" while HB 567 Strikes "including tail" Which may have been an inadvertent Scribner's error.

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

ENROLLED

HB 567, Engrossed 1

2005 Legislature

223 site constitutes an immediate threat to public safety and
224 welfare.
225 (15) A private provider may perform building code
226 inspection services on a building project under this section
227 only if the private provider maintains insurance for
228 professional and comprehensive general liability covering with
229 minimum policy limits of \$1 million per occurrence relating to
230 all services performed as a private provider. Such insurance
231 shall have minimum policy limits of \$1 million per occurrence
232 and \$2 million in the aggregate for any project with a
233 construction cost of \$5 million or less and \$2 million per
234 occurrence and \$4 million in the aggregate for any project with
235 a construction cost of over \$5 million. Nothing in this section
236 limits the ability of a fee owner to require additional
237 insurance or higher policy limits. For these purposes, the term
238 "construction cost" means the total cost of building
239 construction as stated in the building permit application. If
240 the private provider chooses to secure claims-made coverage to
241 fulfill this requirement, the private provider must also
242 maintain, including tail coverage for a minimum of 5 years
243 subsequent to the performance of building code inspection
244 services. The insurance required under this subsection shall be
245 written only by insurers authorized to do business in this state
246 with a minimum A.M. Best's rating of A. Before providing
247 building code inspection services within a local building
248 official's jurisdiction, a private provider must provide to the
249 local building official a certificate of insurance evidencing
250 that the coverages required under this subsection are in force.

Page 9 of 10

CODING: Words stricken are deletions; words underlined are additions.

hb0567-04-er

The corresponding Senate Bill 1470 2005 contains the "tail coverage" language.

Florida Senate - 2005
22-1070-05

SB 1470
See HB 567

1 (b) A local enforcement agency, local building
2 official, or local government may establish, for private
3 providers and duly authorized representatives working within
4 that jurisdiction, a system of registration to verify
5 compliance with the licensure requirements of paragraph (1)(g)
6 and the insurance requirements of subsection (15).

7 (c) Nothing in this section limits the authority of
8 the local building official to issue a stop-work order for a
9 building project or any portion of such order, as provided by
10 law, if the official determines that a condition on the
11 building site constitutes an immediate threat to public safety
12 and welfare.

13 (15) A private provider may perform building code
14 inspection services under this section only if the private
15 provider maintains insurance for professional ~~and~~
16 ~~comprehensive general~~ liability with minimum policy limits of
17 \$1 million per occurrence covering relating to all services
18 performed as a private provider. If the private provider
19 chooses to secure claims-made coverage to fulfill this
20 requirement, the private provider must also maintain,
21 including tail coverage for a minimum of 5 years subsequent to
22 the performance of building code inspection services.
23 Occurrence-based coverage may not be subject to any tail
24 coverage requirement. Before providing building code
25 inspection services within a local building official's
26 jurisdiction, a private provider must provide to the local
27 building official a certificate of insurance evidencing that
28 the coverages required under this subsection are in force.

29 (17) Each local building code enforcement agency shall
30 develop and maintain a process to audit the performance of
31 building code inspection services by private providers

It appears the words "including tail" was struck from the bill by an amendment to the senate bill before finally passing in its final version.

ENROLLED

2005 Legislature

CS for CS for CS for CS for SB 442
2nd Engrossed

1 only if the private provider maintains insurance for
2 professional and comprehensive general liability covering with
3 minimum policy limits of \$1 million per occurrence relating to
4 all services performed as a private provider. Such insurance
5 shall have minimum policy limits of \$1 million per occurrence
6 and \$2 million in the aggregate for any project with a
7 construction cost of \$5 million or less and \$2 million per
8 occurrence and \$4 million in the aggregate for any project
9 with a construction cost of over \$5 million. Nothing in this
10 section limits the ability of a fee owner to require
11 additional insurance or higher policy limits. For these
12 purposes, the term "construction cost" means the total cost of
13 building construction as stated in the building permit
14 application. If the private provider chooses to secure
15 claims-made coverage to fulfill this requirement, the private
16 provider must also maintain, ~~including tail~~ coverage for a
17 minimum of 5 years subsequent to the performance of building
18 code inspection services. The insurance required under this
19 subsection shall be written only by insurers authorized to do
20 business in this state with a minimum A.M. Best's rating of A.
21 Before providing building code inspection services within a
22 local building official's jurisdiction, a private provider
23 must provide to the local building official a certificate of
24 insurance evidencing that the coverages required under this
25 subsection are in force.
26 (17) Each local building code enforcement agency may
27 shall develop and maintain a process to audit the performance
28 of building code inspection services by private providers
29 operating within the local jurisdiction. ~~Work on a building or~~
30 ~~structure may proceed after inspection and approval by a~~
31 ~~private provider if the provider has given notice of the~~

39

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

The final staff analysis by the Local Government Council on April 1 2005 states the effect of the proposed changes to the amendment was to simply conform claims-made coverage to what was “currently available in the market. “

A private provider is authorized to perform building code inspection services under this section only if the private provider maintains insurance for professional and comprehensive general liability. Minimum policy limits are specified in the amount of \$1 million per occurrence relating to services performed as a private provider, and including tail coverage for a minimum of 5 years subsequent to the performance of building code inspection services.

In response to concerns relating to the use of private providers, the Florida Building Commission established a workgroup to evaluate the private provider program and make recommendations to the Legislature. The recommendations of the workgroup were included in the Building Commission's 2005 report to the Legislature.

Effect of proposed changes

The bill is a reflection of discussions and debate by the workgroup and the Commission, noted in the paragraph above. The bill amends s. 553.791, F.S., to provide that, notwithstanding any law or local ordinance or policy, a construction contractor, in addition to the owner of the property and upon written authorization from the owner, may choose a private provider to provide building plans review and inspection services. Structures, as well as buildings, are included in this authorization. The bill deletes a provision allowing a local building official to require a fee owner wishing to use a private provider to use such provider for both plans review and inspection services. The bill also provides additional conditions and notification requirements governing the use of private providers. Currently, the owner or contractor is required to notify the local building department about the use of a private provider at the time of application for a building permit. The bill allows the notification of the use of a private provider to take place for up to 7 business days prior to the first scheduled inspection of the project.

The bill states that local governments may, at their option, establish a registration system to ensure private providers comply with the licensure and insurance requirements. It further states that local building officials retain the authority to issue a stop-work order for a building project if the official determines that a condition on a building site constitutes an immediate threat to public safety and welfare.

The bill eliminates the requirement that the private provider maintain comprehensive general liability insurance with minimum policy limits of one million dollars per occurrence. It continues to require private providers to maintain professional liability insurance, ties coverage limits to the value of the buildings the provider is working on, and conforms claims-made coverage requirements to the insurance currently available in the marketplace:

<u>Per Occurrence/Aggregate</u>	<u>Construction Cost</u>
\$1 million/ \$2 million	\$5 million or less
\$2 million/ \$4 million	\$5 million or more

The bill specifies that the fee owner may require additional insurance or higher policy limits. The bill requires this coverage to be issued by a Florida-authorized insurer rated A or better by A.M. Best.

The bill specifies that work on a building may proceed after the inspection and approval by a private provider if the provider has given notice of the inspection. It further specifies that subsequent to inspection and approval, the completion of work may not be held up or delayed due to the failure to complete an inspection audit by a local building enforcement official.

The bill adds grounds for disciplinary actions for violating or failing to comply with a rule or order of the Florida Building Commission.

C. SECTION DIRECTORY:

Section 1. Amends s. 553.791, F.S., to address various provisions relating to the services of a private provider when offering local construction plans review and inspections.

STORAGE NAME:
DATE:

h0567d.CC.doc
4/1/2005

PAGE: 3

The FS 553.791 (17) does not contain the “including tail” language but keeps “coverage for a minimum the 5-years subsequent language.

“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.”

Insurance Industry “Common Practice” Definitions

Per-occurrence policy: offers lifetime coverage for incidents that occur during the policy period, regardless of when the claim is reported.

Claims-made policy: only covers incidents that occur and are reported within the policy's time frame unless a 'tail' extension is purchased.

Tail coverage: a feature found within a claims-made policy that permits an insured to report claims that are made against the insured after a policy has expired or been canceled if the wrongful act that gave rise to the claim took during the expired/canceled policy. Also known as Supplemental ERP, Optional ERP, Discovery Period, or simply Extended Reporting Period.

Subsequent: Coming after something in time

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 a “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.”?

Summary:

Petitioner respectfully believes the answer to the outlined question is “YES”. If the answer is “NO” then it would not be possible for the Building Official to perform his statutory responsibility to ensure Private Providers maintain coverage for a minimum of 5 years subsequent to the performance of building code inspection services as required by 553.791(17). It cannot be expected that a PP would submit for subsequent years, an additional annual policy for each of five subsequent years if a PP loses coverage or simply goes out of business. It appears through a review of the history and process by which the Statute was amended that the intent of the legislature was to protect the citizens by requiring some form of a “tail-coverage” or supplemental ERP for the entirety of the five subsequent years to the policies expiration when “claims-made” coverage is provided to the Building Official. The slight change in language was simply to provide greater flexibility to the Building Official when reviewing an ERP to ensure it conforms to the requirements of the law.

Doug Sposito
Deputy Building Official, Collier County FL

SpositoDoug

Digitally signed by SpositoDoug
DN: E=Doug.Sposito@colliercountyfl.gov,
CN=SpositoDoug, OU=ORM User Accounts,
OU=GMD, PR Operations and Regulatory
Mgmt, OU=Planning and Regulation,
OU=GMD, OU=Divisions, DC=bcc,
DC=collier.gov, DC=net
Date: 2023.09.29 08:08:37-04'00'