Building Construction Standards -- Private Providers

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Subject:
Building Construction Standards -- Private Providers

Mr. John C. Randolph
Jones, Foster, Johnston & Stubbs, P.A.
Flagler Center Tower
505 South Flagler Drive, Suite 1100
West Palm Beach, Florida 33401

RE: BUILDING CONSTRUCTION STANDARDS – ARCHITECTS – ENGINEERS – PRIVATE PROVIDERS – LICENSURE – CERTIFICATION – BUILDING PLANS – INSPECTION – whether business entity can be "private provider" for purposes of alternative plans review and inspection; qualifications for private providers. s. 553.791, Fla. Stat., Chs. 471 and 481, Fla. Stat.

Dear Mr. Randolph:

As attorney for the Town of Palm Beach, you have asked for my opinion on substantially the following questions:

1. Pursuant to section 553.791, Florida Statutes, can a company be considered a "private provider" if it hires an architect or engineer to provide inspection and plan review services?

2. Does a company that employs an architect or engineer and enters into a contract with an owner to provide inspection or plan review services where that architect or engineer will be the private provider meet the requirements of the private provider statute?

3. What is acceptable proof that the architect or engineer is a bona fide employee of the company within the meaning of section 553.791, Florida Statutes?

In sum:

1. Pursuant to section 553.791, Florida Statutes, a business entity such as a corporation, partnership, or firm may be considered a "private provider" only if it is certified or licensed pursuant to Chapters 471 or 481, Florida Statutes. Thus, a company that hires an architect or engineer, but is not otherwise certified or licensed pursuant to Chapters 471 and/or 481, Florida Statutes, is not a private provider. Further, a duly authorized representative of a private provider must be licensed or certified as an engineer or architect and must act as the agent for an individual or business entity that satisfies the statutory requirements for a "private provider."

2. A company that employs an architect or engineer and enters into a contract with an owner to

provide inspection or plan review services where that architect or engineer will be the private provider may meet the requirements of the private provider statute by acting as a "private provider's firm" if it otherwise satisfies the requirements of section 553.791, Florida Statutes.

3. Section 553.791, Florida Statutes, authorizes a local government to develop a registration system for private providers and duly authorized representatives which requires proof of licensure as an engineer or architect and proof of insurance. The statue also requires that "duly authorized representatives" be entitled to receive unemployment compensation benefits under Chapter 443, Florida Statutes, and the criteria for employment set forth in that chapter may be reviewed.

According to your letter, a company has represented itself as a private provider of architectural or engineering services pursuant to section 553.791, Florida Statutes, but its officers are neither licensed engineers nor architects. Rather, the company has used an architect it has hired to sign and seal plans. Your client, the Director of Planning, Zoning and Building for the Town of Palm Beach, questions the circumstances under which a company may be considered a private provider.

Question One

Your question requires consideration of section 553.791, Florida Statutes, which provides alternatives for building plans review and inspection. The statute authorizes the fee owner of a building or structure or the fee owner's contractor[1] to use a private provider to review plans and provide building code inspection services as an alternative to such activities being performed by a local building official.[2] The fee owner may elect to use the private provider for plans review or required building inspections or both of these services. All such services must be memorialized in a written contract between the private provider, or the private provider's firm, and the fee owner.[3]

The statute defines a "[p]rivate provider" for purposes of section 553.791, Florida Statutes, as:

"a person licensed as an engineer under chapter 471 or as an architect under chapter 481. For purposes of performing inspections under this section for additions and alterations that are limited to 1,000 square feet or less to residential buildings, the term "private provider" also includes a person who holds a standard certificate under part XII of chapter 468." [4]

Further, a private provider and any duly authorized representative[5] of that provider "may only perform building code inspection services that are within the disciplines covered by that person's licensure or certification under chapter 468, chapter 471, or chapter 481" [6] and must maintain insurance for professional liability covering all services performed as a private provider.[7] When performing building code inspection services, a private provider is subject to the disciplinary guidelines of the applicable professional board with licensing or certification jurisdiction over that profession.[8] Finally, the statutes contain a conflict provision prohibiting a private provider from providing building code inspection services on any building designed or constructed by the private provider or the private provider's firm. [9]

The statute does not provide a definition of "person," but a general definition of that term is

contained in section 1.01, Florida Statutes, and includes "individuals . . . firms, associations, joint adventures, partnerships, . . . corporations, and all other groups or combinations." The term "person" at common law and apart from any statutory enactment limiting its meaning includes both natural and artificial persons.[10]

Section 553.791(2), Florida Statutes, directs that "all such services" provided to a fee owner or the fee owner's contractor shall be evidenced by a written contract "between the private provider, or the private provider's firm" and the fee owner. The definition of a "private provider" appears to accommodate both individuals and corporations or business partnerships.

You have suggested that "a company or other business entity cannot meet the licensure requirements of Chapters 471 and 481, Florida Statutes, and therefore cannot meet the statutory definition of a Private Provider." However, both Chapters 471 and 481, Florida Statutes, appear to recognize that licensed engineers and architects may be businesses that practice these professions in Florida as well as the individuals who are licensed to practice these professions.

Chapter 471, Florida Statutes, regulates the practice of engineering in Florida. [11] Section 471.005(8), Florida Statutes, defining "[l]icense" for purposes of that chapter defines the term as "the licensing of engineers *or certification of businesses* to practice engineering in this state." [12] (e.s.) An "[e]ngineer" is "a person who is licensed to engage in the practice of engineering" and includes the terms "professional engineer" and "licensed engineer[.]" [13] Finally, a "[c]ertificate of authorization" is itself defined as "a license to practice engineering issued . . . to a corporation or partnership." [14] Section 471.003, Florida Statutes, sets forth the qualifications for practicing engineering and includes exemptions from licensure requirements. Among those who are not required to be licensed under the provisions of Chapter 471, Florida Statutes, as a licensed engineer are "[e]mployees of a firm, corporation, or partnership who are the subordinates of a person in responsible charge, licensed under this chapter." [15] Thus, Chapter 471, Florida Statutes, authorizes both natural persons and businesses to be "licensed" within the scope of licensure as an engineer or engineering practice.

Chapter 481, Florida Statutes, provides Florida's statutory regulations on the practice of architecture. An "[a]rchitect" or "registered architect" is defined as "a natural person who is licensed under this part to engage in the practice of architecture." While it is clear that an architect may only be a natural person, a business entity may be certified to practice the profession of architecture. While the statutes provide for a "certificate of registration," [16] that is, a license issued "to a natural person" to engage in the practice of architecture, the statutes also provides a "certificate of authorization" [17] which is issued by the department "to a corporation or partnership to practice architecture[.]"

The practice of architecture by licensees through a corporation, limited liability company, or partnership offering architectural services to the public, or by a corporation, limited liability company, or partnership offering architectural services to the public through licensees under this part as agents, employees, officers, or partners, is specifically authorized subject to the provisions of section 481.219, Florida Statutes. [18] As provided in this statute, the Board of Architecture and Interior Design shall certify an applicant as qualified for a "certificate of authorization" to offer architectural services provided that:

"(a) One or more of the principal officers of the corporation or limited liability company, or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as architects, are registered as provided by this part; or

(b) One or more of the principal officers of the corporation or one or more partners of the partnership, and all personnel of the corporation, limited liability company, or partnership who act in its behalf in this state as interior designers, are registered as provided by this part."

Any applicant who has been certified by the board as qualified and who has paid the statutory fee must be issued a certificate of authorization. [19] A certificate of authorization is required for a corporation, limited liability company, partnership, or person practicing under a fictitious name, who offers architectural services to the public jointly or separately. [20]

Thus, it does not appear to be the case that only natural persons may act as private providers as only natural persons are capable of licensure or certification. [21] However, while it appears that business entities may come within the scope of section 553.791, Florida Statutes, not all business entities may qualify as private providers. A private provider must be an individual or business entity that is certified or licensed to provide engineering or architectural services or a duly authorized representative of that individual or entity and must maintain professional liability insurance. Further, as provided in section 553.791(1)(e), Florida Statutes, a "[d]uly authorized representative" is an agent of the private provider:

"'Duly authorized representative' means an agent of the private provider identified in the permit application who reviews plans or performs inspections as provided by this section and who is licensed as an engineer under chapter 471 or as an architect under chapter 481 or who holds a standard certificate under part XII of chapter 468."

The duly authorized representative is the agent of the private provider and a private provider must come within the statutory definition in section 553.791(1)(i), Florida Statutes, that is, licensure or certification pursuant to Chapters 471 or 481, Florida Statutes, is required. The statute also requires that any duly authorized representative who is sent to a building site to perform the required inspections must be "an employee of the private provider entitled to receive reemployment assistance benefits under chapter 443."[22]

Section 553.791(2), Florida Statutes, authorizes the fee owner of a building or structure, or his or her contractor, to choose to use a private provider for building code inspections services. All such services shall be rendered subject to a written contract between the private provider or the private provider's firm and the fee owner. The definition of a "[p]rivate provider" does not distinguish between natural and artificial persons and would, therefore, appear to include business entities as well as licensed individuals. Both Chapters 471 and 481, Florida Statutes, contemplate the licensure or certification of individuals as well as business entities such as partnerships, corporations, or firms. However, as discussed herein, a private provider must be licensed and must maintain professional liability insurance.

In sum, it is my opinion that pursuant to section 553.791, Florida Statutes, a business entity such as a corporation, partnership, or firm may be considered a "private provider" only if it is certified

or licensed pursuant to Chapters 471 or 481, Florida Statutes. Thus, a company that hires an architect or engineer, but is not otherwise certified or licensed pursuant to Chapters 471 and/or 481, Florida Statutes, is not a
private provider. Further, a duly authorized representative of a private provider must be licensed or certified as an engineer or architect and must act as the agent for an individual or business entity that satisfies the statutory requirements for a "private provider."

Question Two

You also ask whether a company may come within the provisions of section 553.791, Florida Statutes, if the company employs an architect or engineer and enters into a contract with a property owner to provide inspection or plan review services in situations where the architect or engineer will be the private provider of building code inspection services.

Section 553.791, Florida Statutes, refers to a "private provider's firm" in several places but provides no definition. The statute requires that building code inspection services 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." [23] The statute prohibits a private provider from providing building code inspection services "upon any building designed or constructed by the private provider or the private provider's firm." [24] And finally, the statute requires that a fee owner using a private provider for building code inspection services must provide notice to the local building official on a form to be adopted by the Florida Building Commission. This notice must include particular information including:

"The name, firm, address, telephone number, and facsimile number of each private provider who is performing or will perform such services, his or her professional license or certification number, qualification statements or resumes, and, if required by the local building official, a certificate of insurance demonstrating that professional liability insurance coverage is in place for the private provider's firm, the private provider, and any duly authorized representative in the amounts required by this section." [25]

Thus, the "private provider's firm" must be capable of securing professional liability insurance coverage.

In light of the Legislature's use of the phrase "private provider's firm," it would appear that a company that employs an architect or engineer and enters into a contract with an owner to provide inspection or plan review services where that architect or engineer will be the private provider may meet the requirements of the private provider statute so long as it is capable of otherwise meeting the statutory requirements.

Question Three

You have asked what may constitute acceptable proof that an architect or engineer is a *bona fide* employee of the private provider within the meaning of section 553.791, Florida Statutes.

Section 553.791(15), Florida Statutes, provides that:

"(a) A local enforcement agency, local building official, or local government may not adopt or enforce any laws, rules, procedures, policies, qualifications, or standards more stringent than those prescribed by this section.

(b) A local enforcement agency, local building official, or local government may establish, for private providers and duly authorized representatives working within that jurisdiction, a system of registration to verify compliance with the licensure requirements of paragraph (1)(l) and the insurance requirements of subsection (16).

(c) This section does not limit the authority of the local building official to issue a stop-work order for a building project or any portion of the project, as provided by law, if the official determines that a condition on the building site constitutes an immediate threat to public safety and welfare."

The statute authorizes the development at the local level of a "system of registration to verify compliance with the licensure requirements . . . and insurance requirements[.]" The statute precludes local officials from adopting or enforcing any qualifications or standards more stringent than those established by the statute. [26]

Thus, it would appear that proof of licensure of the individual or the certification of the business entity (or both in the case of a "duly authorized representative") as an engineer or architect may be required pursuant to a duly adopted registration system under section 553.791, Florida Statutes, along with proof of insurance in the amounts specified in subsection (16):

"A private provider may perform building code inspection services on a building project under this section only if the private provider maintains insurance for professional liability covering all services performed as a private provider. Such insurance shall have minimum policy limits of $1 million per occurrence and $2 million in the aggregate for any project with a construction cost of $5 million or less and $2 million per occurrence and $4 million in the aggregate for any project with a construction cost of over $5 million. Nothing in this section limits the ability of a fee owner to require additional insurance or higher policy limits. For these purposes, the term "construction cost" means the total cost of building construction as stated in the building permit application. 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 insurance required under this subsection shall be written only by insurers authorized to do business in this state with a minimum A.M. Best's rating of A. *Before providing building code inspection services within a local building official's jurisdiction, 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."* (e.s.)

In addition, the statute requires that a "duly authorized representative" of a private provider "must be an employee of the private provider entitled to receive reemployment assistance benefits under chapter 443." [27] It would appear to be appropriate for a local government to determine compliance with this statutory requirement.

The statute makes private providers subject to the disciplinary guidelines of the applicable professional boards with jurisdiction over their license or certification under Chapters 471 or 481, Florida Statutes. Complaint processing, investigation, and discipline that may arise out of a

private provider's performance of building code inspection services are to be conducted by the applicable professional board. [28] Local governments and building officials are provided immunity from liability "to any person or party for any action or inaction" by a fee owner of a building or by a private provider or its duly authorized representative in connection with the building code inspection services provided pursuant to the statute.

Thus, it is my opinion that section 553.791, Florida Statutes, authorizes a local government to develop a registration system for private providers and duly authorized representatives which requires proof of licensure of the individual or the certification of the business entity (or both in the case of a "duly authorized representative") as an engineer or architect and proof of insurance in the amounts specified in that statute. Appropriate inquiries may also be made to determine whether a "duly authorized representative" is an employee of the private provider entitled to receive reemployment assistance benefits under Chapter 443, Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] The statute requires that the fee owner's contractor have written authorization from the fee owner in order to act. *See* s. 553.791(2), Fla. Stat.

[2] *See* Florida House of Representatives Committee on Local Government & Veterans Affairs, Staff Analysis of HB 1307, dated February 5, 2002 (HB 1307 created s. 553.791, Fla. Stat.)

[3] Section 553.791(2), Fla. Stat.

[4] Part XII, Ch. 468, Fla. Stat., regulates the practice of building code administration and inspection in Florida. See s. 468.601, Fla. Stat. You have not indicated that you are concerned with private providers certified pursuant to Part XII, Ch. 468, Fla. Stat.

[5] The term "[d]uly authorized representative" is defined in s. 553.791(1)(e), Fla. Stat., to mean "an agent of the private provider identified in the permit application who reviews plans or performs inspections as provided by this section and who is licensed as an engineer under chapter 471 or as an architect under chapter 481 or who holds a standard certificate under part XII of chapter 468."

[6] Section 553.791(3), Fla. Stat.

[7] Section 553.791(16), Fla. Stat.

[8] Section 553.791(17), Fla. Stat.

[9] *Id.* n.6.

[10] *See* Op. Atty Gen. Fla. 85-99 (1985) *citing City of Grand Rapids v. Harper*, 188 N.W.2d 668, 671 (Ct. App. Mich. 1971); 18 Am. Jur. 2d *Corporations* s. 20 (stating that persons are divided by law into persons natural and persons artificial). *Cf. City of St. Petersburg v. Carter*, 39 So. 2d 804 (Fla. 1949) (definition of term "persons" dependent upon purpose of subject enactment, administrative construction of it, other legislative enactments, and attendant circumstances); *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275 (Fla. 1978) (meaning of term "persons" solely one of legislative intent and must be resolved by taking into account totality of circumstances surrounding statute's enactment).

[11] *See* s. 471.001, Fla. Stat., for the Legislature's statement of purpose for the chapter.

[12] *And see* s. 471.005(3), Fla. Stat., providing that a "[c]ertificate of authorization" means "a license to practice engineering issued by the management corporation [Florida Engineers Management Corporation] to a corporation or partnership."

[13] Section 471.005(5), Fla. Stat.

[14] Section 471.005(3), Fla. Stat.

[15] Section 471.003(2)(e), Fla. Stat.

[16] Section 481.203(4), Fla. Stat.

[17] Section 481.203(5), Fla. Stat.

[18] *Cf. District Board of Trustees v. Morgan*, 890 So. 2d 1155 (Fla. 5th DCA 2004) (the purpose of s. 481.219, Fla. Stat., is to avoid a misrepresentation regarding the composition of architectural business entities that enter contracts for work on Florida projects; s. 481.219, Fla. Stat., is not intended by the Legislature to assure that all architects working in Florida are licensed).

[19] Section 481.219(6), Fla. Stat.

[20] Section 481.219(2), Fla. Stat.

[21] I note that section 553.791, Fla. Stat., uses the term "individual," as distinguished from "person," where the intent seems to be to identify a natural person. *See* s. 553.791(1)(g), Fla. Stat., identifying the "[l]ocal building official" as an "individual."

[22] Section 553.791(8), Fla. Stat. *And see* ss. 443.036 and 443.1216, Fla. Stat., delineating "employment" subject to Ch. 443, Fla. Stat., the "Unemployment Compensation Law."

[23] Section 553.791(2), Fla. Stat.

[24] *Id.* at subsection (3).

[25] Section 553.791(4)(b), Fla. Stat.

[26] It is the rule 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. *Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[27] Section 553.791(8), Fla. Stat.

[28] *See* s. 553.791(17), Fla. Stat.