IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-1122
L.T. Case No. 17-6578RP

FLORIDA ASSOCIATION OF THE AMERICAN INSTITUTE OF ARCHITECTS, INC.,

Appellant,

v.

FLORIDA BUILDING COMMISSION,

Appellee.

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

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STATEMENT OF THE CASE AND FACTS

The Florida Association of the American Institute of Architects ("FAAIA") appeals the Final Order of the Division of Administrative Hearings determining that challenged provisions of proposed rule 61G20-2.002, Florida Administrative Code ("Proposed Rule"), are valid exercises of legislative authority delegated to the Florida Department of Business and Professional Regulation ("Department").

The Florida Building Code (the "Code") is maintained by the Florida Building Commission (the "Commission"), whose Code oversight is governed by Florida Statutes Chapter 553 and Department rules. *See*, *e.g.*, Fla. Admin. Code R. 61G20-2.001–.007. The Code is subject to a compulsory "update" and "adoption" process every three years. § 553.73(7)(a), Fla. Stat. Section 553.73(7)(a) states that the Commission "*shall adopt an updated Florida Building Code every 3 years . . . .*" *Id.* (emphasis added). In the interim, it also may be altered through "technical amendments." *Id*. § 553.73(7)(c), (9)(a).

Prior to statutory changes effective in 2017, section 553.73(7), Florida Statutes (2016), required the Commission to update the Code every three years by incorporating changes to several international building codes (the "Model Codes"). The Commission was given no discretion in adopting the Model Codes as the foundation for the Code. *Id.*

In addition to the comprehensive triennial update, the Commission had authority to make annual "technical amendments" to "incorporate interpretations, clarifications, and to update standards." *Florida Building Code – Residential*, Preface, "Adoption & Maintenance" (6th ed. July 2017), *available at* https://codes.iccsafe.org/public/document/FRC2017/preface; § 553.73(9)(a), Fla. Stat. (2016). These "technical amendments" were permitted only if they met a five-part test including a requirement that they were necessary "to accommodate the specific needs of the state." § 553.73(9)(a), Fla. Stat. (2016).

In 2017, the Florida Legislature amended section 553.73, Florida Statutes, to change the manner in which the Model Codes are incorporated into the Code. Ch. 2017-149, § 11, at 12–16, Laws of Fla. The language of the amendment is included at Appendix A for ease of reference. The statute continues to mandate that the Commission review triennially the current Model Codes. § 553.73(7)(a), Fla. Stat. But rather than simply adopting all Model Codes, the Commission now is required to adopt an updated Code in accordance with its review. *Id*. In addition, the Legislature added a mechanism for Model Codes to be incorporated into the Florida Code through technical amendments, rather than Model Code influence being limited to the triennial update process. *Id.* § 553.73(7)(c).

In response to the statutory changes, the Department published a Notice of Proposed Rule to amend Rule 61G20-2.002, Florida Administrative Code. 43 Fla.

Admin. Reg. 5,185, 5,189 (Nov. 15, 2017). Among the Proposed Rule changes is the requirement that only Model Code provisions "needed to accommodate the specific needs of this state" may be incorporated into the Code through the triennial update process. *Id*.

FAAIA filed a Petition challenging the Proposed Rule as a whole and argued that it is an invalid exercise of delegated legislative authority because it establishes a need standard for the triennial update process which is not supported by statute. The Commission defended the Proposed Rule, arguing that the 2017 statutory amendment authorizing "technical amendments" to adopt Model Codes to accommodate the specific needs of the state actually governs the paragraph (7)(a) triennial update adoption and therefore extends the need standard to the triennial update process by law.

The Administrative Law Judge ("ALJ") entered a Final Order endorsing the Commission's interpretation and finding that "the challenged provisions of [the Proposed Rule] are valid exercises of delegated legislative authority as to the objections raised." (R 124). The ALJ based her conclusion on an understanding that the statutory amendments suggest a legislative rejection of the Model Codes, and that the Legislature's description of a Model Code "technical amendment" process in section 553.73(7)(c) was actually a continuation of the triennial update process set forth in paragraph (7)(a). (R 110-112, 116, 120).

FAAIA timely appealed the Final Order, invoking this Court's jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(1)(C).

SUMMARY OF ARGUMENT

The ALJ erred in finding the Proposed Rule valid. Her conclusion was based largely on a mistake of law that the need standard governing technical amendments under section 553.73(7)(c), Florida Statutes, applies to the triennial update process found in paragraph (7)(a).

The plain language of the statute and established principles of statutory construction show that section 553.73(7)(a) governs the Florida Building Code triennial update adoption and Model Code incorporation, while section 553.73(7)(c) provides a mechanism by which to incorporate Model Code language into the Code through a distinct, "technical amendment" process. Thus, the Proposed Rule improperly applies the need standard for technical amendments to the triennial update process. The ALJ erred in endorsing a Proposed Rule which thrusts an exacting legal burden upon the triennial update process without any statutory support.

The Proposed Rule is an unauthorized and improper exercise of delegated legislative authority and must be deemed invalid.

STANDARD OF REVIEW

As agreed by the parties and ALJ, the issue raised in this case—whether the Proposed Rule is an invalid exercise of delegated legislative authority—is a pure question of law. The applicable standard of review therefore is *de novo.* (R 102); *Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Servs.*, 156 So. 3d 520, 529 (Fla. 1st DCA 2015) (involving a claim that the agency had engaged in unadopted rulemaking and stating that the "issue finally is a question of statutory interpretation, as to which the standard of review is *de novo*"); *Ortiz v. Dep't of Health*, 882 So. 2d 402, 404 (Fla. 4th DCA 2004) (concluding that an "appellate court reviews the issue of whether an agency has exceeded its rulemaking authority *de novo*").

ARGUMENT

I. THE PROPOSED RULE IS INVALID BECAUSE IT ESTABLISHES A LEGAL STANDARD FOR CODE UPDATES THAT IS NOT SUPPORTED BY STATUTE AND THEREBY ENLARGES, MODIFIES, AND CONTRAVENES SECTION 553.73

A. The Statutory Scheme

1. History and Purpose of the Florida Building Code

The Florida Building Commission is mandated by statute to "adopt an updated Florida Building Code every 3 years," by review and appropriate incorporation of Model Code provisions. § 553.73(7)(a), Fla. Stat. By preface to

the 2017 Florida Building Code, the Florida Building Commission astutely described the history and purpose of the Code as follows:

> The State of Florida first mandated statewide building codes during the 1970s at the beginning of the modern construction boom. The first law required all municipalities and counties to adopt and enforce one of the four state-recognized model codes known as the 'state minimum building codes.' During the early 1990s a series of natural disasters, together with the increasing complexity of building construction regulation in vastly changed markets, led to a comprehensive review of the state building code system. The study revealed that building code adoption and enforcement was inconsistent throughout the state and those local codes thought to be the strongest proved inadequate when tested by major hurricane events. The consequences of the building codes system failure were devastation to lives and economies and a statewide property insurance crisis. The response was a reform of the state building construction regulatory system that placed emphasis on uniformity and accountability.
>
> The 1998 Florida Legislature amended Chapter 553, Florida Statutes (FS), Building Construction Standards, to create a single state building code that is enforced by local governments. As of March 1, 2002, the Florida Building Code, which is developed and maintained by the Florida Building Commission, supersedes all local building codes. The Florida Building Code is updated every three years and may be amended annually to incorporate interpretations and clarifications.

Florida Building Code – Residential, Preface, "History" (6th ed. July 2017), *available at* https://codes.iccsafe.org/public/document /FRC2017/preface.

Consistent with the Commission's description, the declared legislative intent of the Code is to "provide a mechanism for the uniform *adoption*, *updating*, *amendment*, interpretation, and enforcement of a single, unified state building code

. . . which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida . . . .” § 553.72(1), Fla. Stat. (emphasis added). The Legislature emphasized that the Code “shall provide for flexibility to be exercised in a manner that . . . promotes innovation and new technology” in a dynamic, and ever-evolving industry, the character and integrity of which impacts the lives and safety of every Floridian. *Id.*

2. Updates and Amendments to the Florida Building Code

From the outset of Florida Building Code Act, and as recognized by the preface to the Code itself, the Legislature made clear that the Commission must adopt an updated Code every three years, and that its duties to update and amend the Code are distinct. The 2017 statutory amendments softened the mandate to incorporate all Model Code updates, but reinforced the Legislature’s command that the Commission adopt an appropriately updated Code every three years. The amendments also reinforced the Legislature’s commitment to the Model Codes and to the long-recognized distinction between triennial “updates” and interim “technical amendments.” That distinction carries through the entire Florida Building Code Act. The 2017 Legislature chose to leave this distinction intact, and there is no reason to ignore or rewrite the statute, as required by the Proposed Rule and appealed Final Order.

Section 553.73, Florida Statutes, is the primary authority governing the adoption of an updated Code and the interim amendment of the Code. It states that the Commission "*shall* use the [Model Codes] or other nationally adopted model codes and standards for updates to the Florida Building Code," while distinguishing that the Commission also "*may* approve technical amendments to the code . . . ." § 553.73(3), Fla. Stat. (emphasis added). The statute separately describes the procedures for the Commission to follow in (i) the triennial adoption of an updated Code following mandatory Model Code review; and (ii) the permissive technical amendment processes. *Id*. § 553.73(7), (9).

The 2017 amendments to section 553.73 modify and expand the manner in which the Model Codes may be incorporated into the Florida Building Code. *See* App. A. The statute now compels the Commission to review triennially the current Model Codes and "adopt an updated" Code in accordance with that review rather than simply incorporating all Model Codes. *Id*.; § 553.73(7)(a), Fla. Stat. During the mandatory, triennial updated Code adoption, the Commission is required, "[a]t a minimum," to adopt provisions of the Model Codes needed to maintain certain categories of federal funding. § 553.73(7)(a), Fla. Stat. By clarifying that these Model Code provisions should be adopted "[a]t a minimum," the statute contemplates adoption of other portions of the Model Code during the triennial review and update process. The statute also provides that the Commission "shall"

review and adopt certain additional codes, and "shall adopt updated codes by rule." *Id.* Section 553.73(7)(a) did not historically, and still does not, mention "technical amendments" or require the Commission to establish need before it adopts the triennial updates pursuant to paragraph (7)(a). *Id.*

Outside of the compulsory, triennial update, the Commission "may adopt" technical amendments. *Id*. § 553.73(7)(c), (9). But unlike the mandatory, triennial Code update, "technical amendments" under the statute are permitted, not required. *Id*.

As before the 2017 amendment, general technical amendments to incorporate the Commission's own interpretations and clarifications continue to be authorized under section 553.73(9)(a), but only annually and only if they satisfy a rigorous, five-part test, including a showing that the amendment is "needed in order to accommodate the specific needs of this state." *Id*. § 553.73(9)(a); *Florida Building Code – Residential*, Preface, "Adoption & Maintenance" (6th ed. July 2017), *available at* https://codes.iccsafe.org/public/document/FRC2017/preface.

The 2017 statutory amendments added that Model Code provisions may also be incorporated via interim technical amendments outside of the triennial update process. § 553.73(7)(c), Fla. Stat. This species of technical amendments is not restricted to annual adoption and is not subject to paragraph (9)(a)'s five-part test for general technical amendments. Paragraph (7)(c) technical amendments to

incorporate Model Code language are only required to satisfy the state-specific need showing.

Thus, during the mandatory triennial update process, certain Model Code provisions must be adopted "at a minimum" and others may be adopted. *Id*. § 553.73(7)(a). Neither requires a showing of need. *Id.* Technical amendments are authorized outside of the three-year update cycle, but only if they are, at a minimum, "needed to accommodate the specific needs of this state." *Id*. § 553.73(7)(c), (9)(a). The showing required for technical amendments other than incorporation of Model Codes is greater, and they are restricted to annual adoption. *Id.* These threshold requirements serve as a restraint on Code amendments outside of the more considered and comprehensive triennial update process.

B. The Proposed Rule

The Proposed Rule amends Rule 61G20-2.002, Florida Administrative Code, to add, among other changes, the following language:

> (2) The Florida Building Commission may amend the Florida Building Code for the following purposes:
>
> (a) *To update the Florida Building Code every three years pursuant to Subsection 553.73(7), Florida Statutes. When updating the code, the Commission shall review the most current updates to the model codes* including but not limited to the International Building Code, the International Fuel Gas Code, the International Existing Building Code, the International Mechanical Code, the International Plumbing Code, the International Residential Code, the International Energy Conservation Code, and the National Electrical Code

(NEC) *for the purpose of determining whether the latest changes to the model codes are needed to accommodate the specific needs of this state.* The Commission shall also consider its own interpretations, declaratory statements, appellate decisions, and local technical amendments. For the purpose of conducting this review, the following steps will be undertaken:

1. The Commission shall select the model codes that will be used to conduct its review.

2. No sooner than ninety days after the latest updates of the model codes are published, a complete listing of the changes to the model codes will be posted and made available for public review on the Commission's website.

3. No sooner than one hundred fifty days after the listing of the changes to the model codes is posted, the Commission's Technical Advisory Committees (TACs) will meet to review the changes to the model codes and make recommendations to the Commission regarding those changes that are needed to accommodate the specific needs of this state. The TACs' recommendations will be posted on the Commission's website for further public review.

4. No sooner than ninety days after posting the TACs' recommendations, the Commission will meet to vote whether to approve the TACs' recommendations regarding the latest changes to the model codes that are needed to accommodate the specific needs of this state. After Commission approval, the approved changes to the Florida Building Code needed to accommodate the specific needs of this state will be made available on the Commission's website. The public will then have the opportunity to submit amendments to the Florida Building Code and the approved changes to the Florida Building Code pursuant to Subsection (3) of this rule.

43 Fla. Admin. Reg. 5,185, 5,189 (Nov. 15, 2017) (emphasis added).

Among the Proposed Rule changes is the requirement that only Model Code provisions "needed to accommodate the specific needs of this state" may be incorporated into the Code during the triennial updated Code adoption and, even then, only after a four-prong adjudication of need. *Id*. The Proposed Rule does this despite the clear and consistent statutory dichotomy between the triennial update process—to which no need standard applies—and the technical amendment processes that, at a minimum, requires a showing of need.

C. Scope of State Agency Rulemaking Authority

Rules aimed at implementing statutes are constrained by the language of the statutes themselves. While a grant of rulemaking authority is necessary, it is not sufficient to allow an agency to adopt a rule "only because it is reasonably related to the purpose of the enabling legislation." § 120.52(8), Fla. Stat. "An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." *Id*.

Thus, an "action that goes beyond the powers, functions, and duties delegated by the Legislature" is an "invalid exercise of delegated legislative authority." *Id*. This kind of overreach occurs, and a rule is therefore invalid, if it "enlarges, modifies, or contravenes the specific provisions of law implemented," or if the "agency has exceeded its grant of rulemaking authority." *Id*. § 120.52(8)(b)–(c).

D. Because it improperly limits adoption of Model Code updates to those shown to be "needed to accommodate the specific needs of this state," the Proposed Rule enlarges, modifies, and contravenes section 553.73, Florida Statutes and is invalid.

The ALJ mistakenly concluded that the need standard found in section 553.73(7)(c) governs the triennial Code update described at paragraph (7)(a). (R 120). Section 553.73 does not impose a need standard on the triennial adoption of Model Code updates. This is plain on the face of the statute and is confirmed by resort, albeit unnecessary, to principles of statutory construction.

When construing a statute and attempting to discern legislative intent, courts first look to the plain language of the statute. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). When a statute is unambiguous, legislative intent is determined without resort to rules of construction. *Therrien v. State*, 914 So. 2d 942, 945 (Fla. 2005).

There is no cogent reason to deviate from the plain language of sections 553.72 and 553.73(7)(a), to conflate "update" with "technical amendment," or to engraft on these provisions a need standard found in unrelated paragraph (7)(c). Repeatedly, paragraph (7)(a) directs the Commission in mandatory terms to "adopt an updated Florida Building Code." § 553.73(7)(a), Fla. Stat. ("The commission *shall adopt an updated Florida Building Code* every 3 years . . . ." (emphasis added)); *id*. ("*At a minimum, the commission shall adopt any updates* to such codes

or any other codes necessary to maintain eligibility for federal funding . . . ." (emphasis added)); *id*. ("The commission *shall also review and adopt updates* based on the International Energy Conservation Code . . . ." (emphasis added)); *id*. ("*The commission shall adopt updated codes* by rule." (emphasis added)).

By contrast, paragraphs (7)(c) and (9)(a) speak only in permissive terms—and not about "updates," but about "technical amendments." *See id*. § 553.73(7)(c) ("The *commission may adopt as a technical amendment* . . . any portion of the codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state." (emphasis added)); *id*. ("The commission *may approve technical amendments* to the updated Florida Building Code after the amendments have been subjected to the conditions set forth in paragraphs (3)(a)-(d)." (emphasis added)); *id*. § 553.73(9)(a) ("The commission *may approve technical amendments* to the Florida Building Code . . . ." (emphasis added)). Notably, Paragraph (7)(c) refers to "*technical amendments* to the *updated Florida Building Code*," reiterating that amendments and updates are two separate processes, and that amendments are adopted only *after* the Code is updated. *Id*. § 553.73(7)(c) (emphasis added). And paragraph (7)(c) contains no timing restrictions, which demonstrates that the technical amendments authorized by paragraph (7)(c) are not tethered to, but are distinct from, both the triennial update and the annual technical amendment process described at paragraph (9)(a).

The distinction between *updates* and *amendments* is apparent from the stated intent of the Florida Building Code Act "to provide a mechanism for the uniform adoption, *updating*, *amendment*, interpretation, and enforcement of a single, unified state building code." *Id.* § 553.72(1) (emphasis added). The Act provides for both updates and amendments to the Code as separate goals. The Act commands the Commission to use the Model Codes to make "updates to the Florida Building Code," while it authorizes the Commission to "approve technical amendments to the" Code. *Id*. § 553.72(3). The resulting linguistic divide between paragraphs (7)(a) and (7)(c) is glaring and intentional: these are two distinct processes defined separately and meticulously throughout the Florida Building Code Act, including on the face of section 553.73.

The crystal clear language of the statute reveals legislative intent to require a showing of state-specific "need" only when Code changes lack the indicia of reliability inherent in the fulsome, triennial updated Code adoption. *Id*. § 553.73(7)(c)–(d), (9)(a). The threshold showing required for adoption of a stand-alone technical amendment made under paragraph (9)(a) is greater than the showing required for paragraph (7)(c) technical amendments to adopt Model Code provisions. That difference is evidence of the Legislature's continued deference to the Model Codes, and its intent to distinguish between these categories of technical amendments. *Compare id*. § 553.73(9)(a), *with id*. § 553.73(7)(c).

This framework endorses the triennial update process and recognizes the reliability of the Model Codes. The Legislature established a process for the Commission to periodically revisit the Code in whole to incorporate changes in accord with the Model Codes as recognized industry standards. Outside of that triennial update process, changes to the Code are not mandatory, but authorized only as needed. There is no ambiguity in the language of the statute, or the intent behind it: the need standard has no place in the triennial Model Code review and update process codified at section 553.73(7)(a) because that process is inherently reliable.

By contrast, the Proposed Rule establishes a legal standard—"needed to accommodate the specific needs of the state"—for the triennial update process, and a four-prong adjudicatory process for determining whether Model Code updates meet that standard, and thus impedes the incorporation of new Model Code provisions into the Florida Building Code. Those impediments are conspicuously absent from and contravene the plain language of section 553.73(7)(a), which unqualifiedly commands the Commission to "adopt an updated Florida Building Code" every three years.

The Proposed Rule's imposition of this need standard on the triennial adoption of Model Code updates also contravenes the legislative mandate for a flexible Code that promotes innovation and new technology. The learned Model

Codes are precisely the kinds of cutting-edge industry standards that will serve those goals. If the Final Order is left intact, technological advances that occur every year in innovative design, construction materials, construction means and methods, and other standards will be virtually barred from adoption in Florida. The result will be building codes and construction that lag behind industry standards in a State that distinguishes itself as a safe destination for visitors, retirees, and senior citizens. This is particularly risky in a construction environment that includes sun, salt water, high winds, heavy rains, and hurricanes. In short, under the Proposed Rule, no matter what advances are made and adopted into the Model Codes, they *will not* benefit Floridians unless proven to be needed to accommodate the specific needs of the State. A Proposed Rule that so hamstrings Model Code influence on the Florida Code is totally inconsistent with the legislative command for a flexible Code that promotes safety, innovation, and technology.

Any remaining doubt is resolved by resort to statutory construction. Statutes should be read as a whole to arrive at an interpretation that gives effect to the statute as a cohesive, consistent unit. *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d at 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another . . . [and with] due regard given

to the sematic and contextual interrelationship between its parts." (citations omitted)).

The only reading of section 553.73 that gives effect to the statute as a consistent whole is the reading described above. To require the Commission to establish state-specific need before triennially updating the Code would contradict the statutory mandate that the Commission adopt certain Model Code provisions "at a minimum." It also would conflate two terms—"update" and "amendment"—and nullify the update process set forth in paragraph (7)(a). If the technical amendment process described at section 553.73(7)(c) is simply the process by which the triennial update required by paragraph (7)(a) is conducted, then most of paragraph (7)(a) would be superfluous, and the authorization in paragraph (7)(c) to "approve technical amendments to the updated Florida Building Code" would be redundant, circular, or meaningless. Finally, paragraphs (7)(a) and (7)(c) are separated by a wholly unrelated paragraph concerning adoption of "codes regarding noise contour lines," § 553.73(7)(b), Fla. Stat., refuting any inference that paragraph (7)(c) is merely an extension of paragraph (7)(a).

The conclusion that a need showing applies only to amendments adopted outside the triennial updated Code adoption accords with the plain meaning and organization of the statute, avoids the above inconsistencies, and makes logical sense: *ad hoc* amendments to the Florida Building Code—a Code designed to

protect Florida citizens—*should* be subject to a threshold showing, while comprehensive updates that reflect widely-accepted industry standards are not. Further, the showing required for *ad hoc* amendments to incorporate interim Model Code changes is appropriately less stringent than the showing required for technical amendments not founded in any Model Code.

This interpretation also harmonizes with the statutory construction principle that the "legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) (quoting *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997)). The Florida Building Code Act consistently distinguishes between "updates" and "amendments." The ALJ conflated the two terms and treated them synonymously, applying the "need" standard that governs technical amendments to triennial updates as well, and rendered "technical amendments" that satisfy a stringent need standard the only means to change the Code. That interpretation ignores the distinction in statutory terminology and handcuffs the Commission's efforts to develop the Building Code with flexibility for the benefit of Florida's citizens.

The Legislature, moreover, is presumed to act intentionally when it includes language in one paragraph of a statute, but omits it in another. *See L.K. v. Dep't of Juvenile Justice*, 917 So. 2d 919, 921 (Fla. 1st DCA 2005). The Legislature recited

some form of the need standard in all paragraphs authorizing "technical amendments" outside of the triennial update process, but excluded it from the paragraph describing triennial "updates." § 553.73(7)(a), (7)(c)–(d), (9)(a), Fla. Stat. It also excluded the descriptor "technical amendments" from section 553.73(7)(a) when it described the triennial update adoption. If the Legislature intended to apply the need standard to the triennial update process, or to conflate triennial updates with technical amendments, it would have said so. It would have employed the same language—not starkly different language—in paragraph (7)(a) as elsewhere.

The resulting presumption is that the Legislature purposely excluded the need standard and mention of "technical amendments" from paragraph (7)(a). The Final Order turns on precisely the opposite presumption: that "update" and "amendment" are synonymous, and that the absence of the need standard from paragraph (7)(a) is meaningless and requires adoption of that standard from another paragraph. There is no such principle of statutory construction. Because the Legislature included the need standard in several sections, its omission from paragraph (7)(a) is presumed to be intentional.

The Proposed Rule injects the need standard into the paragraph (7)(a) triennial updated Code adoption—in effect, doing away with that process—and therefore enlarges and modifies the reach of the need standard. In doing so, it

contravenes section 553.73(7)(a), which mandates adoption of an updated Code without a showing of need. Accordingly, the Proposed Rule enlarges, modifies, and contravenes the statute it purports to implement, and is therefore invalid.

II. THE PROPOSED RULE IS INVALID BECAUSE IT ESTABLISHES A LEGAL STANDARD FOR CODE UPDATES THAT EXCEEDS THE DEPARTMENT'S GRANT OF RULEMAKING AUTHORITY

The particular type of agency overreach at issue here is especially reviled in Florida. An agency may not establish legal or regulatory standards without a very explicit, legislative grant of authority.

This principle is so revered that, when a general grant of permitting authority was read to authorize an agency to establish the requirements for those permits, it prompted immediate legislative backlash. In 1999, the Legislature revised section 120.52(8), Florida Statutes, to constrict agency rulemaking authority in response to *St. Johns River Water Management District v. Consolidated Tomoka Land Company*, 717 So. 2d 72, 81 (Fla 1st DCA 1998), which upheld agency rules establishing permitting standards and thresholds that were among the "class of appropriate subjects for rulemaking," although not explicitly authorized. The Legislature took swift action to "clarify the limited authority of agencies to adopt rules [and] reject the class of powers and duties analysis" set forth in *Consolidated-Tomoka*. *See* Ch. 99-379, § 2, at 2–3, Laws of Fla.

Section 120.52(8) has since been read to mean that only rules specifically, precisely, definitely, and explicitly authorized in statute may be adopted, and that regulatory thresholds not spelled out in statute are invalid. *See Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

The Florida Building Code Act grants no authority—general or specific—to the Department to establish a standard or threshold showing for the triennial adoption of Model Code updates. For the Proposed Rule to satisfy *Save the Manatee*, the statute would have to "precisely, definitely, or explicitly" authorize the Department to establish a threshold *based on state-specific need* for triennial incorporation of Model Code provisions into the Florida Building Code. Instead, the statute directs the Commission to adopt certain Model Code provisions as a floor, and provides no ceiling, and no authority whatsoever for the Commission to establish different parameters.

A rule that properly implements the specific duties conferred on the Department by statute would compel the Commission to triennially update the Code, and would mandate that it include certain elements of the Model Codes at a minimum. The Proposed Rule does precisely the opposite, enlarging, modifying, and contravening section 553.73 and grossly exceeding Department rulemaking authority. *Cf. McDonald v. Dep't of Prof'l Regulation*, 582 So. 2d 660, 663 (Fla. 1st DCA 1991) (holding that "'the power to establish [evidentiary presumptions] is

reserved solely to the courts and the legislature'. . . . [A] state executive branch agency lacks implied or inherent power to fashion, adopt, or apply a legal presumption for application in an administrative proceeding in the absence of specific authority in a statute or the constitution." (quoting *B.R. v. Dep't of Health & Rehab. Servs.*, 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989))).

CONCLUSION

The effect of the Proposed Rule is to insulate the Florida Building Code from influence by the well-reasoned and widely-accepted international building codes that have long been the guiding lights for construction standards nationwide. When the Legislature amended section 553.73, it recognized the importance of state-specific influence. But it also endorsed the reliability of recognized building standards by continuing to require the Model Codes to guide triennial updated Code adoption, by adding a pathway for Model Codes to inform Florida's Code without awaiting a triennial update, and by prescribing a lower standard for technical amendments that adopt provisions of Model Codes. The Proposed Rule contravenes the statute and stifles the legislative intent and policy considerations that the statute expresses.

This Court should reverse the Final Order and find the Proposed Rule invalid on the bases that it enlarges, modifies, and contravenes the plain language of section 553.73, Florida Statutes, and exceeds the Department's rulemaking

authority by injecting an unfounded legal standard into the triennial process for adopting an updated Florida Building Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 31, 2018, a copy of this brief was furnished by electronic delivery to W. Justin Vogel, Chief Legal Counsel, Florida Building Commission, Office of Codes & Standards, Department of Business and Professional Regulation, Office of the General Counsel, 2601 Blair Stone Road, Tallahassee, Florida, wjustin.vogel@myfloridalicense.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ J. Michael Huey
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