

To: All Building and Fire Code Officials

Revised 9-22-14

From: James DiPietro 

Date: May 12, 2014

Subject: Conflict of Interest, policy and affidavit to ensure compliance with Chapter 71-575 Paragraph 4 (B), Laws of Florida.

The Board of Rules and Appeals recently acted to clarify policy concerning Conflicts of Interest. In recent years an individual certified by the Broward County Board of Rules and Appeals could work as a contractor or for a contractor outside of Broward County. The Board staff has strived to make sure any Certified Contractor had their certification located outside of Broward County when getting certified for the first time and also on renewals. During the past recertification period, one individual appealed the fact we were requiring that his certification be moved outside of Broward County. The Board ruled in his favor but decided to review Chapter 71-575 for future certifications. Attached are copies of the attorney's opinion that the Board approved on May 8, 2014 and the affidavit that must be filled out by any new hires, anyone promoted and everyone else when they are re-certified. What this decision means is that anyone certified by the Broward County Board of Rules and Appeals can hold an active Certificate of Competency in any trade and it can be located within Broward County but they cannot use that certificate anywhere. In short, it says an inspector, plans examiner, building official/fire official or anyone else certified by the Broward County Board of Rules and Appeals cannot act in the capacity of or for a contractor anywhere.

The effective date of this policy shall be immediate for new hires and everyone else when they re-new their building or fire certifications.

For any questions please contact any Code Compliance Officer or me at 954-765-4500

Please distribute this to your entire staff.

Thank you

LEGAL ADVISORY OPINION RE: CHAPTER 71-575(4)(B)

I. Statute Interpretation.

It is well established that when interpreting a statute, the courts must examine the plain meaning of the statute to determine the legislative intent. The legislative intent must be determined from the words used without looking to rules of construction or speculating as to intent if the language of the statute is clear and unambiguous. See Palermo v. City of Tampa, 945 So. 2d 550, (Fla. 2nd DCA, 2006). This rule of construction applies to state statutes as well as local ordinances, special acts of legislature, and administrative rules. See Town of Longboat Key v. Islandside Prop. Owners Coalition, LLC, 95 So. 3d 1037 (Fla. 2nd DCA, 2012).

Neither the courts, nor any administrative bodies have the authority to attempt to modify legislative intent through the addition or omission of wording which has been clearly set forth otherwise. See Harvard v. Palm Springs, 98 So. 3d 645, 2012 Fla. App. LEXIS 15330 (Fla. 4th DCA, 2012). (“*Legislative intent is the polestar that guides a court's statutory construction analysis. In attempting to discern legislative intent, a court first looks to the actual language used in the statute. If the statute is clear and unambiguous, a court will not look behind its plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such an instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.*”)

At the same time, statutes must be read in their entirety so as to discern legislative intent in its entirety. See Vrchota Corp. v. Kelly, 42 So. 3d 319 (Fla. 4th DCA 2010). Select passages may not be taken out of context to contort or alter the intent of the statute in its entirety.

II. Florida Building Code is Statutory Law.

The Florida Building Code is incorporated into the Florida Statutes at F.S. Sec 553.73 wherein is stated: 553.73

553.73 Florida Building Code.—

(1)(a) The commission shall adopt, by rule pursuant to ss. 120.536(1) and 120.54, the Florida Building Code which shall contain or incorporate by reference all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such laws and rules, except as otherwise provided in this section.

With respect to 71-575 Sec. 4(b) the Code clearly states:

(b) Any Inspector (such as and including but not limited to structural , engineering, plumbing, mechanical, or electrical) or other building official charged with enforcing or otherwise supervising or inspecting any work covered under any section of the South Florida Building Code as applicable to Broward County pursuant to Chapter 71-575, Laws of Florida, and who is required to hold or who otherwise holds a Certificate of Competency in any area of construction shall not use that Certificate of Competency to engage in free enterprise thereby competing against persons or firms whose work he may also inspect, nor may he allow his Certificate of Competency to be used by another person or firm.

See F.B.C. Chapter 71-575.

A thorough review of the legislation in question necessarily requires a sentence by sentence, word by word, review of the words in their entirety.

III. Analysis of Statute

In this case, the plain language of the Special Act at Sec 4(b) refers to:

Any Inspector (such as and including but not limited to structural, engineering, plumbing, mechanical, or electrical) or other building official charged with enforcing or otherwise supervising or inspecting any work covered under any section of the South Florida Building Code as applicable to Broward County pursuant to Chapter 71-575, Laws of Florida, and who is required to hold or who otherwise holds a Certificate of Competency in any area of construction...

In so saying, it is readily determinable as to whom the language contained in the Special Act applies.

The wording which seems to be generating the greatest discussion and uncertainty is the latter portion which states:

...shall not use that Certificate of Competency to engage in free enterprise thereby competing against persons or firms whose work he may also inspect, nor may he allow his Certificate of Competency to be used by another person or firm.

Again, where the court may be the ultimate decision maker in determining a question of statutory interpretation, the BORA must defer to the same rules used by the courts concerning statutory interpretation and which have been set forth above. (*Supra*).

The language in question does not make any determination that an inspector inactivate his license or close his place of business. The only requirements are that; 1) he/she not inspect any work which may have been performed by a competitor and; 2) not allow his/her license to be used [i.e. to act as a qualifier] by another person or firm.

The statute does not place any geographical limitations on where an inspector may compete with another tradesman. The inspector may not compete against any party which may be a competitor, anywhere.

(a) Inspection of Work of Possible Competitor and Definition of "Competitor."

The plain language rule determines that an inspector could not conduct an inspection on any work which *possibly could have been performed by a competitor*. Necessarily, the inspector may not compete against another licensed contractor in another county of the state of Florida, or another state, or another country. Location is irrelevant since the statute does not provide for any such limitations. The inspector simply cannot perform work in a construction discipline against a competitor whose work he/she may inspect in the course of their duties for Broward County.

Black's Law Dictionary does not define "competition" however it does define "compete." The word "compete" is legally defined as :

To contend emulously, to strive for the position, reward, profit, goal, etc. for which another is striving.

In so saying, the legal definition of "compete" does not require remuneration or compensation however it does require that another party be striving for the same position, goal, reward, or profit. The most literal determination of this language is that simply by engaging in business an inspector may be taking away work -- even if that work was to be obtained through a "no-bid" contract- from another contractor.¹ The language of the statute thereby determines that an inspector may not engage in any work, in any place, where it may entail competition against a party whose work he/she may inspect and which would require the use of his/her Certificate of Competency.

(b) Prohibition from Qualifying for Others

The second point to note is that the statute precludes an inspector from acting as a qualifier for ANY OTHER PERSON or ANY OTHER FIRM. As far as acting as a qualifier, it makes no difference whether or not the other person or other firm being contemplated for qualification may be a competitor of the inspector. As long

¹ The reason for this is evident where even in a "no-bid" situation, the inspector would still be taking work which would have otherwise been given to another contractor, "striving" or "contending" to obtain the same "goal" or "position."

as the license holder is employed as an inspector, they are not permitted to act as a qualifier for any other person or other firm, anywhere, anytime.

IV. Conclusion

The short version of this is that: 1) an inspector may not engage in any work which would require the use his/her certificate of competency anywhere it may entail competition against a party whose work he/she may inspect; 2) an inspector is not required to inactivate his/her license nor is he/she required to close their place of business while employed as an inspector; 3) an inspector may not qualify any other person or other firm anytime, anywhere, for any work requiring his/her Certificate of Competency.

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Board Certified, Construction Law

~~The Board of Rules and Appeals~~ voted to accept the Board Attorney's opinion on this matter on May 8, 2014 by a vote of 10-1.

Subject: Policy/Affidavit to ensure compliance with Chapter 71-575, paragraph 4(b), Laws of Florida

POLICY/AFFIDAVIT

The requirements below have been adopted by vote of the Broward County Board of Rules and Appeals on April 10, 2014, to help ensure compliance with Chapter 71-575, paragraph 4(b), Laws of Florida.

NOTICE

All applicants for certification or re-certification are required to execute the following statement and to have same notarized by a duly authorized Notary. Failure to execute and have this statement notarized will prevent the certification / re-certification process from proceeding to completion.

THE UNDERSIGNED HEREBY VOLUNTARILY AND KNOWINGLY STATES AS FOLLOWS:

The undersigned has read Chapter 71-575, paragraph 4(b), Laws of Florida and has had the opportunity to have same reviewed and explained by legal counsel. Undersigned understands the terms of same and that any Inspector (such as and including but not limited to structural, engineering, plumbing, mechanical, or electrical) or other building official charged with enforcing or otherwise supervising or inspecting any work covered under any section of the Florida Building Code as applicable to Broward County pursuant to Chapter 71-575, Laws of Florida, and who is required to hold or who otherwise holds a Certificate of Competency in any area of construction shall not use his/her Certificate of Competency to engage in free enterprise thereby, competing against persons or firms that may do business within Broward County whose work he/she may also inspect, nor may he/she allow his/her Certificate of Competency to be used by another person or firm. This includes any activity, such as, but not limited to bidding, contracting, code consulting, design, employment, plan review, special building inspections, etc., regardless of compensation. The undersigned makes application for certification or re-certification, affirms compliance with aforementioned Code Section, and vouches for the truth and accuracy of all statements and answers herein contained by affixing his/her signature below. The undersigned agrees that failure to comply with the requirements of chapter 71-575 shall be considered a material breach of the terms of certification and may result in decertification/ denial of certification.

A copy of a legal opinion with respect to Chapter 71-575 is available upon request.

Printed Name and Signature of Applicant.

State of Florida

SS |

County of Broward

On the _____ day of _____, 20____, personally appeared before me the above named individual who signed the foregoing instrument declaring same to be true to his knowledge and belief.

Notary-Public: _____

(Printed name and Signature of Notary Public, State of Florida)

(NOTARY SEAL)

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

Editor's Note: Affidavit Authorized by BORA vote on May 8, 2014, and issued by Chair on May 9, 2014.