STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRG-AQUAZUL, LTD., and ALFONSO FERNANDEZ-FRAGA,	)	
Petitioners,	)	
vs.	)	DOAH Case No. 03-1524BC
BROWARD COUNTY and THE BROWARD COUNTY BOARD OF RULES AND APPEALS	)	
Respondents.[1]	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 28, 2003, by means of a video teleconference in sites at Fort Lauderdale and Tallahassee, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Robert S. Fine, Esquire
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For Respondent Broward County: Jose R. Gonzalez, Esquire
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For Respondent BORA:
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STATEMENT OF THE ISSUES

The principal issue in this case is whether certain local technical amendments to the Florida Building Code adopted by the Broward County Board of Review and Appeals (BORA) comply with the requirements of Section 553.73(4)(b), Florida Statutes (2001). As to Broward County, there is the additional issue of whether Broward County is a proper party to this proceeding.

PRELIMINARY STATEMENT

On April 29, 2003, Petitioners filed an Amended Notice of Appeal and Petition for Formal Administrative Hearing (Amended Petition) with the Florida Building Commission (Commission) pursuant to Section 553.73(4)(b)8., Florida Statutes (2002). The Amended Petition contests the validity of certain local technical amendments to the Florida Building Code adopted by BORA. On April 30, 2003, the Commission referred the Amended Petition to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the hearing requested by Petitioners.

The basic position of Petitioners is that, for a number of reasons set forth in detail in their Amended Petition, the technical amendments challenged here are invalid because the

manner in which the amendments were adopted failed to comply with several of the applicable statutory provisions. The basic position of BORA is that the challenged amendments were properly adopted and are valid. The basic position of Broward County is that Broward County is not a proper party to this proceeding, and that BORA is the only appropriate Respondent in a proceeding challenging the validity of local technical amendments adopted by BORA.

Because Section 553.73(4)(b)8., Florida Statutes (2002), mandates expedited consideration of cases such as this, a telephonic case management conference was held on May 6, 2003, to schedule the final hearing and to establish "fast track" deadlines for several prehearing activities. The case was set for final hearing on May 28, 2003.

Petitioners called the following witnesses: James DiPietro, Administrative Director of BORA; Jose Suarez, an expert in the field of the architectural design of high-rise buildings; and Alfonso-Fernandez-Fraga, an expert in the fields of mechanical and fire-safety engineering. Respondent Broward County called no witnesses. All parties stipulated to the deposition testimony of Steven Feller, an expert in the fields of mechanical and fire safety engineering, being entered into the record as his hearing testimony. Respondent BORA called the following witness: Robert Andrews, who testified as the Chief

Mechanical Code Compliance Officer for BORA and as an expert in the application of mechanical and fire-safety systems in high-rise buildings.

A large number of exhibits were received into evidence, some by offer of a specific party, but most by stipulation of all parties. All of the exhibits received in evidence are described in a master index which is part of the record in this proceeding. The parties' pre-hearing stipulation, which was modified at the beginning of the hearing, was also received into evidence.

The transcript of the hearing was filed with the Division on June 13, 2003. At the conclusion of the hearing, the parties were allowed 15 days from the date of the hearing within which to file their respective proposed recommended orders and were instructed that such filing should be by fax. All parties filed timely proposed recommended orders.[2] The proposals submitted by all parties have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, and upon the parties' stipulations, the following findings are made:

Findings about status of Broward County

1. Respondent Broward County is a county created pursuant to the laws of the State of Florida.

2. Broward County became a charter county effective on January 1, 1975, by a referendum approved by the voters of Broward County in November of 1974.

3. In 1976, the Broward County Charter was amended to add a new Section 8.18, which the legislative history for the charter describes as establishing BORA as "an arm of Charter government."

4. Broward County has not voted to adopt any local amendments to the Florida Building Code.

Findings about status of BORA

5. Respondent BORA, is a board created under the provisions of the Charter of Broward County (the "Charter").

6. BORA was originally created in 1971 by a special act of the Florida legislature, 71-575, Laws of Florida, Special Acts of 1971. That special act adopted the South Florida Building Code, as the applicable building code for Broward County and included within the South Florida Building Code as Section 203 the following language, which created BORA:

> 203. Board of Rules and Appeals. In order to determine the suitability of alternate materials and types of construction, to provide for reasonable interpretation of the provisions of this code and to assist in the

> control of the construction of buildings and structures, there is hereby created a BORA, appointed by the appointing authority, consisting of twenty-four (24) members who are qualified by training and experience to pass on matters pertaining to building construction.

Findings about status of Petitioners

7. Petitioner, TRG-Aquazul, Ltd. ("TRG"), is a Florida limited partnership and is the developer of a high-rise multi-family residential building project located in Broward County ("Project") which is subject to the Florida Building Code, as amended, in Broward County.

8. Petitioner, Alfonso Fernandez-Fraga, is a principal of Initial Engineers. Mr. Fernandez-Fraga and Initial Engineers are the mechanical engineers of record on the Project. Mr. Fernandez-Fraga's firm has designed other high-rise residential buildings in Broward County in the past and plans on doing more such projects in the future. Petitioners allege that they will be materially and adversely affected by the application of the Broward County local technical amendments to the Florida Building Code in that the application of said technical amendments to the Project will require a redesign of the mechanical systems of the Project to comply with those technical amendments and undertaking such redesign will cost significant time and money.

9. Alfonso Fernandez-Fraga submitted plans to the Broward County Building Department for approval in connection with the Project. The plans submitted included plans for smoke control measures. The smoke control measures were not approved by the chief mechanical official because in his estimation they did not comply with the local technical amendments to the Florida Building Code enacted by BORA on March 1, 2002. Despite the Broward County Building Official's suggestion that Mr. Fernandez-Fraga appeal the Building Official's decision interpreting the applicable code, Mr. Fernandez-Fraga decided not to appeal that decision. Rather, Mr. Fernandez-Fraga chose to challenge the validity of the local technical amendments to the Florida Building Code adopted by BORA, a different appeal than the one discussed with the Building Official.

10. TRG, through its engineer and its architect of record on the project, attempted to comply with option four of the local technical amendments at issue here, which allows one to achieve an understanding with the local building official on an alternative method for smoke control. TRG could not, and did not, reach that understanding with the Broward County Building Official.

11. The building that TRG proposes to build is over 75 feet high, which makes it subject to the local technical amendments at issue here.

12. At the time the local technical amendments at issue here were being adopted, Petitioners were not concerned with such developments because at that time they did not have any projects in Broward County.

Findings about BORA's amendment process

13. Once it was clear that Florida was going to have a new statewide Florida Building Code, BORA embarked upon a course of action to adopt several local technical amendments to the Florida Building Code. Such amendments were allowed, with certain qualifications and requirements, by the then-new statutes providing for the implementation of a new Florida Building Code. On March 1, 2002, BORA adopted the local technical amendments that are at issue here. Those two local technical amendmants, Sections 412 and M403.6.4, contained standards for the application and testing of smoke control systems for high-rise buildings. The two amendments were more stringent than the corresponding requirements in the Florida Building Code.

14. Each of these local technical amendments had been part of Broward County's local building code in effect prior to the adoption of the Florida Building Code, and as set forth in the South Florida Building Code, Broward Edition. BORA sought to maintain the status quo within Broward County with respect to the adoption of these two local technical amendments to the

Florida Building Code, a status quo that had been in effect since the mid 1980's. The two local technical amendments at issue here did not introduce any new subjects that had not previously been contained in the South Florida Building Code, Broward Edition.

15. The process leading up to the adoption of amendments on March 1, 2002, began several months earlier with the appointment of a committee and a sub-committee to discuss and draft proposed amendments.

16. The chairman of BORA's Mechanical Committee appointed a subcommittee which reviewed materials and made decisions with respect to the Local Amendments and made recommendations to the Mechanical Committee which, in turn, made recommendations to BORA

17. The meetings of BORA's Mechanical Committee and its Smoke Control Subcommittee were not publicly noticed in the Sun Sentinel or any other local newspaper of general circulation.

18. No findings or determinations made by BORA's Mechanical Committee or Smoke Control Subcommittee with respect to the local need to enact the Local Amendments are reflected in the minutes of their meetings.

19. On December 13, 2001, BORA held a hearing to receive and consider information from the subcommittee and the committee regarding the pending proposed amendments.

20. BORA's December 13, 2001 hearing was not publicly noticed in the Sun Sentinel or any other local newspaper.

21. Final BORA action to adopt the proposed amendments was eventually scheduled for March 1, 2002.

22. The March 1, 2002, BORA meeting was the only BORA meeting pertaining to the local technical amendments at issue here that was publicly noticed in the Sun Sentinel or any other local newspaper.

23. BORA did not make any findings or determinations at the March 1, 2002, meeting.

24. There was no discussion or determinations made at the March 1, 2002, hearing regarding whether there was a local need justifying the subject local technical amendments.

25. There was no discussion at the March 1, 2002 hearing regarding the subject local technical amendments.

26. At the March 1, 2002, meeting, BORA determined that what its Mechanical Committee presented was acceptable and BORA therefore voted to adopt it without any meaningful discussion. BORA did not make any other determinations with respect to the local technical amendments at that hearing.

27. The members of the Florida Building Commission's Mechanical and Technical Advisory Committee, which drafted and/or made recommendations with respect to the Florida Building Code, are presently considering the possibility of putting more

stringent smoke control measures into the Florida Building Code for statewide application.

Findings about the challenge process

28. Broward County does not have, and has never had, an interlocal agreement establishing a countywide compliance review board for the purpose of reviewing any challenges to local technical amendments to the Florida Building Code that may be challenged by a substantially affected party.

29. Neither Broward County, per se, nor any of the municipalities in Broward County, is authorized to exercise any authority over the building code in Broward County. In light of this situation in Broward County it appears to have been the concensus of the members of BORA that it was simply not necessary to structure any interlocal agreement nor create any county-wide compliance review board as otherwise generally provided for in the applicable statutory provisions. Thus, when Petitioner Fernandez-Fraga advised BORA that he wished to challenge the validity of two of the local technical amendments adopted by BORA, it was initially unclear where the challenge should be filed and where it should be heard. Following discussion with Commission staff, BORA advised that the challenge should be filed with BORA and would be heard by BORA.

30. On or about March 20, 2003, Petitioners filed an appeal with BORA challenging the validity of the subject

amendments. BORA scheduled a hearing on the challenge for April 10, 2003.

31. BORA was apparently of the initial view that it was hearing the Petitioners' appeal in the capacity of a statutory "countywide compliance review board" because BORA originally noticed the April 10, 2003, hearing as being held by "the Board of Rules and Appeals sitting as a Countywide Compliance Review Board pursuant to Florida Statutes 553.73(4)(b) to hear challenges to Broward County Local Amendments to Sections 412 and M403.6.4 by Mr. Alfonso Fernandez-Fraga, P.A."

32. Notwithstanding the notice and agenda of the April 10, 2003, BORA meeting/hearing, during the course of the hearing BORA took the position that Broward County does not have a countywide compliance review board as described in Section 553.73(4)(b)8, Florida Statutes. Counsel for BORA stated, on the record, that BORA "has exclusive authority over the building code in Broward County." Counsel then advised the Board:

> That statutory section which refers to an interlocal agreement applies to counties where the county and municipalities have the authority to amend the code. In Broward County, the municipalities and the county do not have that authority. Therefore, we don't have a Compliance Review Board in Broward County because it's just not authorized because we operate on a different procedure here. The Board of Rules and Appeals has the sole authority to amend the code, so we're hearing this appeal tonight really as an appeal to reconsider whether the action of

> this board in March of 2002, when you passed these amendments, were done properly, and that's the sole issue.

33. The appeal was heard by BORA on April 10, 2003. BORA voted unanimously to deny the appeal. Mr. Fernandez-Fraga promptly received a letter from James DiPietro advising him that the appeal had been rejected. Thereafter the Petitioners timely filed their petition seeking relief from the Commission.

CONCLUSIONS OF LAW

Conclusions on basic and introductory matters

34. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 553.73(4)(b)8., Florida Statutes (2002).

35. The Florida Building Code was created under the authority of Chapter 98-287, Laws of Florida, as amended by Chapter 2000-141, Laws of Florida. The Florida Building Code became effective on the first day of March, 2002, pursuant to Chapter 2001-372, Laws of Florida. Prior to the effective date of the Florida Building Code, Broward County was subject to the provisions of the South Florida Building Code (Broward Edition).

36. The Florida Building Code is binding on Broward County and its municipalities.

37. At all times relevant hereto, Section 553.73(4)(b), Florida Statutes, provided the sole authority, procedures and

prerequisites for local governments to be able to adopt local technical amendments to the Florida Building Code.

38. Section 553.73(4)(b)1, Florida Statutes, provides:

> (b) Local governments may, subject to the limitations of this section, adopt amendments to the technical provisions of the Florida Building Code which apply solely within the jurisdiction of such government and which provide for more stringent requirements than those specified in the Florida Building Code, not more than once every 6 months. A local government may adopt technical amendments that address local needs if:
>
> 1. The local governing body determines, following a public hearing which has been advertised in a newspaper of general circulation at least 10 days before the hearing, that there is a need to strengthen the requirements of the Florida Building Code. The determination must be based upon a review of local conditions by the local governing body, which review demonstrates by evidence or data that the geographical jurisdiction governed by the local governing body exhibits a local need to strengthen the Florida Building Code beyond the needs or regional variation addressed by the Florida Building Code, that the local need is addressed by the proposed local amendment, and that the amendment is no more stringent than necessary to address the local need. (Emphasis added.)

39. Section 553.73(4)(b)7, Florida Statutes, provides, in pertinent part:

> 7. Each county and municipality desiring to make local amendments to the Florida Building Code shall by interlocal agreement establish a countywide compliance review board to review any amendment to the Florida Building Code, adopted by a local government within

> the county pursuant to this paragraph, that is challenged by any substantially affected party for purposes of determining the amendment's compliance with this paragraph.
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> * * *
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> 8. If the compliance review board determines such amendment is not in compliance with this paragraph, the compliance review board shall notify such local government of the noncompliance and that the amendment is unenforceable until the local government corrects the amendment to bring it into compliance.
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> * * *
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> The local government adopting the amendment that is subject to challenge has the burden of proving that the amendment complies with this paragraph in proceedings before the compliance review board and the commission, as applicable. (Emphasis added.)

40. The parties in this case have stipulated that the Petitioners have standing to challenge the local technical amendments at issue here.[3]

Conclusions regarding Broward County

41. Broward County is a political subdivision of the State of Florida. Section 7.06, Florida Statutes; Broward County Charter, Article I, Section 1.01. Unless provided to the contrary in the Charter, Broward County has all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. Constitution of the State of Florida, Article VIII, Section 1(g); Broward County Charter, Article I, Section 1.02.

42. BORA is an autonomous board whose members are appointed by the Broward League of Cities and the Broward County Commission. The procedures for appointing members of BORA are set out in the Broward County Charter.

43. It is the function of the BORA to exercise the powers, duties, responsibilities, and obligations as set forth and established in Chapter 71-575, Laws of Florida, Special Acts of 1971, as amended by Chapters 72-482 and 72-485, Laws of Florida, Special Acts of 1972; Chapter 73-427, Laws of Florida, Special Acts of 1973; and Chapters 74-435, 74-437, and 74-448, Laws of Florida, Special Acts of 1974; and the applicable building code. See Broward County Charter, November 5, 2002 Revision, Article IX, Section 9.02 (A); and Broward County Charter, Article VIII, November 5, 1996 Revision, Section 8.18. The provisions of the applicable building code shall be amended only by BORA. See Broward County Charter, November 5, 2002 Revision, Article IX, Section 9.02 (A); and Broward County Charter, Article VIII, November 5, 1996 Revision, Section 8.18 (F). Neither the Board of County Commissioners nor any municipality in Broward County may enact any ordinance in conflict with the applicable building code. See Broward County Charter, November 5, 2002 Revision, Article IX, Section 9.02 (A); and Broward County Charter, Article VIII, November 5, 1996 Revision, Section 8.18 (F).

Broward County is not the local government that adopted the local technical amendments being challenged herein.

44. Section 553.73(4)(b)(8), Florida Statutes, provides in part that the local government adopting the amendment that is subject to challenge has the burden of proving that the amendment complies with this paragraph in proceedings before the compliance review board and the commission (Florida Building Commission), as applicable. The Broward County Commission never voted to adopt any amendment to the Florida Building Code. Accordingly, Broward County has no burden of proof to meet in this matter and is not a proper party to this proceeding.

45 Section 553.73(1)(e), Florida Statutes, provides:

> Subject to the provisions of this act, responsibility for enforcement, interpretation, and regulation of the Florida Building Code shall be vested in a specified local board or agency, and the words "local government" and "local governing body" as used in this part shall be construed to refer exclusively to such local board or agency.

46. Accordingly, BORA, rather than the County Commission, is the "local government" and "local governing body" referenced in Sections 553.73(1)(e) and 553.73(4)(b)(8), Florida Statutes.

47. Broward County does not have an interlocal agreement establishing a countywide compliance review board. Whether or not such a review board is a prerequisite in Broward County in order for BORA to adopt local amendments to the Florida Building

Code, it does not require Broward County as a party to this proceeding.

48. Broward County did not act or fail to act in any way that makes it a proper party to this proceeding. The actions of the Broward County Building Official are not relevant to a determination of the validity or invalidity of the technical amendments at issue here.

Conclusions regarding the "Sunshine" issue

49. In their Proposed Recommended Order Petitioners argue that the challenged amendments should also be invalidated because of conduct by a member of BORA that Petitioners argue is a violation of the "Government in the Sunshine Law." Petitioners' arguments in this regard must be rejected for several reasons. First, no such issue was raised in the Amended Petition and no motion was made or granted to allow further amendment of the Amended Petition on the day of the hearing. Second, in the usual course of events the Division does not have any original jurisdiction to determine or remedy violations of the Sunshine Law. And, finally, enforcement of the Sunshine Law does not appear to be one of the statutory functions of the Florida Building Code Commission.

BORA's authority to adopt local technical amendments

50. There is no doubt that today BORA has the necessary authority to adopt local technical amendments to the Florida

Building Code. But Petitioners argue that BORA did not have that authority on March 1, 2002, when BORA purported to adopt the local technical amendments at issue here. Petitioners' argument in this regard relies in large part on the language of relevant portions of the Broward County Charter as it existed on March 1, 2002, and as later amended.

51. The Broward County Charter that was in effect on March 1, 2002, still described the functions of BORA as exercising the powers and duties established by the BORA Special Acts. The Charter at that time did not make any mention of the Florida Building Code. Section 8.18 read as follows:

> It shall be the function of the Broward County BORA, created by this Charter, to exercise the powers, duties, responsibilities, and obligations as set forth and established in Chapter 71 575, Laws of Florida, Special Acts of 1971, as amended by Chapters 72- 482 and 72- 485, Laws of Florida, Special Acts of 1972; Chapter 73- 427, Laws of Florida, Special Acts of 1973; and Chapters 74- 435, 74- 437, and 74- 448, Laws of Florida, Special Acts of 1974; and the South Florida Building Code as enacted and amended by Chapter 71- 575, as amended.

52. The Charter also provided:

> The provisions of the South Florida Building Code shall be amended only by the Board of Rules and Appeals and only to the extent and in the manner specified by the Code. Neither the Board of County Commissioners nor any municipality within Broward County may enact

> any ordinance in conflict with Chapter 71-575, as amended, or the South Florida Building Code.

53. The Broward County Charter provisions relating to BORA were amended by referendum on November 5, 2002, approximately eight months after the adoption of the local technical amendments at issue here. Those Charter amendments became effective on January 1, 2003, and were codified as Section 9.02 of the Broward County Charter. Section 9.02, which became effective on January 1, 2003, and is currently in effect, states that BORA has the authority to amend the Florida Building Code. The language of Section 9.02 A.(2) includes the following:

> The provisions of the Florida Building Code shall be amended only by the Board of Rules and Appeals and only to the extent and in the manner specified in the Building Code. The County Commission or a municipality shall not enact an ordinance in conflict with Chapter 98-287 and Chapter 2000-141, Laws of Florida, as may be amended from time to time.

54. Since sometime in the early 1970's, BORA has been, and is today, the only local government in Broward County with authority to administer, amend, and enforce whatever building code was in effect in Broward County at any given time; first the South Florida Building Code (Broward Edition), and more recently the Florida Building code. BORA was created and vested with authority under the South Florida Building code in 1971 by Chapter 71-575, Laws of Florida, Special Acts, which Special Act

was incorporated into the Charter of Broward County in 1976 by public referendum as Section 8.18, which is now numbered Section 8.02. The South Florida Building Code was one of several state minimum building codes prior to March 1, 2002.

55. Under the letter of the law at the time BORA adopted the subject amendments, BORA was specifically authorized to exercise various powers with regard to the "South Florida Building Code." At the same time, neither Broward County, nor any municipality in Broward County, nor any other unit of local government in Broward County was expressly authorized to exercise any powers with regard to the new "Florida Building Code." Further, at that same time, the Broward County Charter contained the following limitation on Broward County and all municipalities in Broward County: "Neither the Board of County Commissioners nor any municipality may enact any ordinance in conflict with Chapter 71-575, as amended, or the South Florida Building Code." In view of all of the foregoing, under the letter of the law relied upon by Petitioners, from the date the new Florida Building Code went into effect until the changes in the Broward County Charter took effect in November of 2002, neither BORA nor any other local government entity in Broward County was expressly authorized to, among other things, adopt a local technical amendment to the new Florida Building Code. That would be an absurd result; a result the Florida Legislature

surely did not intend. It is well-settled law in Florida that the courts will not attribute to the Legislature an intent to create an absurd result.

56. In circumstances such as are before us here, the intent of the Legislature must control over the letter of the laws it has enacted. Upon consideration of all of the statutory provisions regarding the establishment and enforcement of a state-wide Florida Building Code, the most reasonable conclusion is that the intent of the Legislature was that BORA, and boards like BORA, would have, within the requirements of the new state-wide code, the same types of powers with respect to the Florida Building Code as they had over the South Florida Building Code. Accordingly, the undersigned is of the view that, the letter of the law notwithstanding, BORA had the necessary authority to adopt amendments to the Florida Building Code on the date it adopted the local technical amendments at issue here.

Some recent guidance

57. Florida Home Builders Association, Inc., et al., vs. City of Daytona Beach, et al., DOAH Case No. 03-0131BC (RO issued April 29, 2003), is the only prior case addressing challenges to local technical amendments to the Florida Building Code which has come before the Division of Administrative Hearings. Much of what was concluded in that proceeding is equally applicable here. Attention is especially directed to

the following conclusions of law reached in the Recommended Order in the Florida Home Builders case:

> 141. The Legislature amended Section 553.73(4)(b) in 2002 through Chapter 2002-293, Section 14, Laws of Florida, but that act did not become effective until May 30, 2002, which is after the local amendments at issue in this proceeding were adopted. Accordingly, the determination as to whether Respondents' local amendments comply with the substantive criteria in Section 553.73(4)(b) must be based on the 2001 version of the statute. However, the procedural aspects of the 2002 version of the statute apply in this proceeding. See South West Florida Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903, 909 (Fla. 2nd DCA 2001).
>
> 142. The parties stipulated that this proceeding is de novo in nature even though Section 553.73(4)(b)8., Florida Statutes (2002), refers to the Commission's review of the countywide compliance review board's decision as an "appeal."
>
> 143. The parties' stipulation accurately characterizes the nature of this proceeding because Section 553.73(4)(b)8., Florida Statutes (2002), also provides that "[t]he provisions of Chapter 120 and the uniform rules of procedure apply." Proceedings under Chapter 120, Florida Statutes, are de novo proceedings whose purpose is to formulate final agency action, not to simply review preliminary agency action such as the countywide compliance review board's decision. See Section 120.57(1)(k) ("All proceedings conducted pursuant to this subsection shall be de novo."); Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 785-87 (Fla. 1st DCA 1981) (citing McDonald v. Dept. of Banking & Fin., 346 So. 2d 569 (Fla. 1st DCA 1977)). But cf. Florida Board of Medicine v. Florida Academy

of Cosmetic Surgery, 808 So. 2d 243, 257 (Fla. 1st DCA 2002) (characterizing rule challenge proceedings as "technically" de novo, at least with respect to the determination as to whether the rule is supported by competent substantial evidence).

144. The parties further stipulated that Respondents have the burden to prove that the challenged amendments comply with the requirements of Section 553.73(4)(b). This allocation of the burden of proof was specifically added to the statute in 2002. See Chapter 2002-293, Section 14, Laws of Florida (amending Section 553.73(4)(b)7. and re-designating the pertinent language as Section 553.73(4)(b)8.). Because statutory amendments affecting procedural matters such as the allocation of the burden of proof may be applied in pending cases, see South West Florida Water Mgmt. Dist., 774 So. 2d at 909, Respondents would have the burden of proof in this proceeding even without the parties' stipulation.

145. The standard of proof is a preponderance of the evidence. See Section 120.57(1)(j).

* * *

162. The enabling legislation for the Florida Building Code was enacted in 1998 based upon the recommendations of the Governor's Building Codes Study Commission (Study Commission). See generally Chapter 98-287, Laws of Florida (effective January 1, 2001).

163. The Study Commission found the State's existing system of building codes "to be particularly deficient in the . . . large number of codes found around the State [and] the inconsistencies among and between them . . . ."

164. To address that deficiency, the Study Commission recommended as its first "foundation" that:

> Florida should have one building code for use statewide which governs all administrative and technical requirements applicable to Florida's public and private Built Environment. That building code should be called the Florida Building Code ("The Code") and should become effective for use statewide.

165. The Study Commission expanded on that recommendation as follows:

> The Code should be a single set of documents and should apply to the design, construction, code enforcement, erection, alteration, modification, maintenance (specifically related to code compliance), and demolition of Florida's public and private Built Environment. The Code should be organized so as to offer consistency and simplicity of use. It should be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction. It should allow flexibility that is exercised in a manner that meets minimum requirements, is affordable, does not inhibit competition, and promotes innovation and new technology.

166. Consistent with the Study Commission's recommendation, Section 553.72(1), provides that the Code is the "unified state building code . . . [and] consists of a single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state and to the enforcement of such requirements . . . ." See also Section 553.73(1)(a) (requiring the Code to "contain or incorporate by reference all laws and rules

which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition" of all buildings and structures).

167. The Code is required to contain "provisions or requirements . . . relative to structural, mechanical, electrical, plumbing, energy, and gas systems" in buildings and structures subject to the Code. See Section 553.73(2) (emphasis supplied).

168. The Code was adopted by the Commission through Rule 9B-3.047, and became effective on March 1, 2002.

* * *

170. The Code preempts the building codes adopted by local governments. See Section 553.898. And cf. Section 553.72(1) ("The Florida Building Code shall be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.").

171. The Florida Building Code is required to be reviewed and updated every three years. See Section 553.73(6).

* * *

173. Despite the Study Commission's recommendation, the 1998 enabling legislation for the Code authorized local governments to adopt amendments to both the administrative requirements and technical provisions of the Code. See Chapter 98-287, Laws of Florida, at Section 40 (amending and renumbering Section 553.73(4)(a), Florida Statutes (1997), as Section 553.73(4)(b)). As discussed below, that authorization remains in the statutes.

174. Section 553.73(4)(b) and Rule 9B-3.051(1) authorize local governments to

periodically adopt amendments to the technical provisions of the Code to address "local conditions."

175. Local technical amendments to the Code shall be effective only until the adoption of the new edition of the Code. See Section 553.73(4)(b)6. And cf. Rule 9B-3.051(4) (describing the process for review of local amendments during the triennial update of the Code).

176. Local technical amendments apply solely within the jurisdiction of the adopting local government and must provide for more stringent requirements than those specified in the Florida Building Code. See Section 553.73(4)(b). It is undisputed that the amendments at issue in this proceeding impose more stringent requirements than the Code.

177. Local technical amendments to the Code must meet the requirements enumerated in Subparagraphs 553.73(4)(b)1. though (4)(b)9. . . .

* * *

178. The Legislature amended Section 553.73(4)(b) in 2002 to provide that local technical amendments do not become effective until 30 days after the amendments have been received and published by the Commission. See Chapter 2002-293, Section 14, Laws of Florida (amending Section 553.73(4)(b)5.). The 2002 legislation further provided that if the amendment is challenged by a substantially affected party, the amendment does not become effective until after the Commission enters a final order determining the amendment to be in compliance with Section 553.73(4)(b). See id. (amending Section 553.73(4)(b)7.).

179. As noted above, the 2002 legislation did not become effective until May 30, 2002,

which is after the local technical amendments at issue in this proceeding were adopted. Accordingly (and subject to the discussion in Part D.3. below), the local technical amendments at issue in this proceeding are currently in effect.

* * *

1. Section 553.73(4)(b)1.: (Local Conditions Justifying the Amendments)

181. Petitioners first allege that the local technical amendments are invalid because Respondents failed to demonstrate the existence of any "local conditions" justifying the amendments as required by Section 553.73(4)(b)1. Petitioners' argument on this issue is twofold: (1) the conditions identified by Respondents are not "local conditions" as contemplated by Section 553.73(4)(b), and (2) even if such conditions were "local conditions" they do not "justify" the amendments at issue in this proceeding. With respect to Respondent South Daytona, Petitioners also contend that the governing body of that City failed to perform the review and make the determinations required by Section 553.73(4)(b)1. Each contention will be addressed in turn.

a. Review and Determinations by Local Governing Bodies

182. Section 553.73(4)(b)1. requires the local governing to hold a public hearing and determine that there is a need to strengthen the Code prior to adopting a local technical amendment. The statute further provides that the determination must be based upon a review of local conditions by the local governing body which demonstrates that the local conditions justify the more stringent requirements in the local technical amendments.

* * *

185. Nevertheless, because this is a de novo proceeding (rather than a certiorari-type review of the local governing body's findings based upon the "evidence" before it), Port Orange was not precluded from putting on evidence which might show that the other amendments were justified by the "local condition" of high winds, just as Petitioners were not precluded from putting on evidence to show that the findings and determinations made by the City Council were incorrect.

186. In sum, South Daytona's local technical amendments fail to comply with Section 553.73(4)(b)1. because the evidence fails to establish that the City Council conducted the required review and made the necessary determinations. By contrast, the evidence establishes that Port Orange's City Council conducted the required review and, at least as to the amendments based upon the area's corrosive conditions, made the required findings. However, because this is a de novo proceeding, those findings are not dispositive or determinative.

b. Existence of "Local Conditions"

187. Section 553.73(4)(b) does not define "local conditions" and the parties disagree as to the meaning of that phrase. The proper construction of that phrase is a significant threshold question because it determines the circumstances under which local technical amendments are permitted. Although the phrase "local conditions" has been part of the law since 1974, the meaning of that phrase appears to be a matter of first impression. The parties have cited no controlling authority on that issue, nor has the undersigned's research located any.

188. Petitioners contend that a "local condition" is a condition that is unique to

the local government adopting the amendment. By contrast, Respondents contend that the condition need not be unique to the local government so long as the condition exists within the local government's boundaries and does not exist at all or to the same degree statewide.

189. Ultimately, the meaning of the phrase "local conditions" turns on the meaning word "local" because the parties appear to agree that environmental matters such as atmospheric salt and high winds are "conditions" for purposes of Section 553.73(4)(b). And cf. Exhibit P4, at 6, 47 (identifying "climatic conditions, soil types, termites, weather-related events, [and] risks associated with coastal development" as potential subjects of "local variations" which the Study Commission recommended be part of the Code).

190. Where, as here, the words used in a statute are not defined by statute, they should be given their plain and ordinary meaning as set forth in the dictionary. See Southwest Florida Water Management District v. Save the Manatee Club, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

191. Petitioners' construction is more consistent with the dictionary definitions of "local." See Mirriam-Webster's Online Dictionary, www.m-w.com (defining "local" to mean "of, relating to, or characteristic of a particular place: not general or widespread") (emphasis supplied); Black's Law Dictionary, at 938 (6th ed. 1990) (defining "local" to mean "[r]elating to a place, expressive of a place; belonging or confined to a particular place. Distinguished from 'general,' 'personal,' 'widespread,' and 'transitory.'") (emphasis supplied).

192. Petitioners' construction is also more consistent with the legislative intent

of the Code, because a restrictive interpretation of the phrase "local conditions" serves to protect the uniformity of the Code. See Section 553.72(1).

193. Petitioners' construction is also more consistent with the amendments to Section 553.73(4)(b)1. adopted by the Legislature in 2002. See Chapter 2002-293, Section 14, Laws of Florida. Those amendments further illustrate the Legislature's intent to restrict local technical amendments to conditions which are local rather than regional. Even though the substantive criteria in the 2002 version of the statute do not apply in this proceeding because Respondents' local amendments were adopted prior to the 2002 amendments becoming effective, it is appropriate to consider those amendments in construing the existing law. See, e.g., Lowry v. Parole and Probation Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985).

194. The conditions Respondents cited as the justifying the local amendments -- corrosive environment resulting from atmospheric salt and high winds -- are not "local conditions" for purposes of Section 553.73(4)(b). Those conditions exist to varying degrees in all coastal communities, and portions of more than half of Florida counties and a significant number of municipalities. As a result, those conditions are "general or widespread," and clearly not "confined to" Port Orange and South Daytona.

195. Indeed, if conditions which exist in more than half of the Florida counties can be considered "local conditions" then each local government within those counties could adopt amendments to the Code to address those conditions. Each of those local governments might address the local condition differently -- e.g., restricting

aluminum wire to "number 2" or larger, or "number 3" or larger, rather than "number 1" or larger as Port Orange and South Daytona did. In such circumstances, the uniformity of the Code would be undermined and the Code would effectively be replaced with the patch-work building code system that existed prior to the Code which, according to the findings of the Study Commission (see Exhibit P4, at 6, 8, 39-48), contributed to the failure to enforce building codes and untold property damage.

c. "Justification" for the Amendments

196. Respondents not only have the burden of proving the existence of "local conditions," but also that the local conditions "justify" the more stringent requirements in the local technical amendments. See Section 553.73(4)(b)1. Stated another way, Respondents must demonstrate that the more stringent requirements in the local amendments are necessary because of the cited local conditions, or that there is a direct nexus between the cited local conditions and the more stringent requirements. The 2002 amendments to the statute confirm as much. See Chapter 2002-293, Section 14, Laws of Florida (amending Section 553.73(4)(b)1. and clarifying that the local need to strengthen the Code must "beyond the needs or regional variation addressed by the [Code]" and that the local need must be addressed by an amendment which is no more stringent than necessary to address that need).

197. In light of the foregoing determination that Respondents failed to prove the existence of "local conditions," it is not necessary to determine whether such conditions justify their local technical amendments. However, in the event that the undersigned's construction of "local conditions" is rejected by the Commission in its final order or by an

> appellate court, the issue as to whether the conditions cited by Respondents -- corrosive environment caused by atmospheric salt and high winds -- "justify" the amendments will be addressed below.
>
> * * *
>
> 200. The local technical amendment to NEC Section 230-70 may be desirable from a safety standpoint, but it is not justified by high wind conditions. Indeed, the fact that an outside "main disconnect" or "shunt trip" might make it easier for firefighters to turn off power to a building in case of an emergency is no more significant in the event of a hurricane than it is in the event of a fire or some other emergency. Accordingly, even if high winds were considered a "local condition" in Port Orange and South Daytona, that condition does not justify the local amendment to NEC Section 230-70.

The undersigned agrees with all of the above-quoted conclusions from Florida Home Builders and is of the view that, to the extent those conclusions address issues in this case, they are equally applicable here.

Compliance with Section 553.73(4)(b)7

58. Petitioners contend that an interlocal agreement between the County and the municipalities in Broward County establishing a county-wide compliance review board is a condition precedent to BORA's authority to adopt the local technical amendments at issue here. In this regard Petitioners direct attention to the language of Section 553.73(4)(b)7, Florida Statutes, which reads as follows:

> 7. Each county and municipality desiring to make local technical amendments to the Florida Building Code shall by interlocal agreement establish a countywide compliance review board to review any amendment to the Florida Building Code, adopted by a local government within the county pursuant to this paragraph, that is challenged by any substantially affected party for purposes of determining the amendment's compliance with this paragraph. If challenged, the local technical amendments shall not become effective until time for filing an appeal pursuant to subparagraph 8. has expired or, if there is an appeal, until the commission issues its final order determining the adopted amendment is in compliance with this subsection. (Emphasis added.)

59. The foregoing language must also be considered in pari materia with the following language from Section 553.73(1)(e), Florida Statutes:

> (e) Subject to the provisions of this act, responsibility for enforcement, interpretation, and regulation of the Florida Building Code shall be vested in a specified local board or agency, and the words "local government" and "local governing body" as used in this part shall be construed to refer exclusively to such local board or agency. (Emphasis added.)

60. There does not appear to be any doubt that BORA is a "specified local board or agency" within the meaning of Section 553.73(1)(e), Florida Statutes. And it follows logically from the provisions of Section 553.73(1)(e) that BORA is a "local government" authorized by Section 553.73(4)(b), Florida Statutes, to "adopt amendments to the technical provisions of

the Florida Building Code. . . ." But BORA is not a "county" or a "municipality" within the meaning of subparagraph 7 of Section 553.73(4)(b). Such being the case, the requirements of subparagraph 7 do not expressly apply to an entity like BORA, because the requirements of subparagraph 7 are expressly limited to a "county' or a "municipality" that desires to make local technical amendments.

61. While the letter of subparagraph 7 does not apply to BORA, one must ask whether the purpose and intent of the requirements of that subparagraph are such as would necessarily encompass BORA to fulfil the purposes of the subject statutory requirement. The undersigned is of the view that BORA is not encompassed by the requirements of subparagraph 7 of Section 553.73(4)(b), Florida Statutes. This conclusion is reached largely on the basis that in a geographic area like Broward County, where only one unit of local government is authorized to adopt amendments to the Florida Building Code, it would serve no useful purpose to have a countywide compliance review board if there is only one entity in the county that is authorized to adopt local technical amendments.[4] In view of the foregoing conclusions, the undersigned also concludes that the establishment of a countywide compliance review board by interlocal agreement is not a necessary prerequisite to the

authority of BORA to adopt local technical amendments to the Florida Building Code.

62. The foregoing conclusion raises, of necessity, the question of whether, in the absence a statutory "countywide compliance review board," challenges to BORA's local technical amendments may, or must, be addressed to BORA before seeking relief before the state Commission. Stated otherwise, the unresolved question is: Even though BORA is not a countywide compliance review board, may BORA, or must BORA, act as though it were a countywide compliance review board? This question does not appear to be answered by any language in Chapter 553, Florida Statutes. Hopefully, the Commission will be able to fashion some solution to this problem for the benefit of future parties.

63. Although it cannot be said with any degree of certainty that a proceeding before BORA challenging the validity of the local technical amendments at issue here was a prerequisite to filing an appeal with the Commission, it seems quite certain that such a proceeding before BORA prior to an appeal to the Commission was not in any way an impediment to the Petitioner's subsequent efforts to seek relief before the Commission. From the Petitioner's point of view, it would seem that the proceeding before BORA was, at worst, an exercise of an over-abundance of caution to make sure that the Petitioners had

exhausted all of their local administrative remedies before seeking relief from the Commission.[5]

Conclusions regarding newspaper notice

64. Petitioners contend that BORA failed to comply with the statutory requirement in Section 553.73(4)(b)1, Florida Statutes, of publishing notice in a newspaper of general circulation at least 10 days before a public hearing to adopt local technical amendments to the Florida Building Code. The sub-committee and committee meetings constituted workshop meetings and were advisory in nature. The BORA meeting of December 13, 2001 was a meeting to discuss the proposed amendment in concept. These meetings do not appear to have been within the scope of the cited statutory requirements for publication of notice in a newspaper because no final action was taken at those sub-committee or committee meetings or at the BORA meeting of December 13, 2001. In addition, the aforesaid publication requirement did not become effective until March 1, 2002, and, therefore, was not applicable to the sub-committee and committee meetings and BORA's meeting of December 13, 2001. When BORA officially adopted the Amendments on March 1, 2002, the notice of the meeting was published in compliance with Section 553.73(4)(b)1, Florida Statutes.

Local conditions and local needs

65. Section 553.73(4)(b)1, Florida Statutes, requires, as a prerequisite to any local technical amendment, that a determination be made based upon a review of local conditions "by the governing body" which review demonstrates "by evidence

or data that the geographical jurisdiction governed by the local governing body exhibits a local need to strengthen the Florida Building Code beyond the needs or regional variation addressed by the Florida Building Code." The statute also requires evidence or data "that the local need is addressed by the proposed local amendment." And, finally, the statute requires evidence or data that "the amendment is no more stringent than necessary to address the local need." The evidence in this case is insufficient to show that BORA complied with any of the three last-mentioned statutory requirements.

66. With regard to the "local conditions" requirement, for the reasons discussed in Florida Home Builders, supra, the quoted term must be given a narrow construction to accomplish the legislative goals of the new legislation. The local conditions mentioned in BORA's arguments are not unique to Broward County. Nor do any of such conditions demonstrate a "need" for local technical amendments. The most that can be said on the basis of the record in this case is that BORA has shown that it has a strong "desire" to have the amendments in order to maintain a 20-year-old status quo, but there has been no showing of a "need."

67. As explained in some of the above-quoted language from Florida Home Builders, in the absence of a showing of a "local need" it is impossible to demonstrate that the subject local technical amendments address the need that has not been shown. The same is equally true of the statutory requirement of a showing that "the amendment is no more stringent than necessary

to address the local need." If no local need is shown, it follows logically that any local technical amendments that impose more stringent requirements than the Florida Building Code of necessity also impose requirements that are more stringent than necessary.

68. In reaching the foregoing conclusions, the undersigned has not overlooked the testimony in support of BORA's position that included a list of several conditions the witness cited as justifying the local technical amendments at issue here. Those conditions may be briefly described as follows:

(a) A large number of high-rise buildings.
(b) Very high high-rise buildings.
(c) Large elderly population.
(d) Response time impacted by bridges and by volunteer fire departments
(e) Use of impact glass in high-rise buildings.
(f) Use of HVWZ—hurricane shutters.
(g) Long history of smoke control regulations in Broward County.

69. The conditions summarized immediately above fail to provide any support for BORA's position for two reasons. First, they are not "local conditions" within the meaning of Section 553.73(4)(b). All of those conditions exist to one extent or another in a number of other Florida counties and in a significant number of municipalities. As a result, those conditions are "general or widespread," and clearly not "confined to" Broward County. Second, even if the conditions summarized above were "local conditions" within the meaning of

the applicable statutes, there is no persuasive evidence that the members of BORA ever considered even a single one of those conditions prior to voting to adopt the subject amendments. It is clear from the evidence in this case that, whatever the members of BORA may have had in mind when they voted to adopt the subject amendments, they never memorialized any "local conditions" within the meaning of Section 553.73(4)(b), Florida Statutes, that they relied upon as justification for the amendments.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Building Commission issue a final order which concludes that, for the reasons set forth above, the local technical amendments adopted by BORA which are challenged in this case fail to comply with the requirements of Section 553.73(4)(b)1, Florida Statutes (2001), and are invalid local technical amendments, and further concluding that Broward County is not a necessary or appropriate party to this proceeding.

DONE AND ENTERED this 30th day of June, 2003, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2003.

ENDNOTES

1/ The style of this proceeding has been changed in the interest of accuracy. The proper name of the party previously described as "BROWARD COUNTY BOARD OF COUNTY COMMISSIONERS" is simply "BROWARD COUNTY." The party described in the original style as "THE BROWARD COUNTY BOARD OF RULES AND APPEALS/COUNTY-WIDE COMPLIANCE REVIEW BOARD" has never existed. Although the party named "THE BROWARD COUNTY BOARD OF RULES AND APPEALS" has on at least one occasion acted as, or attempted to act as, a "countywide compliance review board" within the meaning of the applicable statutes, there has never been an entity named "THE BROWARD COUNTY BOARD OF RULES AND APPEALS/COUNTYWIDE COMPLIANCE REVIEW BOARD."

2/ Petitioners and Broward County requested and were granted a few extra hours for the submission of their respective proposed recommended orders.

3/ The issue of standing in a case of this nature is discussed at some length at paragraphs 146 through 161 of the Recommended Order in Florida Home Builders Association, Inc., et al., vs.

City of Daytona Beach, et al., DOAH Case No. 03-0131BC (RO issued April 29, 2003).

4/ This is a matter on which reasonable people acting in good faith could disagree. Thus, this conclusion is not entirely free from doubt. Hopefully the Commission's final order will provide clear guidance to be followed in the future.

5/ The Petitioners' reliance on BORA's assertion that BORA had authority to hear challenges as though it were a countywide compliance review board would appear to resolve any dispute on this issue between these parties. But future cases could present more complicated circumstances, and it would be most helpful to have some Commission or Legislative clarification on this issue. On this general subject it is gratuitously noted that, if in the future BORA undertakes to fulfil the role of a countywide compliance review board within the meaning of Section 553.73(4)(b)7 and 8, Florida Statutes, BORA should offer the challenging party a trial-type proceeding, and BORA should have someone participating in the hearing on BORA's behalf to present evidence and argument in support of the challenged local technical amendments. At such a hearing, even if the hearing is conducted by itself and before itself, sub-paragraph 8 of Section 553.73(4)(b) imposes the following requirement on BORA: "The local government adopting the amendment that is subject to challenge has the burden of proving that the amendment complies with the provisions of this paragraph in proceedings before the compliance review board and the commission, as applicable." (Emphasis added.)

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.