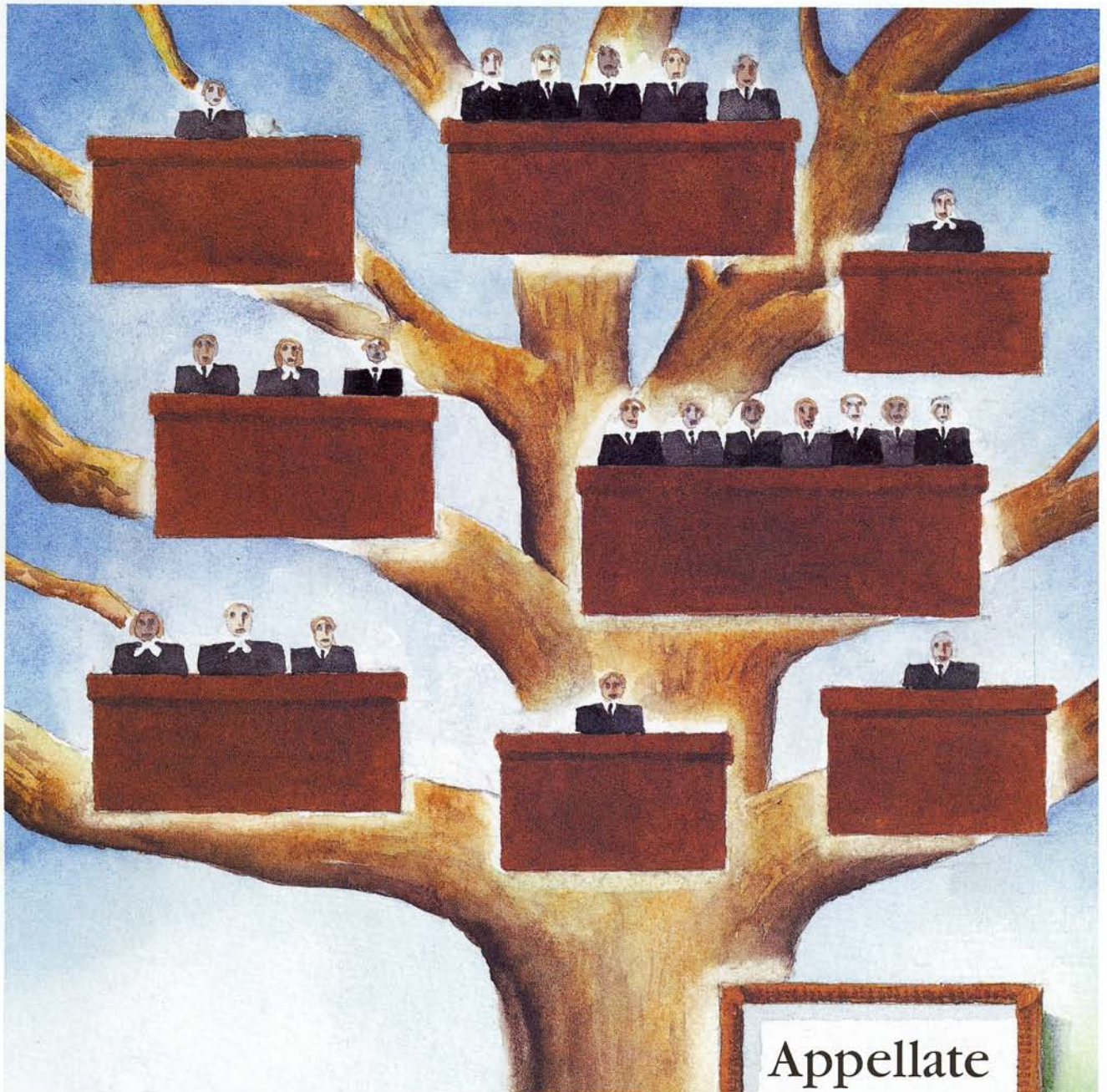


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Private Building Inspectors

Wouldn't it be great if we could speed up construction without sacrificing quality? With all of the construction in Florida and not enough inspectors, owners and contractors have been screaming for relief from delayed plan review and delayed inspections. Yet not too many people know that the legislature allows for an "alternative plan review and inspection."¹ This article discusses what a private provider is and, in this author's opinion, why it is advantageous for an owner to use a private provider rather than a building official for inspecting residential and commercial construction projects. For purposes of brevity, private provider will be referred to as PP and building official as BO.

What Is a Private Provider?

Enacted October 1, 2002, and then revised on July 1, 2006, F.S. §553.791 provides that "[t]he fee owner may elect to use a private provider to provide *plans review or required building inspections*, or both."² A PP must be licensed under Ch. 471 as an engineer, under Ch. 481, or as an architect.³ Individuals licensed under Ch. 468 Part XII as building inspectors are also permitted to do inspections but are limited to residential additions and alterations up to 1,000 square feet.⁴ To avoid self-policing or self-regulation, PPs cannot provide services for any building designed or constructed by the PP.⁵

Advantages of Using a Private Provider

- Building construction and plan review time is substantially reduced.
- More thorough inspections leads to increased quality in workmanship, less defect claims, and less warranty claims.
- When an inspection for construction is requested from the building department, usually the contractor/design professional is not even present. The contractor/design professional finds out from markings on a permit card or plans that have been rejected. It is easier for private providers to coordinate with contractors or design professionals, and they will usually review the work/plans directly with the contractor/design professional right at the job site.
- There just are not enough inspectors or plan reviewers and this shortage leads to substantial delays. Delays mean loss of productivity. Loss of productivity means lost profits, which is especially true for contracts that have liquidated delay damage clauses. The quicker a project is completed, the less an owner will be inconvenienced. This leads to a more pleasant, fast-tracked, and turnkey experience.
- There is an additional level of quality control.
- Projects are not exposed as long to rain, vandalism, theft, attractive nuisance, or other hazards that affect idle projects.
- Disciplinary action may be taken against a PP for violations.
- The biggest reason to use a PP

is because a PP must carry professional liability insurance. Because of their personal exposure, PPs are more likely to be complete, accurate, and thorough than a BO, who has sovereign immunity from liability.

Sovereign Immunity for Building Inspectors

In *Trianon Park Condominium Ass'n. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), the plaintiffs were condominium unit owners seeking damages against the City of Hialeah building inspectors for negligence in inspecting their condominium building and certifying it for occupancy. The Florida Supreme Court held that unless the plaintiffs could show that the city owed either an underlying common law or statutory duty of care to the individual condominium owners with respect to the alleged negligent conduct, there could be no governmental liability for this negligence. The *Trianon* plaintiffs argued that the city owed them a statutory duty of care to properly inspect construction projects pursuant to F.S. Ch. 533, and that the inspection laws were enacted for the protection of individual citizens as well as the general public. The court, however, determined that Ch. 533 was enacted only for the purpose of protecting the health and welfare of the public in general, and was not intended by the legislature to create a governmental duty of care to individual property owners. Finding no statutory or common law duty of care owed by the city to the individual property owners to inspect their building and issue

certificates of occupancy, the court held that the city could not be held liable for any negligence in the performance of these acts.⁶

Level of Professional Liability Insurance a PP Must Maintain

The PP must maintain professional liability coverage. For projects of \$5 million or less, the policy must be \$1 million per occurrence and \$2 million in the aggregate. For projects more than \$5 million, the policy must be \$2 million per occurrence and \$4 million in the aggregate.⁷ The PP can purchase claims-made policies but must maintain tail coverage for at least five years. Therefore, if this amount is insufficient, then an owner should request that the insurance coverage be increased.⁸ However, even though a PP is required to carry insurance “[t]he contractor’s contractual or legal obligations are not relieved by any action of the private provider.”⁹

Finding and Hiring a PP

Most building departments require the PP and their duly authorized representatives to register in order to verify the PP’s licensure and ensure that the PP maintains the requisite insurance.¹⁰ The PP must have a written contract with the fee owner (not the contractor) for its services.¹¹ If a PP is used for plan review, then the building official, in accordance with local adopted polices, may also require a PP to be used for the building inspections as well.¹²

Notwithstanding any other provision of law or local government ordinance or local policy, the fee owner of a building or structure, or the fee owner’s contractor upon written authorization from the fee owner, may choose to use a private provider to provide building code inspection services with regard to such building or structure and may make payment directly to the private provider for the provision of such services.¹³

Plan Review by a PP

If a PP is used for plan review, the PP is required to review the construction plans and sign an affidavit in a form authorized by the Florida Building Commission, under oath, that the plans comply with the applicable codes.¹⁴ Although special

permission may be sought from the BO, there is nothing in §553.791 that authorizes construction to commence prior to issuance of the permit. There is also a 30-business day deadline for the BO to review the plans, which can be tolled by the BO providing the PP with notice of a deficiency.¹⁵ Each time the BO issues a notice of deficiencies, the BO is given five extra business days to review the PP’s revisions to the plans.¹⁶

When to Elect to Use a PP

Prior to the 2006 revision, the question of when the election to use a PP must be made generated a lot of confusion and generated two interpretive attorney general opinions.¹⁷ Previously, the election could only be made either “at the time of permit application, or no less than seven business days prior to the first scheduled inspection.”¹⁸ The 2006 revision has been amended to also provide that, “if the local building official is unable to provide inspection services in a timely manner,” then election can be made “no less than seven business days prior to the next scheduled inspection.”¹⁹

The term “timely manner” is not defined anywhere in the Florida Statutes. Nor does the Florida Building Code specify the time that an inspection must take place. However, Broward County has issued amendments and interpretations to the Florida Building Code requiring: “Inspections shall be made not later than the following workday after the day of the request for inspection when a request is made prior to 12:00 noon. Requests for inspections received after 12:00 noon, shall be made not later than the day after the following workday.”²⁰

Therefore, unless there is some local amendment to the Florida Building Code specifying when an inspection must take place, the term “timely manner” seems unconstitutionally vague, since it is not defined anywhere. Therefore, this author is of the opinion that because at least one local jurisdiction essentially requires that the inspection must occur within virtually the next day, a BO should not reject a PP’s application

based solely on the grounds that the BO feels as though he or she is providing inspection services in a timely manner.²¹

Providing Notice a PP Is Going To Be Used

Election must be made with a form typically called “notice to building official of use of private provider form.”²² The form must be signed by the owner, posted at the project, and must generally contain 1) the PP’s licensure, contact information, resume, or statement of qualifications; 2) services to be provided by the PP; 3) certificate of professional liability insurance for the PP if required by the building official; and 4) statement from the owner indemnifying the building department from the owner’s use of the PP.²³ If changes are made to either the PP or the PP’s scope of work, then the notice must be updated within one business day.²⁴

Inspections of the Construction

If a notice of commencement is required (generally for jobs more than \$2,500), the PP may not perform or approve inspections until the notice of commencement is filed.²⁵ Whatever inspections the BO is required to perform, the PP is also required to perform.²⁶ The PP must notify the BO of any intended inspections and the approximate time.²⁷ The BO may visit the site as often as necessary to verify that the PP is actually providing the inspections.²⁸ After each completed inspection, the PP is required to record on a form posted at the job site indicating pass or fail.²⁹ The PP then has two business days to notify the BO about the PP’s conclusion.³⁰ However, what usually happens is the BO waives the requirement that *each* inspection be separately reported and instead simply requires the PP to submit a record of all the inspections together with a “certificate of compliance.”³¹

Completion of all Inspections by the PP

Upon completion of all required inspections, the PP must submit to the BO 1) a record of all required in-

spectations; 2) request for either a "certificate of completion" or "certificate of occupancy"; and 3) a "certificate of compliance" under oath including a statement in substantially the following form: "To the best of my knowledge and belief, the building components and site improvements outlined herein and inspected under my authority have been completed in conformance with the approved plans and the applicable codes."³²

Upon receipt of the above from the PP, the BO has two business days to "identify the specific deficiencies, as well as the specific code chapters and section" or must issue the certificate of occupancy or certificate of completion the next business day.³³

If the BO determines that the construction is not code compliant, the BO may deny the certificate of occupancy or certificate of completion, or issue a stop-work order for the project.³⁴ Upon denial or issuance of the stop-work order, the PP may 1) submit a corrected request for a certificate of occupancy or certificate of completion,³⁵ or 2) meet with the BO within two business days to resolve the dispute.³⁶ If the dispute still cannot be resolved, the PP can appeal the decision to the BO's board of appeals, or the local BO if there is no board of appeals, which must consider the matter at the next scheduled meeting.³⁷ Thereafter, if there is still a dispute, it must be brought before the Florida Building Commission.³⁸

Disciplinary Action

Because a PP must be licensed as either an engineer, architect, or building inspector, they are still subject to the disciplinary guidelines of their applicable professional boards respectively found under Ch. 471, Ch. 481, and Ch. 468. In addition, a PP is also subject to the disciplinary guidelines of §468.621(1)(c)-(h), which are specifically for building code administrators and inspectors. Although currently there is only one reported disciplinary case against a PP, there is certainly room for abuse.³⁹ The most notable violations involve making or filing a report or record which the PP knows to be

false; failure to properly enforce applicable building codes by committing willful misconduct, gross negligence, gross misconduct, repeated negligence, or negligence resulting in a significant danger to life or property; and failure to maintain the required insurance.□

¹ FLA. STAT. §553.791 (2006) is entitled "Alternative Plans Review and Inspection."

² FLA. STAT. §553.791(2) (2006) (emphasis added).

³ FLA. STAT. §553.791(1)(g) (2006).

⁴ FLA. STAT. §553.791(3) (2006). A PP can only perform services within the disciplines covered by their licensure or certification under Ch. 468 (building code administrators and inspectors for additions and alterations that are limited to 1,000 sq. ft. or less to residential buildings), Ch. 471 (engineering), or Ch. 481 (architecture, interior design, and landscape architecture).

⁵ FLA. STAT. §553.791(3) (2006).

⁶ *Holodak v. Lockwood*, 726 So. 2d 815, 816 (Fla. 4th D.C.A. 1999), citing *Trionon Park Condominium Ass'n. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985).

⁷ FLA. STAT. §553.791(16) (2006).

⁸ FLA. STAT. §553.791(4)(c), (16) (2006).

⁹ FLA. STAT. §553.791(8) (2006).

¹⁰ FLA. STAT. §553.791(15) (2006).

¹¹ FLA. STAT. §553.791(2) (2006).

¹² *Id.*

¹³ *Id.*

¹⁴ FLA. STAT. §553.791(6) (2006).

¹⁵ FLA. STAT. §553.791(7) (2006).

¹⁶ *Id.*

¹⁷ See, Fla. AGO 2006-29; Fla. AGO 2006-23.

¹⁸ FLA. STAT. §553.791(4) (2006).

¹⁹ FLA. STAT. §553.791(5) (2006).

²⁰ 2005 Broward County Amendments to the 2004 Florida Building Code 109.5 provides: "Inspection requests shall be made to the Building Department office at least one day prior to the required inspection and shall provide reasonable time for such inspections to be made. Inspections shall be made not later than the following workday after the day of the request for inspection when a request is made prior to 12:00 noon. Requests for inspections received after 12:00 noon, shall be made not later than the day after the following workday. The request for inspection shall be made by the person, firm or corporation performing the work. Failure to request such inspections constitutes a violation of this Code."

²¹ "Vagueness, of course, is the term given to that ground of constitutional infirmity of a [s]tatute that is based on its failure to convey sufficiently definite notice of what conduct is proscribed. A

[s]tatute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *State v. Gray*, 435 So. 2d 816, 819 (Fla. 1983). See generally *DuFresne v. State*, 826 So. 2d 272, 274 (Fla. 2002) ("It is well established that where reasonably possible and consistent with constitutional rights, a [s]tatute will be interpreted by the courts in a manner that resolves all doubt in favor of its validity. This [c]ourt has noted, however, that in a vagueness challenge, any doubt as to a [s]tatute's validity should be resolved in favor of the citizen and against the [s]tate."). Cf., *State v. Webb* 786 So. 2d 602, 604 (Fla. 1st D.C.A. 2001) (upholding statute using the term "reasonable time").

²² Although each building department has various versions of the form on their county or municipal letterhead, an example used by Miami-Dade County's building department can be found at www.miamidade.gov/buildingcode/alt_plan.asp#Required_Forms.

²³ FLA. STAT. §553.791(4) (2006).

²⁴ *Id.*

²⁵ FLA. STAT. §713.135(d).

²⁶ See FLA. STAT. §553.791(10) (2006).

²⁷ FLA. STAT. §553.791(9) (2006).

²⁸ *Id.*

²⁹ FLA. STAT. §553.791(10) (2006).

³⁰ *Id.*

³¹ *Id.*

³² FLA. STAT. §553.791(11) (2006).

³³ FLA. STAT. §553.791(12) (2006).

³⁴ *Id.*

³⁵ *Id.*

³⁶ FLA. STAT. §553.791(13) (2006).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Florida Eng's Mgmt Corp. v. Fred C. Jones, P.E.*, 2006 WL 1198052 (Fla. Div. Admin. Hrgs).

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