PETITION FOR CLARIFICATION AND REHEARING BEFORE THE FLORIDA BUILDING COMMISSION

BORA Appeal No. 25-03

JACK A BUTLER,

Petitioner,

v.

BROWARD COUNTY BOARD OF RULES AND APEPALS,

Respondent.

PETITION/MOTION SEEKING CLARIFICATION OF ORDER AND REHEARING

Comes now Petitioner, **JACK A BUTLER** ("Petitioner" or "Butler"), who hereby files this Petition/Motion under Rule 9.330(a)(1), Fla. R. App. P., seeking clarification of the Order Denying Petition for Hearing ("Order") issued by the Florida Building Commission ("Commission") on August 15, 2025, and filed with the Office of the Agency Clerk on August 26, 2025, which makes that the date of rendition.

I. STATUTORY PROVISION(S) AND RULE(S) ON WHICH HEARING IS SOUGHT

This Petition is submitted in conformance with Rule 9.330(a)(1), Fla. R. App. P., which says, "A motion for rehearing, clarification, certification, or issuance of a written opinion may be filed within 15 days of an order or decision of the court or within such other time set by the court." As stated in Rule 9.330(e), Fla. R. App. P., the rule applies to appellate orders or decisions that adjudicate, resolve, or otherwise dispose of an appeal. The content of such a motion is set by Rule 9.330(a)(2), Fla. R. App. P., which relevantly says:

> **(2)** ***Contents*****.**
> **(A) Motion for Rehearing.** A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked

or misapprehended in its order or decision. The motion shall not present issues not previously raised in the proceeding.

(B) Motion for Clarification. A motion for clarification shall state with particularity the points of law or fact in the court's order or decision that, in the opinion of the movant, are in need of clarification.

Given the nature of proceedings before the Commission, this motion is submitted in the form of a petition seeking, first, clarification of two ambiguous aspects of the Commission's Order and, second, a rehearing on the question as to whether judicial admissions issued by Respondent, **BROWARD COUNTY BOARD OF RULES AND APPEALS** ("Respondent" or "BORA"), and contained in the record satisfy the Commission's stated requirement for a written determination to be issued by a local tribunal.

For the purposes of this Petition, the record consists of those documents and statements of which the Commission was aware at the time of its decision; i.e., the corrected appeal petition filed by Butler on May 7, 2025, the Response filed by BORA on July 25, 2025, and statements made during the August 12, 2025, Commission hearing.

II. CLARIFICATION OF THE COMMISSION'S ORDER

The subject appeal petition considered by the Commission on August 12, 2025, sought a hearing by an administrative law judge employed by the Division of Administrative Hearings under the authority of §553.73(4)(g), Fla. Stat. Although that statute says, "[t]he commission shall promptly refer the appeal to the Division of Administrative Hearings," the Commission itself determined the appeal was improper and did not forward it to the Division. In its Order, the Commission says in Paragraph 8:

> 8. Paragraph 553.73(4)(g), Florida Statutes (2025), clearly and explicitly provides that the *written determination of a compliance review board* regarding the compliance of local amendments with the provisions of subsection 553.73(4), Florida Statutes (2025), may be appealed to the Commission. There has been no such

> determination made in this instance, and the Commission declines to adopt Petitioner's theory that BORA's failure, to date, to conduct a hearing or issue a determination on the matter serves as the equivalent. (At p. 3, emphasis theirs.)

That paragraph refers to a "compliance review board" as being the local tribunal that must render the required "written determination" that may be appealed. Paragraph 5 of the Order had quoted the portion of §553.73(4)(f), Fla. Stat., that says:

> [e]ach county and municipality desiring to make local technical amendments to the Florida Building Code shall establish by interlocal agreement a countywide compliance review board to review any amendment to the Florida Building Code that is adopted by a local government within the county under this subsection and that is challenged by a substantially affected party for purposes of determining the amendment's compliance with this subsection. (At p. 3.)

Petitioner seeks to fully understand the Commission's intent regarding these aspects of the Order and asks two questions:

1. *Is BORA the countywide compliance review board that must issue a written determination of BORA's compliance with §553.73(4), Fla. Stat.?*
2. *How must the countywide compliance review board's written determination be rendered?*

With regard to the first question, the Order emphasizes in Paragraph 5 that a countywide compliance review board must render the written determination of compliance or non-compliance by the local government with the requirements stated in §553.73(4), Fla. Stat., when it adopted local amendments to the Florida Building Code ("Code"). The Order clearly states that Petitioner must submit his challenge to the proper local tribunal, which must then issue a written determination regarding procedural compliance. The Order also states in Paragraph 8 that the refusal of BORA to conduct a hearing to consider Petitioner's challenge is not equivalent to a written determination on compliance.

What the Order fails to state is whether BORA is, in fact, the legitimate countywide compliance review board that may consider the challenge and render a written determination. Absent a clear answer from the Commission as to whether BORA is the countywide compliance review board, Petitioner is unable to identify the proper local tribunal for a determination.

The record clearly establishes that BORA was created through an action of Broward County voters when they adopted such a charter amendment with an effective date of January 1, 2003. By virtue of this charter provision, BORA is the designated county agency that may adopt local Code amendments that apply in the unincorporated areas and the municipalities contained within the county. The Commission quotes §553.73(4)(f), Fla. Stat., in its Order (Para. 5) as a fact upon which it relied when it reached its determination to deny the appeal. This statute says any local government considering the adoption of local technical amendments "shall establish **by interlocal agreement** a countywide compliance review board" (emphasis added) that will hear any challenge to the manner in which any local amendment was adopted. At the very least, the legislative intent appears to be for the countywide compliance review board to be somewhat independent of the local government agency that adopts a challenged local Code amendment.

The Order acknowledges in Paragraph 7 that "Petitioner alleges simultaneously that Broward County has no compliance review board, and that BORA impermissibly serves as the compliance review board while also promulgating local amendments upon which it may be required to render a determination." (At p. 3.) BORA argues on page 25 of its Response that it meets the functional requirements of a countywide compliance review board and alleges, "The statute requires function, not form." Did the Commission accept BORA's argument that it was a valid countywide review board when it concluded, "BORA's failure, to date, to conduct a hearing or issue a determination on the matter" was not a "written determination" sufficient to initiate an

appeal (p. 3)? Or did the Commission accept Petitioner's argument and find that BORA failed to meet the statutory requirements of a countywide compliance review board because of the manner in which it was created and, therefore, cannot render an independent compliance determination?

The answer to this first question can have an impact on the answer to the second question for which clarification is sought. For example, if the Commission is satisfied that BORA is the countywide compliance review board, then the mere fact of its adopting a local Code amendment could be considered to be *prima facie* evidence that it had made a determination it is acting in compliance with the requirements of §553.73(4), Fla. Stat., and the adopted amendments become the written determination of compliance. On the other hand, if BORA is not the required countywide compliance review board, whose formation is a prerequisite to adopting local technical amendments to the Code, then such amendments are invalid.

Putting aside the potential interrelationship of the answer to the two questions posed for which clarification of the Order is sought, the second question asks about the form(s) that a written determination may take. The Order says "BORA's failure, to date, to conduct a hearing or issue a determination on the matter" is the reason for denying the appeal. (At p. 3.) Petitioner notes that the conjunction 'or' was used in this statement, which implies that the local tribunal may either: (1) "conduct a hearing" or (2) "issue a [written] determination" in order to settle the matter at the local level, after which an appeal of an adverse decision may be made. Paragraph 3 of the Order similarly uses the conjunction 'or' in saying "hearing or an order." (At p. 2.) If the Order had used the conjunction 'and', then the written determination would have to be made following a hearing, but the use of 'or' suggests that the written determination (or order) may be issued without a hearing being conducted on the specific challenge. In the latter case, any written statement of compliance by the local board may be legally sufficient.

Petitioner argued during the hearing of August 12, 2025, that the statute did not specify how the written determination was to be issued and notably did not require a hearing conducted by the countywide compliance review board to be the source of the determination. In Paragraph 8 of its Order, the Commission declares the statutory language "clearly and explicitly" calls for a written determination by a compliance review board. (At p. 3.) It makes no similar statement regarding a statutory requirement for a hearing to be conducted first, if at all, nor does it establish any specifications for the written determination.

Petitioner asserted during the August 12, 2025, hearing that there is no specified statutory consideration process that must precede the issuance of a written determination regarding compliance by the countywide board. The Order makes no statement directly connecting a hearing to the written determination. It appears to be procedurally sufficient for the challenge to be presented to the local compliance review board and for it to issue a written determination through any process and in whatever manner it desires. The second question posed for clarification of the Order asks if that is the intent of Paragraph 8.

III. REHEARING ON THE QUESTION OF WRITTEN DETERMINATION

If the Commission answers the second question by agreeing with the assertion that there is no specific form or creation process required for the written determination, then Petitioner asserts BORA provided such a written determination through judicial admissions in its Response to Butler's appeal petition. A judicial admission is a verbal or written statement made by a party in the course of the proceedings that dispenses with the need for proof with respect to the matter or fact admitted and is a party's unequivocal concession of the truth of a matter, which effectively removes the fact as an issue in the litigation. Once an admission is made, it is an undeniable truth for the duration of the case. In accordance with Rule 1.370(b), Fla. R. Civ. P., "Any matter

admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Butler's appeal petition included three claims, with the third one being that BORA failed to follow the statutorily prescribed requirements to adopt local Code amendments. Paragraph 2 of the Commission's Order acknowledges this fact by stating, "Claim 3 alleges that BORA failed to comply with the statutory process required to adopt local amendments." (At p. 2.) To that point, pages 40-46 of the appeal petition listed seven alleged errors in BORA's 2023 local amendment adoption process. BORA answered each of these allegations on pages 24-28 of its Response through a series of judicial admissions that collectively serve as a written determination that BORA complied with the requirements of §553.73(4), Fla. Stat. BORA even titles this portion of the Response on page 24 as "BORA's Adoption of Local Amendments Was Lawful and in Full Compliance with Section 553.73(4), Florida Statutes (Claim 3)." That statement alone may be sufficient to serve as a written determination of compliance.

At the end of the numerous judicial admissions describing how BORA complied with the statutory requirements of §553.73(4), Fla. Stat., page 28 of the Response says, "Taken as a whole, Claim 3 offers no legal or factual basis to overturn or question the validity of BORA's 2023 amendment process. The allegations reflect a policy disagreement rather than a procedural violation. The Commission should decline to indulge this attempt to convert legislative discretion into a procedural trap, and should reject Claim 3 in its entirety." This summary proclaims that this section of the Response provides a comprehensive written determination that the local amendment adoption procedure was in compliance with statutory requirements. As a matter of law, then, the issue of whether BORA has provided a written determination of compliance is no longer in doubt.

Petitioner specifically referred to the judicial admissions contained in the Response as forming a written determination of BORA's compliance during his testimony at the hearing of August 12, 2025. However, the Commission's Order makes no reference to these relevant judicial admissions, which indicates the Commission may have overlooked them or misapprehended their meaning in reaching its decision to deny the appeal. Petitioner reasserts that this portion of the Response meets the Commission's requirement for a written determination to be made by the local tribunal, provided that the Commission agrees with BORA's assertion that it is the countywide compliance review board. On that basis, Petitioner seeks a rehearing on the original question posed to the Commission by its staff as to whether BORA has provided a written determination of compliance that makes the matter ripe for appeal and hereby asserts BORA has done so through a series of judicial admissions in its Response.

Should the Commission conduct such a rehearing on Butler's appeal and agree that BORA's Response is a valid written determination of compliance, it is additionally requested that the 14-day deadline for filing an appeal start at the time the Commission renders an appropriate order recognizing BORA's written determination, and that Butler be permitted to timely file an amended petition of appeal to fully reflect the subsequent actions by the Commission in this matter.

Timely submitted on this date, September 2, 2025, to the Florida Building Commission through the following representatives:

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By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent on September 2, 2025, in accordance with the Rules of Administrative Procedure, via email to Respondent's administrative director, Dr. Ana C. Barbosa, DBA, 1 North University Drive, Suite 3500B, Plantation, Florida 33324, 954-765-4500 ext. 9692, abarbosa@broward.org, and Respondent's attorney of record, Mr. Charles M Kramer, Managing Partner, Construction Law Group of Florida, PL, General Counsel to the Broward County Board of Rules and Appeals, 2900 North University Drive, Suite 36, Coral Springs, Florida 33065, (954) 340-5955, cmk@ckramerlaw.com.

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