

## CITY OF GAINESVILLE BUILDING DEPARTMENT

### Position #1 - The Intent and Requirements of the Florida Threshold Program

For four decades, the Florida Threshold Program and the special inspector have been an integral part of the inspection process that worked closely with local building officials. These 3<sup>rd</sup> party engineers provided independent structural inspections, while being directly responsible to the building official with the common goal of avoiding the type of disaster where the collapse of the Harbour Cay Condominium in Cocoa Beach on March 27, 1981, resulted in eleven workers being killed and 23 others injured.

This common goal of protecting the workers during construction and providing for safe and structurally sound buildings, in tandem with building code inspections, has served the industry well over the years. These parallel, yet distinctly separate, inspection programs provide important checks and balances in the inspections of Threshold Buildings and are equally important as professional inspection programs.

The building code inspections performed by the building departments and “building code inspection services” performed by the private providers, as defined in FS 553.791(1)(d), are the same service and should be viewed the same in performance and scope regardless of the entity performing the inspections. These functions are, and should continue to be, separate from the independent threshold program and the threshold inspections performed by the special inspector as required by FS 553.79(5). The Florida Statutes further specify the separate and distinct function of “building code inspection services” by “building inspectors” versus “special inspectors”:

*FS 553.791 1(d) - “Building code inspection services” means those services described in s. 468.603(5) and (8) involving the review of building plans as well as those services involving the review of site plans and site work engineering plans or their functional equivalent, to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes.*

*FS 468.603 (5)(a) - “Building inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed in accordance with the provisions of the governing building codes and state accessibility laws.*

*FS 553.71 (9) - “Special inspector” means a licensed architect or registered engineer who is certified under chapter 471 or chapter 481 to conduct inspections of threshold buildings.*

Combining Threshold Inspections with minimal building code inspection services by building inspectors, including under private provider structural inspections, by the same company, would compromise this long standing independent arrangement established in the *Laws of Florida Chapter 84-365 (FS 553.79)*.

*FS 553.79 (5)(a) During new construction or during repair or restoration projects in which the structural system or structural loading of a building is being modified, the enforcing agency shall require a **special inspector to perform structural inspections on a threshold building** pursuant to a structural inspection plan prepared by the engineer or architect of record. The structural inspection plan must be submitted to and approved by the enforcing agency before the issuance of a building permit for the construction of a threshold building. The purpose of the structural inspection plan is to provide specific inspection procedures and schedules so that the building can be adequately inspected for compliance with the permitted documents. The special inspector may not serve as a surrogate in carrying out the responsibilities of the building official, the architect, or the engineer of record. The contractor's contractual or statutory obligations are not relieved by any action of the special inspector. The special inspector shall determine that a professional engineer who specializes in shoring design has inspected*

*the shoring and reshoring for conformance with the shoring and reshoring plans submitted to the enforcing agency. A fee simple title owner of a building, which does not meet the minimum size, height, occupancy, occupancy classification, or number-of-stories criteria which would result in classification as a threshold building under s. 553.71(12), may designate such building as a threshold building, subject to more than the minimum number of inspections required by the Florida Building Code. [emphasis added.]*

*FS 553.79 (5)(b) The fee owner of a threshold building shall select and pay all costs of employing a special inspector, but the special inspector shall be responsible to the enforcement agency. The inspector shall be a person certified, licensed, or registered under chapter 471 as an engineer or under chapter 481 as an architect. (FBC-B 110.8.3) [emphasis added.]*

When the private provider contracts for “Building inspector” services as defined in FS 468.603(5)(a), and when also performing threshold inspections, this places the special inspector and the building official’s professional relationship in a compromised position for ensuring compliance with FS 553.79 (5)(b) and with 61G15-35.004 of the Florida Administrative Code.

*FAC 61G15-35.004*

*(3) Special Inspectors shall be in responsible charge of the work of the Authorized Representative, including reviewing reports and spot checks.*

*(4) Special Inspectors shall institute quality assurance procedures to include but not be limited to requiring unscheduled visits, utilization or relevant check lists, use of a Daily Inspection Report and insuring that the Special Inspector or the Authorized Representative is at the project whenever so required by the inspection plan.*

This combined inspection practice would be the first step in diluting the Threshold Program and altering the original intent of the Legislature, for public safety reasons, to require independent structural inspections and still provide accountability to the local building official.

## **Position #2 - Statutory Compliance Issues**

The statutory provisions which created the threshold program in 1983 and the private provider program in 2002 make no reference or changes to the statutory language in either program and continue to be separate and distinct requirements. In other words, the private provider program under FS 553.791 makes no mention of and does not alter in any way the separate and distinct threshold program under FS 553.79(5); rather, FS 553.791 merely provides an alternative private provider program for “building code inspection services” by “building inspectors.” If the Legislature intended FS 553.791 to alter the separate function of “special inspectors” for threshold buildings, it would have specified as much in FS 553.791. The Legislature didn’t specify that change and therefore did not intend it.

The City’s position is this legal concept applies - Expressio unius est exclusio alterius - which means that the express inclusion of items in a statute means that those not listed are excluded.

See *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); "It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius." See also *McFadden v. State*, 737 So. 2d 1073 (Fla. 1999).

The Attorney General's office has issued opinions stating it is a fundamental principle of statutory construction that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way.

## **Position #3 - Authority Solely Granted to the Local Building Official**

**FBC 110.8.6** - *The building department **may** allow a special inspector to conduct the minimum structural inspection of threshold buildings required by this code, Section 553.73, Florida Statutes, without duplicative inspection by the building department. [emphasis added.]*

Though FBC-B 110.8.6 is permissive (not a requirement) and grants discretion to the **building department**, and not private providers or special inspectors, to accept the special inspector’s inspection for those required building related inspections in FBC Chapter 1 (FS 553.73), the Gainesville building department does not allow this practice and separate inspections and recordation is required by the Gainesville building official.

When the decision is made by the special inspector to combine threshold and private provider inspections, it is a violation of FS 553.79(5)(a); and when decided by the private provider, a violation of their limitations to only provide “building code inspection services” as defined in FS 553.791. With a local building official employed by the jurisdiction, the private provider cannot act as the local building official.

*FS 553.79 (5)(a) The special inspector may not serve as a surrogate in carrying out the responsibilities of the building official, the architect, or the engineer of record. (FBC-B 110.8.1)*

*FS 553.791(1)(d) “Building code inspection services” means those services described in s. 468.603(5) and (8) involving the review of building plans as well as those services involving the review of site plans and site work engineering plans or their functional equivalent, to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes.*

*FS 468.603(5) “Categories of building code inspectors” include the following:*

(a) *“Building inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed in accordance with the provisions of the governing building codes and state accessibility laws.*

*FS 468.603 (8) “Plans examiner” means a person who is qualified to determine that plans submitted for purposes of obtaining building and other permits comply with the applicable building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes.*

#### **Position #4 – The Structural Inspection Plan & the Special Inspector**

Pursuant to FS 553.79 (5)(a), the structural inspection plan must be submitted to and approved by the enforcing agency before the issuance of a building permit for the construction of a threshold building. If the structural inspection plan and the notice by the special inspector, as required by FAC 61G15-35.004, fails to demonstrate compliance, including the use of authorized representative by the special inspector and specifically sub-sections (3) & (4), in the implementation of independent threshold inspections and compliance with FS 553.79 (5)(b), the building official has the right and responsibility to reject the structural inspection plan until the fee owner of a threshold building has selected a special inspector that is independent and directly, without encumbrance, responsible to the enforcement agency.

#### **Position #5 – Potential Conflicts**

FS 553.791 requires the fee owner to complete a form acknowledging their intent to use a private provider. All such services shall be the subject of a written contract between the private provider, or the private provider’s firm, and the fee owner or the fee owner’s contractor, upon written authorization of the fee owner. Clearly the fee owner’s contractor, on behalf of the fee owner, has the ability to contract directly with the private provider for services.

FS 553.79 requires the fee owner of a threshold building to select and pay all costs of employing a special inspector; this appears to indicate the owner is required to contract directly with the special inspector.

Under the scenario of an entity contracting with the fee owner’s contractor as a private provider for “Building code inspection services” at the same time that entity is contracting with the fee owner for “Threshold Inspection Services”, there does exist a potential “Conflict of Interest.”

#### **Position #6 – Issuance of the Certificate of Occupancy**

During the construction process, the building official is to ensure compliance with the Florida Building Code and to faithfully perform these responsibilities without interference from any person - FS 468.604 (1). The building official, as a public employee, is also bound by the oath of FS 876.05.

The local building official is charged with the duty of issuing a Certificate of Occupancy upon completion of a threshold building. When the plan reviews and the inspections are performed by his/her delegated plans examiner or inspector, there is a level of confidence of compliance with the FBC.

The Gainesville building department’s positions #1-5, as expressed above, can place the building official in an unenviable position of signing a Certificate of Occupancy when he/she has had little control or oversight of the construction process. The integrity of the private provider and threshold programs is paramount in the local building official having the professional confidence in signing the Certificate of Occupancy.

It has been clearly established through documents submitted to the public record that private providers send out the same “designated representative” to act as the inspector in both roles, (private provider inspection services and threshold special inspector services) simultaneously. This practice is unacceptable to the City of Gainesville as it clearly erodes any protections that have long been provided by the Threshold statute, and is ultimately an unacceptable public safety concern.

### **BUILDING DEPARTMENT CONCLUSION**

The Gainesville building department’s policy in question is borne out of the concern that the Threshold Program is being adversely affected by the private sector and the desire to place profit above life safety. It appears the private sector is exceeding the intent of the Threshold Program, as initially created by the Laws of Florida Chapter 83-160.

As amended in the *Laws of Florida Chapter 84-365*, “the special inspector shall be responsible to the enforcement agency.” No statutory changes in the Threshold Program that allows the building department or the private provider to perform or combine the duties of the special inspector in the performance of required threshold inspections have been approved by the Florida Legislature or the Florida Administrative Code, since the creation of the Threshold Program under the Laws of Florida Chapter 83-160.

Since the building department is required to have a special inspector to perform structural inspections on a threshold building, and the private provider is performing the building/structural inspections normally performed by the building department, this 3<sup>rd</sup> party separation would apply to the special inspector and the private provider as related to building/structural inspections. This maintains the original intent of the Laws of Florida Chapter 83-160, which established the threshold program with the specific intent to address public health, safety, and welfare.

(5)(a) The enforcing agency shall require a special inspector to inspect all structural components of a threshold building which components are related to the public health, safety, or welfare. The inspector shall be present during any time when such components of such building are being constructed.

And, to the intent of the Laws of Florida Chapter 84-365, as amended the following year, to include the critical relationship between the special inspector and the enforcement agency.

(b) The fee owner of a threshold building shall pay all costs of employing a special inspector, but the special inspector shall be responsible to the enforcement agency. The inspector shall be a person certified, licensed, or registered under the public

The Threshold Program pre-dates the private provider option established in the Laws of Florida Chapter 2002-295. If it is the intent of the Florida Building Commission and the private provider industry to dilute the Threshold Program, consideration should be given to the fee owners of potential threshold buildings to the practice of duplicative inspection services and the financial cost associated with this “double dipping” practice of combined services and the lack of independent threshold inspections.

The jurisdictional building official looks to the support of the State of Florida, the Florida Building Commission and BOAF in supporting their efforts to ensure public safety and a safe “built environment” and to document the permitting and inspection process with professional certainty and integrity in the Public Record.