

December 22, 2020

James DiPietro, Administrative Director
The Broward County Board of Rules and Appeals
1 N. University Drive, Suite #3500-B
Plantation, FL 33324

**ADVISORY OPINION REGARDING VIRTUAL
INSPECTIONS AND INSPECTIONS PERFORMED
IN WHOLE OR IN PART VIA ELECTRONIC MEDIA**

Jim,

You have asked the Office of General Counsel if virtual building inspections performed by electronic media are permissible in Broward County and further, if no law presently governs such inspections, whether the Broward County Board of Rules and Appeals may establish such law.

Summary:

Virtual inspections and the type, methods, and scope of such inspections are neither specifically permitted nor precluded under current Florida Statutes or Building Code. The Board of Rules and Appeals has the authority under Special Act 71-575 and the Broward County Charter to establish the law on a county-wide basis where there is no statutory pre-emption

Qualification and provisions:

The rules governing the means of building inspection incorporate at least four primary fields of engineering- chemical, civil, electrical, and mechanical, with hundreds if not thousands of engineering analysis techniques. The question you pose pertains to the methods of inspection, the current legal status of performing visual inspection, and the Board's authority to create law through amendments to the Florida Building Code, Broward County Edition. This Advisory is confined to same.

Case precedent and historical perspective:

The methods for building inspection are set forth in Florida Statutes Sec. 468, and 553 and further to those statutory requirements, you have provided what you believe to be precedent in the form of:

- 1) a "Petition for Declaratory Statement Before the Building Code Administrators and Inspectors Board"("BCAIB") date stamped November 15, 2018 which includes an Exhibits "A" incorporating
 - i) a "Petition for Declaratory Statement Before the Building Code Administrators and Inspectors Board"("BCAIB") date stamped May 4, 2017 November 15, 2018
 - ii) a "Memorandum in Support of Petition for Declaratory Statement Before the Building Code Administrators and Inspectors Board" date stamped June 15, 2017; and
 - iii) a "Final Order" #DS 2017-038 and date stamped July 28, 2017 which was issued by the BCAIB.

- 2) a “Final Order” #DS 2018-078 date stamped February 27, 2019 from the Building Code Administrators and Inspectors Board (“BCAIB”) which includes a Petition and support documents.
- 3) a “Final Order” #DS 2019-031 Date stamped August 1, 2019 from the Building Code Administrators and Inspectors Board (“BCAIB”) which includes a Petition and support documents.

The forecited documents pertain to the practice of conducting virtual inspections via electronic media including through the use of a smartphone application or “app” and may entail coordination of video conferencing with GPS technology to provide live and recorded video of building inspections. However, the questions posed are not directed at any technical aspect nor the safety or efficacy of virtual inspection. Rather the Petitions all seek a determination of an inspector’s status as to potential disciplinary action for conducting a virtual inspections where such inspections are not specifically forbidden by statute.

We see the propounding of a question as to protection from individual liability under F.S. Sec 468 as troubling from the onset because the precedent you cite appears to place a premium on expedience and convenience at the expense of requirements to safeguard the public health, safety and general welfare. See Florida Building Code Sec 101.3.¹ In all cases the BCAIB Final Orders go to great lengths to limit their application and to not only correct, but to openly state disagreement with numerous misrepresentations made by Petitioners with respect to

accuracy, desirability, efficacy, and any endorsements by BCAIB. *See for example* Final Order #DS2018-078 *infra*.

Analysis:

i) Statute, Code and Home Rule

The well-established rule under Florida law is that a special act takes precedence over a general act when the two cannot be harmonized. *See Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209, 212 (Fla. 1972). Florida courts have outlined exceptions to this general rule in certain circumstances. A subsequent general law may, by its terms, supersede a special law in conflict with it, but only if the manifest intent of the subsequent general law is to introduce a new and exclusive rule on the subject. *See Florida Power & Light Co. v. City of Miami*, 72 So. 2d 270 (Fla. 1954). *See also American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524 (1938). A general law that is merely inconsistent with a special law or local provision of a charter, however, does not supersede such provision. *Oceancoast Corp. v. City of Miami Beach*, 221 So. 2d 802 (Fla. 3d DCA 1969). In so saying, a **municipality or local governing authority has the power to act under either the general law creating the exception or its special charter.** *See Broward County Charter Section 9.02 et al.*

The question of whether more stringent local government action conflicts with the less burdensome state statute or statewide code is best answered through the use of the underlying language. If no portion of the

¹ By way of example, the question posed in the Petition for Declaratory Statement Before the Building Code Administrators and Inspectors Board (“BCAIB”) date stamped November 15, 2018 Petition to Final Order #DS 2018-078 states as follows: “Without any limiting conditions or restrictions as set forth in Section 553.791(1)(i), Fla. Stat, will the virtual inspection of any and all required inspections under the Florida Building Code for both residential and commercial construction, including but not limited to new construction, renovations, alterations, and additions, conducted via Petitioner’s smartphone application, as described herein, in and of itself subject Petitioner or properly licensed employees of his corporation, Innovative Construction Inspections, Inc., to disciplinary action under Chapter 468, Pat XII, Fla. Stat.?” This is essentially the same question posed to three (3) different jurisdictions, in all of the cited Final Orders of BCAIB.

statute or code **expressly forbids** more stringent regulation, **the local government, or governing authority, may enact the regulation.**²

The Broward County Board of Rules and Appeals was granted its authority by Special Act Ch. 71-575 and incorporated in the Broward County Charter. Additionally, BORA was granted the authority to make special amendments to the Florida Building Code by and through the provisions of the Charter of Broward County. As such, all provisions of the Broward County Board of Rules and Appeals acting within its scope of authority, are authorized by special act of the Florida legislature. Therefore, under the general rule, clarifications and more stringent provisions instituted by the Board of Rules and Appeals which are not pre-empted by previous legislation have the power of state law within Broward County. This is axiomatic where BORA is legislatively established as the governing authority.

The Florida legislature has long recognized that the building regulations of Broward County require great local deference. This is illustrated by Broward County's designation as a High Velocity Hurricane Zone in the Florida Building Code. For this reason, the state has granted Broward County and BORA great independence in amending and enforcing its building regulations. With this legislative history in mind, it is not logical to conclude that the legislature or any other administrative or even legislative body intends to supersede the authority of BORA .

ii) Precedent as cite in Final Orders of the State of Florida Building Code Administrators and Inspectors Board

We have given careful review of all documents attendant to the three (3) Final Orders of the BCAIB and find that none of them create a statutory or code pre-emption with respect to limiting or precluding virtual building inspections via electronic media. More to the point, the BCAIB made it clear that its findings were very specific and only determined that the use of electronic media to conduct a virtual inspection does not "ipso facto subject an inspector's license to disciplinary action." See #DS 2019-031. The BCAIB went further in its Final Order #DS 2018-078 where it disagreed with almost every point which the Petitioner asserted as to efficacy, safety, or desirability of virtual inspections by stating *inter alia*:

The Board also made specific findings of fact that differ from the statements presented in the petition as follows:

- a. **The Board does not endorse** the means or method of performing inspections using the process or the product which forms the foundation of the petition and as it relates to disciplinary action.
- b. **The Board disagrees** with the statement in the last sentence of page 3 of the petition that this process and product which forms the foundation of the petition has been "allowed" by the Board.
- c. **The Board disagreed** with the statement in the last sentence of the 3rd paragraph of page 4 of the petition that;
"inspectors will be able to conduct more thorough and in- depth inspections allowing for safer construction across the board".
- d. **The Board disagreed** with the statement in the second sentence of the first paragraph on page 6 of the petition that;

² §155.021(1), Fla. Stat. (2020) determines that municipalities may not enact legislation concerning subjects expressly preempted to the state by general law. In this case, the proposed code standard is not only not pre-empted, it is specifically permitted by the Broward County Charter and Special Act 71-575.

"There are no inherent differences between the process conducted by the limited scope inspections and the expanded scope of use. Conducting such virtual inspections is in keeping with the responsibilities of a licensed building inspector as outlined in § 468.604 (2), Fla. Stat."

e. ***The Board disagreed*** with the 3rd paragraph on page 6 of the petition that; Further, the ability of an inspector to conduct a virtual inspection for the expanded scope as opposed to the limited scope inspections, in no way inhibits the inspector's ability to conduct an efficient, complete, and comprehensive inspection. The inspector is still able to properly enforce the applicable building codes and permit requirements in the state as provided under §468.621. (1)(g), Fla. Stat., and, because the inspector has more resources available to him while conducting such an inspection, the inspector is in a better position to verify the applicable codes and permitting requirements than an onsite inspector.

See Final Order #DS2018-078 at pg. 2

In so saying, any position that a virtual inspection is: 1) safer; 2) no different than a physical inspection; 3) necessarily in keeping with the responsibilities of a licensed building

inspector as outlined in §468.604 (2), Fla. Stat. (4) or is specifically allowed or endorsed by the BCAIB, is false.

Conclusion:

With the exception of recent, limited action permitting virtual inspections as the result of COVID-19, the issue of virtual building inspection is a question of first impression for the Broward County Board of Rules and Appeals.

The Final Orders of the BCAIB in all prior cases make no determination as to a right to perform virtual inspections by previously existing legislation.

The issue of virtual inspections is something which is not specifically countenanced in the Florida Statutes or the Florida Building Code.

By the power of Special Act 71-575, the Board of Rules and Appeals has the authority to make special amendments to the Florida Building Code by and through the provisions of the Charter of Broward County. As such, governing action and determinations of the Broward County Board of Rules and Appeals while acting within its scope of authority, are authorized by Special Act of the Florida legislature and have the power of State law.

The Broward County Board of Rules and Appeals has the right to amend those sections of Chapter One of the Florida Building Code, Broward County Edition to preclude or allow virtual inspections including any limitations in scope as to the type, method, and scope of any virtual inspections.

Highest regards,

Charles M. Kramer, Esq.
Board Certified by the Florida Bar