

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

Agency Clerk No. **DS 2023-046**

I. PETITIONER

Jack A Butler, AICP
Florida Certificate CRC1328041
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II. PETITIONER'S ATTORNEY

Petitioner is not represented by counsel and files this Petition *pro se*.

**III. STATUTORY PROVISION(S), AGENCY RULE(S), AGENCY ORDER(S),
AND/OR CODE SECTION(S) ON WHICH DECLARATORY STATEMENT IS
SOUGHT**

2020 Florida Building Code, 7th Edition – Building: Applicable portions of §§107 and 1603. The subject language is repeated in the 2023 version (8th Edition).

IV. HOW THE RULE SUBSTANTIALLY AFFECTS PETITIONER

The Petitioner was motivated to file this Petition by his uncertainty regarding a key requirement in the Florida Building Code related to construction documents. As a residential designer and contractor, Petitioner is affected by the language of the Florida Building Code (FBC) and how that language is interpreted. This Petition is not prompted by the actions or code interpretations of any specific jurisdiction, but by Petitioner's overall experience in dealing with multiple jurisdictions that apply differing interpretations to the provisions of §107.1 in Florida Building Code – Building (FBC-Building) as they relate to special conditions and additional construction documents. For example, one jurisdiction interpreted the phrase "special conditions" in §107.1 to include a residential structure that exceeded 5,000 square feet of living space. Another jurisdiction interpreted the phrase to mean any residential project costing more than \$30,000. More than one jurisdiction has interpreted the phrase "additional construction documents" to include *all* construction documents.

This Petition seeks to resolve the controversy by requesting a declaratory statement from the Florida Building Commission (“Commission”) as to the proper interpretation so that Petitioner may better understand any jurisdictional limits on his practice as a residential designer and builder.

V. QUESTIONS POSED

The questions posed by this petition relate to the follow sections of FBC-Building:

107.1 General.

Submittal documents consisting of construction documents, statement of special inspections, geotechnical report and other data shall be submitted in two or more sets with each permit application. The construction documents shall be prepared by a registered design professional where required by Chapter 471, Florida Statutes or Chapter 481, Florida Statutes. **Where special conditions exist, the building official is authorized to require additional construction documents to be prepared by a registered design professional.** *[emphasis added]*

Exception: The building official is authorized to waive the submission of construction documents and other data not required to be prepared by a registered design professional if it is found that the nature of the work applied for is such that review of construction documents is not necessary to obtain compliance with this code.

107.2 Construction documents.

Construction documents shall be in accordance with Sections 107.2.1 through 107.2.6.

The last sentence of the main portion of §107.1 has been highlighted by using a bold underlined font. This is the sentence central to the two questions posed by this Petition, which are:

1. Does the phrase “special conditions,” as used in FBC-Building §107.1, refer to specific elements of the planned construction or site characteristics that are not common to other projects within the enforcing jurisdiction?
2. Are the “additional construction documents” referenced in FBC-Building §107.1 limited to documents that only address any such special conditions that may exist for the project or construction site and do not include the standard construction documents that are to be submitted with a building permit application, as contained in FBC-Building §§107.2.1 through 107.2.7?

VI. DETAILED DISCUSSION

The following sections provide additional details regarding the subject section of the FBC-Building, supplemental information intended to aid the Commission in providing a suitable response, and legal support justifying a declaratory statement to resolve the matter.

JURISDICTION

Plaintiff asserts this Petition is filed pursuant to, and conforms with, the requirements of Rule 28-105.002, F.A.C. Petitioner further asserts that the Commission has jurisdiction over this matter under §120.565, Fla. Stat., and Rule 28-105.001, F.A.C., in that the Commission has the general power to interpret the FBC under provisions of Chapter 553.72(3), Fla. Stat., which says, “It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. 120.536(1) and 120.54 and enforced by authorized state and local government agencies.”

The Florida Legislature additionally provided specific powers related to this Petition in §553.775(3)(b), Fla. Stat., by directing the Commission to issue declaratory statements upon petition by a substantially affected person: “When requested in writing by any substantially affected person or state agency or by a local enforcement agency, the commission shall issue a declaratory statement pursuant to s. 120.565 relating to this part and ss. 515.25, 515.27, 515.29, and 515.37. Actions of the commission are subject to judicial review under s. 120.68.” The phrase “this part” refers to Chapter 553, Part IV – Florida Building Code, which consists of §§553.70 through 553.899, Fla. Stat. This implicitly includes the FBC, which is adopted by the Commission as an agency rule.

The provisions of §553.775(3)(d), Fla. Stat., may also apply, depending on the manner by which the Commission chooses to compose its response. This paragraph says, “Upon written application by any substantially affected person, contractor, or designer, or a group representing a substantially affected person, contractor, or designer, the commission shall issue or cause to be issued a formal interpretation of the Florida Building Code or the Florida Accessibility Code for Building Construction as prescribed by paragraph (c).”

DECLARATORY STATEMENTS

Florida law provides the authority for administrative agencies to issue “a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances” (§120.656(1), Fla. Stat.). Any such petition “shall state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.” (§120.656(2), Fla. Stat.)

The Commission has the specific statutory authority through §553.775(3)(a), Fla. Stat., to “issue declaratory statements pursuant to s. 120.565 relating to the enforcement or administration of the Florida Building Code.” FBC-Building is a rule adopted by the Commission. Thus, the Commission is the administrative agency designated in Florida law as the one established to provide declaratory statements in response to petitions filed in accordance with Chapter 28-105, F.A.C.

Rule 28-105.001, F.A.C., relevantly says, “A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory

provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances." The facts of the Petition establish that it is not filed for resolving purely hypothetical issues, but for addressing a particular set of existing circumstances affecting Petitioner and his future behavior. The Petition does not seek for the Commission to review past interpretations or to direct the action of another party. The Petition is not submitted in anticipation of any subsequent legal action.

The relief offered by a declaratory statement is meant to address a current or pending crisis that is particular to the circumstances of the petitioner. The Commission has previously referenced *Fla. Optometric Ass'n v Dep't of Bus. & Prof'l Regulation, Bd. Of Opticianry*, 567 So.2d 928, 937 (Fla. 1st DCA 1990) as limiting the scope of declaratory statements to instances "where the petition has clearly set forth specific facts and circumstances which show that the questions presented relate only to the petitioner and his particular set of circumstances." The Commission has also quoted *Sutton v. Dep't of Envtl. Prot.*, 654 So.2d 1047, 1048 (Fla. 5th DCA 1995), which said, "A declaratory statement cannot be issued for general applicability."

However, the enabling legislation in §553.73, Fla. Stat., and elsewhere is broadly stated in terms of the topics and applicability of declaratory statements that may be issued by the Commission. For example, the Legislature fully anticipated that declaratory statements and code interpretations issued by the Commission would broadly apply—even to the Commission itself and other parties—when it directed:

Local enforcement agencies, local building officials, state agencies, and the commission shall interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission, except that conflicts between the Florida Fire Prevention Code and the Florida Building Code shall be resolved in accordance with s. 553.73(11)(c) and (d). [§553.775(2), Fla. Stat.]

Supporting a broader application of the relief provide by declaratory statements, the Florida Supreme Court, ruling in *Florida Dep't of Bus. and Professional Regulation, Div. of Pari-mutuel Wagering v. Investment Corp. of Palm Beach*, 24 Fla. Law Weekly S250, 1999 WL 1018661 (Fla. 1999), said the requirement for a question to deal solely with "petitioner's particular circumstances" does not mean that the answer provided need apply only to that person. It means only that the actual matter in controversy must exist. The Court held that the phrase, "petitioner's particular circumstances," is synonymous to "a particular set of facts." The Court said, "By providing for publication of notice when the petition is filed, the Legislature clearly understood that the answer to a petition for declaratory statement may very well have impact on others who are regulated by the agency." (*Id.*, quoting Judge Cope in 714 So.2d at 592-94.)

The Court also found that the mere belief on the part of an administrative agency that its declaratory statement will apply to other persons similarly situated and may even lead to subsequent rulemaking does not preclude the need for the declaratory statement itself:

[I]t is sensible for courts to encourage agencies to be responsive to specific questions and then anticipate whether a broader application may occur in the future and take action accordingly. Agency rules established in that manner are pre-empting later disputes rather than simply engaging in crisis management and reacting to endless inquiries each tailored to a petitioner's 'particular set of circumstances.' One approach should not and now does not absolutely foreclose the other. (*Id.*)

Reinforcing this conclusion, the Court found the statute anticipated that the particular set of circumstances described in a petition for declaratory statement would apply to others in requiring public notice of any such petition:

[I]n *Chiles*, 711 So. 2d at 154-55 (explaining that declaratory statements may help parties avoid costly administrative litigation, while simultaneously providing 'useful guidance to others who are likely to interact with the agency in similar circumstances'). The First District also interpreted the notice provision in the declaratory statement statute as "account[ing] for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties." *Id.* at 155. (*Id.*, at 22.)

This more recent ruling by the Florida Supreme Court trumps the conclusions of earlier inferior courts referenced by the Commission in prior orders denying petitions for declaratory statement, such as in the instance of *Excel Electrical Group, LLC*. (DS 2019-022, Feb. 16, 2018). It is sufficient for the specified circumstances to apply to Petitioner without regard to the possibility that the declaratory statement may also affect other persons similarly situated. Any need for rulemaking identified by the administrative agency in the course of responding to a petition for declaratory statement does not abrogate the need to provide an answer to the petition.

Thus, as a matter of law, the Petition meets the purpose and use requirements of Rule 28-105.001, F.A.C. In addition, the Petition meets the requirements of §120.565(2), Fla. Stat., and Rule 28-105.002, F.A.C., for the form and content of a petition for declaratory statement; and the Commission is the appropriate agency for considering this Petition and rendering a declaratory statement on the subject in answering the questions posed in the Petition. The questions posed are particular to Petitioner's situation, even though they may apply to others.

STANDING OF PETITIONER

Petitioner Jack A. Butler is a Florida Certified Residential Contractor holding Certificate No. CRC1328041 and co-owner and managing member of Butler & Butler, LLC, a Florida-registered for-profit company organized in March 2002 and in continuous

operation since then. Among other services, Petitioner and his firm provide residential design and construction services. Petitioner is not certified or licensed as an architect; his practice as a residential designer is permitted under the exemptions included in §481.229(1)(b), Fla. Stat.

As demonstrated herein, Petitioner is a party with substantial interests in the questions placed before the Commission for resolution with regard to the meaning and application of certain statutory and code requirements and is, thus, a substantially affected person under the requirements of §120.565(1), Fla. Stat. Section 553.775(2)(b), Fla. Stat. requires a petition for declaratory statement to be filed by a substantially affected person. Section 553.775(2)(d), Fla. Stat., says a petition for declaratory statement may be filed by a substantially affected person, contractor, or designer. Petitioner meets all these requirements. Petitioner further asserts that the circumstances giving rise to the Petition are current and continuing, and apply directly to Petitioner.

INTERNATIONAL BUILDING CODE ORIGIN OF THE SUBJECT LANGUAGE

The Commission appears to have used the 2018 edition of the International Building Code (IBC) developed by the International Code Counsel (ICC) as its foundation for constructing FBC-Building in accordance with §553.73(3), Fla. Stat. The following language is found in that source document:

107.1 General.

Submittal documents consisting of construction documents, statement of special inspections, geotechnical report and other data shall be submitted in two or more sets with each permit application. The construction documents shall be prepared by a registered design professional where required by [the statutes of the jurisdiction in which the project is to be constructed]. Where special conditions exist, the building official is authorized to require additional construction documents to be prepared by a registered design professional.

Exception: The building official is authorized to waive the submission of construction documents and other data not required to be prepared by a registered design professional if it is found that the nature of the work applied for is such that review of construction documents is not necessary to obtain compliance with this code.

107.2 Construction documents.

Construction documents shall be in accordance with Sections 107.2.1 through [107.2.8].

The text shown above in brackets was modified by the Commission when it adopted the language found in the same sections of FBC-Building. The Commission made two changes in this part of the code. In §107.1, the bracketed text was replaced by “Chapter 471, Florida Statutes or Chapter 481, Florida Statutes.” These are the two chapters of Florida Statutes that govern registered design professionals.

The bracketed text found in IBC §107.2 of “107.2.8” was replaced with “107.2.6” in FBC-Building. The difference in range comes from two findings. The 2018 IBC includes

§107.2.7 (construction documents must include information contained in §1603) and §107.2.8 (relocatable buildings) in the list of construction documents required under §107.2. The 2020 and 2023 editions of FBC-Building include the text of §107.2.7, but does not list it within the list found in §107.2. Subsection 107.2.8 is not included in either edition of the FBC. Even though it is not included in the range contained in §107.2, §102.2.7 and its referenced §1603 are still required standard construction documents as a standalone element given the structure of the code's subsection. Thus, §102.2.7 was likely omitted from the range of subsections in FBC-Building §102.2 as being redundant and has no impact on what actually is included in the list of standard construction documents.

Except for these two differences, which do not impact the meaning or interpretation of these subsections, the language in FBC-Building is the same as that of the source IBC document. Although the 2021 edition of IBC substantially expanded the language of these subsections, the FBC-Building text found in the 2023 edition remains unchanged and continues to be based on the 2018 edition.

As given in FBC-Building, the standard construction documents are:

- Dimensioned plans [§107.2.1]
- Fire protection system shop drawings, where applicable [§107.2.2]
- Location, construction, size and character of all portions of the means of egress [§107.2.3]
- Exterior wall envelope description [§107.2.4]
- Details of the impervious moisture barrier system for exterior balcony and elevated walking surfaces, if any [§107.2.5]
- Site plan [§107.2.6]
- Size, section, and relative locations of structural members with floor levels, column centers, and offsets dimensioned [§1603.1]
- Design loads and other information pertinent to the structural design required by Sections 1603.1.1 through 1603.1.9 [§1603.1]

Additional construction documents would be supplemental to these minimal, standard requirements. The building official, acting under the authority granted in the exception found in §107.1, may remove the requirement for some of these documents. For example, the site plan and exterior wall section may be omitted for interior construction projects.

Because of the language continuity from the 2018 IBC, Petitioner first sought an informal interpretation from the ICC. That agency assigned the task of responding to Christopher R. Reeves, P.E., Director, Architectural & Engineering Services. His answer was provided in an email to Petitioner on November 27, 2023:

This email is in response to your email correspondence regarding "special conditions" and the need for "additional construction documents". All comments are based on the 2018 International Building Code (IBC) unless noted otherwise.

As noted in Section 107.1, the building official is authorized to require "additional construction documents" to be prepared by a registered design professional where "special conditions" exist. Admittedly, while the code doesn't define what constitutes

“special conditions”, such conditions are typically matters not provided for or addressed by the code or proposed design alternatives to the basic provisions in the code as regulated by Section 104.11. For example, the code does not specifically address how to construct a chemical refinery or other special hazardous occupancies which may require unusual height or area limitations due to a specific process or equipment. Extremely large buildings may also warrant a specific egress design study to justify an additional exit access travel distance beyond basic code limitations. “Special conditions”, as alluded to in your correspondence, is not, in my opinion, necessarily related to the cost of the project or other local amendments.

As noted, “additional construction documents” could include drawings, structural calculations, research reports, test data or additional studies, prepared by a registered design professional, to substantiate equivalent compliance with the intent of the code with final approval subject to the building official.

The ICC staff’s understanding of the phrase “special conditions” is consistent with Petitioner’s contention that such a condition must be one arising from either a specific characteristic of the construction site, such as poor soils or steep slopes, or the particular design elements of the proposed structure, such as a fenestration that exceeds the proscriptive provisions of a header table in the FBC or its referenced standards. In other words, a special condition is one that is not directly addressed by prescriptive guidance found in the code. The ICC staff response directly says that the term does not include such generic measures as the “cost of the project or other local amendments.”

The ICC staff’s interpretation of the phrase “additional construction documents” is also consistent with Petitioner’s contention that such documents are appended to the standard construction documents in order to say how the proposed structure will accommodate the special conditions. Such documents are not a wholesale replacement for the regular set of construction documents described in the FBC and which, for specified structures, may be prepared by design professionals or owner/builders who are not registered. These additional construction documents could be as complex as a set of foundation plans prepared by a professional engineer to address unfavorable soil conditions or as simple as a professional engineer’s letter stating that the proposed design for headers supporting openings that exceed the lengths addressed in FBC load tables are adequate for the intended purpose.

VII. PROPOSED ANSWERS


Petitioner proposes the following answers to the questions posed by this Petition:

1. “Special conditions” means the presence of an element of the construction site and/or design that is outside the parameters upon which the Florida Building Code is based or exceed the prescriptive guidance found in the code, and that are unique to the proposed construction rather than generally applicable within the jurisdiction of the local enforcement agency.

2. “Additional construction documents” means one or more documents beyond those standard documents called for in FBC-Building §§107.2 and 1603, and that are needed to address the special conditions related to the particular project.

CERTIFICATE OF SERVICE

This Petition for Declaratory Statement is hereby submitted on December 6, 2023, via email to Mo Madani, Technical Director, Building Codes & Standards Office, 2601 Blair Stone Road, Tallahassee, Florida 32399, Mo.Madani@myfloridalicense.com for consideration of a response by the Florida Building Commission.



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