

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

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

Agency Clerk No. \_\_\_\_\_

\_\_\_\_\_ /

**PETITIONER'S RESPONSE TO STAFF RECOMMENDATIONS**

Petitioner Jack A. Butler hereby submits this Response to Staff Recommendations in support of his Petition for a Non-binding Advisory Opinion before the Florida Building Commission ("Commission") regarding local amendments adopted by the Broward County Board of Rules and Appeals ("BORA"). The information and arguments provided in this document supplement and support the Petition.

**STAFF'S RECOMMENDED ANSWER TO QUESTION 1**

Petitioner's Question 1 asked, "Are the subject amendments, implicitly classified as administrative amendments by BORA, actually technical amendments that are subject to additional requirements prior to and following adoption?" This question was posed under the authority of §553.73(4)(1), Fla. Stat., which allows a substantially affected person to ask the Commission whether a local ordinance has effectively imposed a local technical amendment. Adopting such local technical amendments follows a process described in §553.73(4)(b), Fla. Stat. A form is prescribed in statute and rule for the purpose of filing such a petition.

Staff recommended that the answer to this question should be "No," without any explanation, findings of fact and conclusions of law, or legal foundation. This answer also does

not explicitly include a finding that the subject building code edits are local administrative amendments or something else.

Staff's recommended answer was first heard by the Commission's Codes Administration Technical Advisory Committee (CATAC) at a teleconference held on December 1, 2023, as directed by Rule 61G20-2.003(3), F.A.C. CATAC endorsed staff's recommendation without discussion of Question 1. An advisory board must go beyond simply answering a question. According to the Advisory Board Centre, "The role of an advisory board is not to make decisions, but rather to provide current knowledge, critical thinking and analysis to increase the confidence of the decision-makers" [from <https://www.advisoryboardcentre.com/insight/what-are-the-advisory-board-roles-and-responsibilities>].

Since staff provided no foundation for its recommendation, and the CATAC conducted no discussion on the proposed answer, the CATAC's recommendation is without foundation and is, therefore, improper. Petitioner respectfully asks the Commission to return the question to the CATAC to develop findings of fact and conclusions of law that will provide the required logical support for the proposed answer and the ability for Petitioner, BORA, and others to apply this advisory opinion to future questions of a similar nature.

#### STAFF'S RECOMMENDED ANSWER TO QUESTION 2

Petitioner's Question 2 asked, "Did BORA properly follow the local amendment adoption procedure described in §553.73(4), Fla. Stat., when the subject amendments were adopted as part of a larger package of amendments?" Staff recommended that the Commission should provide no response to this question based on staff's opinion that "This question falls outside the scope of a nonbinding advisory opinion petition." Petitioner strongly disagrees with this recommended "non-response."

Although no explanation was given in the staff document, and following Petitioner’s opportunity to speak during the CATAC teleconference held on December 1, 2023, staff provided their reasoning for the recommended response to Question 2 when answering a question posed by a CATAC member. Staff’s answer was that Rule 61G20-2.003, F.A.C., requires such requests for a non-binding advisory opinion of this type to come from a local government. Since the Petitioner is not a local government, staff told the CATAC that the Commission could not answer the question. This is not what the rule says, and Petitioner was precluded by the meeting facilitator from correcting the record before the CATAC vote was conducted. As a result, the CATAC’s action was based on a mistaken understanding of the rule. Again, the proper remedy is to return the question to the CATAC for reconsideration.

Petitioner posed his Question 2 under the authority provided in §553.73(4)(i), Fla. Stat., which says, “In addition to paragraphs (f) and (g), the commission may review any amendments adopted under this subsection and make nonbinding recommendations related to compliance of such amendments with this subsection.” The reference to “this subsection” is to §553.73(4), Fla. Stat., in its entirety, including the administrative amendments authorized in §553.73(4)(a), Fla. Stat., and the technical amendments authorized in §553.73(4)(b), Fla. Stat. Thus, *any* amendment—administrative or technical—would be subject to Commission review of the local adoption process described in that subsection. Petitioner agrees with staff that the controlling verb is ‘may’ rather than ‘shall’, but providing an answer to the question posed is not outside the scope of a non-binding advisory opinion.

It is important to closely review the language of Rule 61G20-2.003(4), F.A.C., in order to correctly understand its intent. There are three relevant subsections to this matter. Subsection (4) provides the form used by Petitioner to ask the first question regarding the nature of the local

amendments under the provisions of §553.73(4)(1), Fla. Stat. There is no prescribed form for asking the second question pursuant to the authority of §553.73(4)(i), Fla. Stat., so Petitioner asked that question on the same form.

Rule 61G20-2.003(4), F.A.C., is titled, “Local Amendments to the Florida Building Code.” Subsection (1) of the rule, the second one relevant to this question, says, “Local governments may adopt amendments to the Florida Building Code which meet the requirements of Section 553.73(4)(b), F.S.” This statutory reference is to the proscribed process of adopting local technical amendments. There is no reference anywhere in the rule to §553.73(4)(a), Fla. Stat., which is the paragraph that authorizes local administrative amendments.

One possible interpretation of this omission is that the entire rule is not relevant to local administrative amendments, but there is no explicit limitation contained within the language of the rule to support such a conclusion. Neither does the omission of a reference to local administrative amendments authorized under §553.73(4)(a), Fla. Stat., mean that they are precluded by the rule. Subsection (1) just appears to restate what is already in statute and serves no useful purpose.

The third component of the rule that applies to the subject at hand is Subsection (3):

The Commission may review local amendments and issue nonbinding recommendations to the local government regarding the compliance of such amendments with the requirements of Section 553.73(4), F.S. For purposes of this review, each amendment shall be considered first by the applicable Technical Advisory Committee which shall make a recommendation to the Commission regarding the compliance of the amendment with the applicable criteria. The nonbinding recommendation shall be issued in writing to the local government and shall be issued to the local government within thirty (30) days of the conclusion of the Commission meeting at which the recommendation is approved.

The referenced “Section 553.73(4), F.S.” covers both administrative and technical amendments, including all adoption, challenge, and review processes. Staff appears to base its opinion that the petition must come from a local government on the requirement for the non-

binding advisory opinion to be issued to the local government whose amendment prompted the petition, inferring that since the opinion must be transmitted to the local government, then only the local government can ask the question seeking the opinion. This is an incorrect conclusion.

Subsection (3) is the only part of the rule that addresses the process for responding to a petition of any type regarding a local amendment, including the possible local technical amendments addressed in Subsection (1) and that are the subject of the petition form prescribed in Subsection (4). By law, such petitions are not submitted by a local government, but by a “substantially affected person.” Thus, the fact that Subsection (3) says the opinion must be *issued* to the local government has no connection whatsoever to who has to *submit* the petition. This is logical given that the entity being advised by the opinion is the local government, which is expected to consider the Commission’s opinion and decide whether the local government needs to take some corrective action. A petitioner is just the person who brings the matter to the Commission’s attention. A petitioner has no ability to act on the opinion. Besides, §553.73(4)(i), Fla. Stat., imposes no restriction on who can seek Commission review of a local amendment.

In fact, given the wording of §553.73(4)(i), Fla. Stat., there appears to be no requirement for *anyone* to petition the Commission in order to start a review authorized under that paragraph. Neither statute nor rule limit the initiation of a Commission review of any local amendment at any time. Even the Commission itself could initiate a review without an outside request. The rule, which was revised after the 2021 statutory changes, cannot impose a restriction that is not authorized by statute. So, while the Commission may choose not to answer the question, it is not prohibited from doing so, as staff incorrectly told the CATAC. In other words, regardless of whether the three local amendments were administrative or technical in nature, §553.73(4)(i),

Fla. Stat., gives the Commission the authority to provide its opinion as to whether the amendment was adopted in accordance with the applicable requirements of §553.73(4), Fla. Stat.

The CATAC recommendation regarding Question 2 was based on its being told that it could not consider the question. This is incorrect. To correct the mistaken advice, the matter should be returned to the CATAC and the proper meaning of the rule conveyed to that advisory body so they may potentially revise their recommendation to the Commission.

#### IMPORTANCE OF ANSWERING PETITION QUESTION 2


Petition Question 2 was posed due to statutory changes that were enacted in the 2021 legislative session. As a result, Petitioner asserted that §553.73(4)(h), Fla. Stat., now calls for all local amendments—administrative and technical—to “include a fiscal impact statement that documents the costs and benefits of the proposed amendment.” BORA and other local governments are currently adopting local amendments in anticipation of the next edition of the Florida Building Code. Local governments must be advised to recognize the new requirement for administrative amendments imposed by the Legislature in 2021; i.e., to extend the requirement for a fiscal impact statement to local administrative amendments. Thus, while the Commission may choose not to answer the question given the wording of §553.73(4)(i), Fla. Stat., an answer is vitally needed and timely.

There is also the matter of the final phrase in the question, “the subject amendments were adopted as part of a larger package of amendments.” BORA’s edits to the core Florida Building Code are extensive. BORA uses a similar process for all its many local amendments and the evidence submitted to the Commission shows that almost none of the statutorily required elements contained in §553.73(4)(b), Fla. Stat., are being followed. Now that the Commission has knowledge of the lack of conforming adoption processes in multiple jurisdictions, the

Commission should consider providing a complete advisory opinion that informs all local governments of the proper adoption procedure for local administrative and technical amendments under today's statutory regime.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mo Madani, Technical Director, Building Codes & Standards Office, 2601 Blair Stone Rd, Tallahassee, FL 32399, [Mo.Madani@myfloridalicense.com](mailto:Mo.Madani@myfloridalicense.com); Charles M. Kramer, BORA Attorney, at Benson, Mucci & Weiss, P.L., 5561 North University Ave, #102, Coral Springs, FL 33067, [ckramer@BMWlawyers.net](mailto:ckramer@BMWlawyers.net); and W. Justin Vogel, Chief Legal Counsel, Florida Building Commission, Department of Business and Professional Regulation, 2601 Blair Stone Rd, Tallahassee, FL 32399, [William.Vogel@myfloridalicense.com](mailto:William.Vogel@myfloridalicense.com) via electronic mail.



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December 4, 2023

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