

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

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

Appellant,

v.

CASE NO.: 1D18-1122
L.T. NO.: 17-6578RP

FLORIDA BUILDING COMMISSION,

Appellee.

ON APPEAL FROM A FINAL ORDER OF THE
FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, the Florida Association of the American Institute of Architects, Inc. (“FAAIA”), appeals a Final Order of the Division of Administrative Hearings that found that Proposed Rule 61G20-2.002, Florida Administrative Code, was not an invalid exercise of delegated legislative authority.

FAAIA was the Petitioner during the proceedings below, and the Florida Building Commission (“the Commission”) was the Respondent.

References to the Record on Appeal will appear as (R at page #.).

The issue in this case is essentially whether the provisions of paragraph 553.73(7)(c), Florida Statutes (2017), still apply to the Florida Building Code triennial update, as the Commission maintains and the lower tribunal agreed.

The Commission respectfully submits that the Court should affirm the Final Order because FAAIA fails to demonstrate that the Administrative Law Judge (“ALJ”) committed any of the reversible errors enumerated under section 120.68(7), Florida Statutes (2017). See §120.68(8), Fla. Stat. (2017)(providing that “[u]nless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency’s action.”).

STATEMENT OF THE CASE AND FACTS

The Commission considers FAAIA's Statement of the Case and Facts to contain erroneous characterizations of the laws and processes at issue in this case. The Commission submits that a more complete, pertinent, and accurate description of the facts follows below.

The Regulation of Building Standards and Design in Florida

The Commission is a state agency created and located within the Department of Business and Professional Regulation for administrative purposes. See § 553.74(1), Fla. Stat. (2017). The Commission is the state agency responsible for the development and maintenance of the Florida Building Code under chapter 553, Florida Statutes, and Rule Chapter 61G20, Florida Administrative Code. See § 553.77(1)(a), Fla. Stat. (2017).

The Florida Building Code ("the Code") governs the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings in the state. See § 553.73(1)(a), Fla. Stat. (2017). The Code may be modified through three mechanisms specified within section 553.73, Florida Statutes. First, subsection 553.73(7) addresses how the Code as a whole is to be updated every three years. See § 553.73(7), Fla. Stat. (2017). Second, subsection 553.73(8) provides a means to amend the Code at any time in order to address such matters as conflicts within the Code, or with state or federal law. See §

553.73(8)(a)-(f), Fla. Stat. (2017). Finally, subsection 553.73(9) provides a mechanism by which the Commission can amend the Code on a yearly basis, subject to certain criteria. See § 553.73(9)(a), Fla. Stat. (2017).

Rule 61G20-2.002, Florida Administrative Code, contains provisions pertaining to how the Commission will go about updating and amending the Florida Building Code in accordance with chapter 553, Florida Statutes.

The Statutory Scheme Prior to 2017

Prior to 2017, the statutory framework in section 553.73, Florida Statutes, conceived of certain model codes acting as “foundation codes” for the Florida Building Code. Subsection 553.73(3) stated that “[t]he commission shall use the International Codes published by the International Code Council, the National Electric Code (NFPA 70), or other nationally adopted model codes and standards needed to develop the base code in Florida to form the foundation for the Florida Building Code.” § 553.73(3), Fla. Stat. (2016) (emphasis added) (amended 2017).

The Florida Building Code would be updated every three years, by the Commission selecting updated versions of the model codes to serve as the “foundation codes” for the updated Florida Building Code:

The commission . . . shall update the Florida Building Code every 3 years. When updating the Florida Building Code, the commission shall select the most current version of the [model codes] to form the foundation codes of the updated Florida Building Code, if the version has been adopted by the applicable model code entity.

§ 553.73(7)(a), Fla. Stat. (2016) (emphasis added) (amended 2017).

During the triennial update, model code provisions could be amended, provided that the modifications could be justified as necessary to address a Florida-specific need: “The commission may modify any portion of the foundation codes only as needed to accommodate the specific needs of this state.” § 553.73(7)(c), Fla. Stat. (2016) (amended 2017). These amendments had to be clearly distinguished in the Florida Building Code:

Amendments to the foundation codes which are adopted in accordance with this subsection shall be clearly marked in printed versions of the Florida Building Code so that the fact that the provisions are Florida-specific amendments to the foundation codes is readily apparent.

Id.

The Commission’s own interpretations could also be incorporated into the updated Florida Building Code during the triennial process, again provided that it was necessary to amend the foundation codes in order to accommodate Florida-specific needs:

The commission shall further consider the commission’s own interpretations, declaratory statements, appellate decisions, and approved statewide and local technical amendments and shall incorporate such interpretations, statements, decisions, and amendments into the updated Florida Building Code only to the extent that they are needed to modify the foundation codes to accommodate the specific needs of the state.

§ 553.73(7)(d), Fla. Stat. (2016) (emphasis added) (amended 2017).

Thus, prior to the 2017 changes, section 553.73 spoke essentially in terms of foundation codes that would form the basis of the Florida Building Code, and subsection 553.73(7) prescribed how the triennial update process would function and under what conditions the Commission could amend the foundation code provisions during the triennial update. Under the old process, the default was that the newest versions of the model codes would be adopted as the Florida Building Code, and could only be modified if necessary to accommodate the specific needs of the state.

The 2017 Amendments Changed the Triennial Update Process.

The 2017 amendments to section 553.73, Florida Statutes, ceased referring to the model codes as “foundation” codes, and removed references to that term from subsections 553.73(3), (7), and (9). See Ch. 2017-149, § 11, Laws of Fla.

Instead of adopting model codes as the foundation for the Florida Building Code and amending them as needed, triennial updates now consist of reviewing the model codes and adopting specific provisions from them as technical amendments into the existing Florida Building Code. See § 553.73(7)(a), (c), Fla. Stat. (2017). Provisions which are required in order to maintain eligibility for funding or discounts from certain specified federal programs must be adopted. § 553.73(7)(a), Fla. Stat. (2017). In order for other provisions from the newest versions of the model codes to be incorporated into the existing Florida Building Code, they must

be “needed to accommodate the specific needs of this state.” § 553.73(7)(c), Fla. Stat. (2017). This represents an inversion of the prior process, where the newest model codes were adopted as the foundation for the Florida Building Code and could only be amended as needed to accommodate the specific needs of the state. Now, the existing Florida Building Code itself acts as the foundation, and can be amended with provisions from the newest editions of the model codes if the Commission, during its triennial review, determines that the provisions are needed because of the federal programs, or in order to accommodate the specific needs of the state. See § 553.73(7)(a), (c), Fla. Stat. (2017).

FAAIA’S Rule Challenge

In response to the changes implemented by the Legislature, the Commission published a Notice of Proposed Rule to amend Rule 61G20-2.002, Florida Administrative Code, and bring it into conformance with these new statutory requirements. Fla. Admin. Reg., Vol. 43, No. 221, at 5188 (Nov. 15, 2017).

FAAIA filed a petition challenging the Proposed Rule as an invalid exercise of delegated legislative authority. (R at 6-16.) FAAIA argued, *inter alia*, that the requirements of paragraph 553.73(7)(c), which provide for the inclusion of model code provisions that are needed to accommodate the specific needs of the state, were not meant to apply to the triennial update of the Florida Building Code, and that the Proposed Rule incorrectly and unnecessarily applied that standard to the

triennial update. (See R at 87-89.) The Commission argued the opposite, that the amendments to the statute clearly constrained it to adopting model code provisions into the Florida Building Code only if it determined that doing so was necessary in order to accommodate the specific needs of the state. (See R at 63-66.)

Both parties stipulated that the questions posed were entirely legal in nature, and that an evidentiary hearing was not necessary. (See R at 45.) Accordingly, both parties submitted proposed final orders to the Administrative Law Judge (“ALJ”). (R at 54-74, 77-92.)

The ALJ subsequently issued a Final Order upholding the validity of the Proposed Rule as a valid exercise of delegated legislative authority. (R at 120, 124.) The ALJ agreed with the Commission and rejected FAAIA’s contention that the provisions of 553.73(7)(c) did not apply to the triennial update process as inconsistent with the plain language of the statute, as well as its clear organizational structure. (R at 116-118.) The ALJ concluded instead that the provisions of the Proposed Rule properly reflected the new standards implemented by the Legislature, and were consistent with the Commission’s specific powers and duties. (R 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 THE ARGUMENT

This Court should affirm the ALJ's Final Order dismissing FAAIA's rule challenge, because the Proposed Rule appropriately reflects changes to the Florida Building Code's triennial update process imposed by the Legislature, and is a valid exercise of delegated legislative authority.

The amendments to subsection 553.73(7) provide for model code provisions to be included in the updated Florida Building Code under two conditions: 1) if doing so is necessary to maintain eligibility for funding or discounts from certain federal programs, or 2) if the Commission determines that the provision is needed in order to accommodate the specific needs of this state. See § 553.73(7)(a), (c), Fla. Stat. (2017). The Proposed Rule reflects these changes. (See R at 17-19.)

Paragraph 553.73(7)(c), Florida Statutes, clearly applies to the triennial update process. FAAIA's arguments to the contrary ignore the plain language of the statute and its organizational structure, and are ultimately rooted in policy disagreements with the Legislature about the wisdom of the changes to the update process.

As the challenged provisions of the Proposed Rule accurately reflect the legislative alteration of the process, and appropriately amend rule 61G20-2.002 to bring it into conformance with the amendments to chapter 553, Florida Statutes,

the Proposed Rule is a valid exercise of delegated legislative authority and the Final Order should be upheld in all respects.

STANDARD OF REVIEW

The issue raised in this case is a pure question of law. The applicable standard of review is thus *de novo*. Anderson v. State, 87 So. 3d 774, 777 (Fla. 2012).

ARGUMENT

The ALJ correctly dismissed FAAIA’s rule challenge. The ALJ’s analysis of the changes to chapter 553, Florida Statutes, demonstrates that in order for the Commission to incorporate model code provisions into the updated Florida Building Code, they must be shown to be necessary to maintain funding or discounts from specified federal programs or otherwise needed to accommodate the specific needs of the state.

An “invalid exercise of delegated legislative authority” is an “action that goes beyond the powers, functions, and duties delegated by the Legislature.” § 120.52(8), Fla. Stat. (2017). FAAIA challenged the Proposed Rule on the grounds that it allegedly “enlarges, modifies, and contravenes the provisions of Florida Statutes” that it implements. (R at 9.) Since the ALJ correctly found that the Proposed Rule comports with the requirements of the statute it implements, the Final Order should be affirmed.

I. FAAIA Improperly Reads Paragraph 553.73(7)(c) in Isolation

FAAIA asserts that the Proposed Rule is an invalid exercise of delegated legislative authority because it provides that in order for changes in the model codes to be adopted as amendments to the Florida Building Code during the triennial update, they must be shown to be “needed to accommodate the specific needs of this state.” FAAIA denies that the terms of subsection 553.73(7)(c) apply to the triennial update process, and on appeal appears to offer a new line of argument that the 2017 amendments had the effect of creating an entirely new means of inserting model code provisions into the Florida Building Code outside of the triennial update process or subsection 553.73(9). FAAIA’s argument should have been presented to the lower tribunal below, but still fails for multiple reasons.

When a statute’s language is clear and unambiguous, then it must be given its plain meaning, without resorting to the rules of statutory interpretation. See, e.g., A. R. Douglass, Inc. v. McRaney, 137 So. 157, 159 (Fla. 1931). Courts are “without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications.” Am. Bankers Life Assurance Co. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

Furthermore, the Florida supreme court has stated that “[i]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.” Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992) (emphasis in original). Statutes and rules “must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.” Id. (quoting Fleischman v. Dep’t of Prof’l Regulation, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983)).

FAAIA erroneously maintains that only paragraph (a) of subsection 553.73(7) applies to the triennial update process. This was not the case prior to the 2017 amendments, and is not the case now. An analysis of subsection 553.73(7), from both before and after the 2017 amendments, demonstrates that its provisions clearly relate to the triennial update process for the Florida Building Code.

FAAIA itself acknowledged in its initial rule challenge that the provisions of paragraphs (7)(c) and (7)(d) applied to the triennial update process prior to the 2017 amendments. (See R at 12.) The Commission concurs, and notes that paragraphs 553.73(7)(a), (c), (d), and (e) in fact all explicitly pertain to what may be included in the updated code, or how it is to be promulgated. Paragraphs 553.73(7)(b) and (f) provide additional directives about certain controlling federal

guidelines pertaining to airport noise¹, and a prohibition against modifying any provisions of the base Florida Building Code in such a manner that would weaken them in relation to wind resistance or the prevention of water intrusion. See § 553.73(7)(b),(f), Fla. Stat. (2017).

There is thus a clear and coherent structure to subsection 553.73(7), which addresses generally how the triennial update is to be conducted. As noted above, section 553.73(3), Florida Statutes, states that “[t]he commission may approve technical amendments to the code as provided in subsections (8) and (9).” (emphasis added). These are the subsections which address amending the Code between update cycles.

While FAAIA attempts to construe (7)(c) as being an island unto itself, and an injection of a new process into the subsection dealing with the triennial update, that is not a reasonable construction of the statute. Paragraph (7)(c) inescapably references technical amendments being adopted “in accordance with this subsection;” it does not say “in accordance with this paragraph.” Paragraph 553.73(7)(e) further states that “[a] rule updating the Florida Building Code in accordance with this subsection shall take effect no sooner than 6 months after the publication of the updated code.” § 553.73(7)(e), Fla. Stat. (2017) (emphasis

¹ This is only relevant to two specific sections in the Florida Building Code, which themselves refer to applicable controlling federal guidelines. See § 3114, Florida Building Code, Building, 6th Edition (2017); § R327.1, Florida Building Code, Residential, 6th Edition (2017). See also Aviation and Noise Abatement Act of 1979, Pub L. No. 96-193, §102, 94 Stat. 50; 14 C.F.R. §A150.101 (2018).

provided). The language in the statute is abundantly clear that subsection 553.73(7), including paragraph (c), pertains to the triennial update of the Code.

Even if the Court were to find that the statutory language was not clear, it should then look to the legislative intent behind the 2017 amendments to guide it in statutory construction. Larimore v. State, 2 So. 3d 101 (Fla. 2008) (citing Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003)). The substance of the changes made to paragraph (7)(c) do not support FAAIA's contention that the Legislature intended to abruptly sever its connection to the triennial update process, and leave an entirely novel means of incorporating model code provisions within the body of an otherwise coherent subsection (7).

II. Amendments Are Part of the Update Process

FAAIA accuses the ALJ of improperly conflating “updating” and “amending” the Florida Building Code in its initial brief; however, it is FAAIA which is misconstruing chapter 553's clear organization and the application of those terms. FAAIA's objection is especially puzzling in light of the fact that FAAIA itself conflates the terms multiple times in its own filings and arguments below. (See R at 11-12, 83.) It is only on appeal that FAAIA has developed an aversion to their association, and that aversion is not based on any logical interpretation of the statute.

While FAAIA now tries to characterize “amendments” as being completely unrelated to the triennial update of the Florida Building Code, this is misleading and incorrect. As noted above, prior to the 2017 amendments, paragraph (7)(c) provided a means by which to modify the foundational model codes, during the triennial update, with amendments necessary to accommodate the specific needs of the state. There is no contradiction with paragraph (7)(c) continuing to offer a means of amending provisions of the Florida Building Code during the triennial update, and the terms “amend” and “update” have never been used within chapter 553 in the mutually exclusive manner that FAAIA now propounds. Such a severe interpretation is actually contrary to how the terms are utilized, and irreconcilable with the many terms that are used to describe changes to the Code throughout the chapter, including “modify,” “incorporate,” “amend,” “adopt,” and “update,” some of which occur within the same paragraph. See, e.g. § 553.73(7)(c), Fla. Stat. (2016) (amended 2017).

There would be further negative ramifications to adopting FAAIA’s line of reasoning. As noted by the ALJ, paragraph (7)(a) provides no specific authority or means by which to incorporate model code provisions during the triennial update that are not required for the purposes of the federal programs. (See R at 119-120.) Paragraph (7)(c), besides providing an explicit route by which to

include these provisions, also provides crucial legislative guidance about how the new review process is meant to function.

Removing the condition that amendments to the Florida Building Code during the triennial update must be needed to accommodate the specific need of the state would strip away key legislative guidance regarding the composition of the “review” of the model codes that subsection 553.73(7)(a) mandates. The provision in paragraph (7)(a) that requires the Commission to “[a]t a minimum . . . adopt any updates to such codes or any other code necessary to maintain eligibility for federal funding and discounts from the [federal programs]” acts as a floor for what updates the Commission must adopt. The provision in paragraph (7)(c) which states that “[t]he commission may adopt as a technical amendment to the Florida Building Code any portion of the codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state,” acts as a ceiling. To hold otherwise would vest the Commission with an enormous amount of unfettered and unguided discretion to incorporate model code updates into the Florida Building Code, regardless of their actual utility to the state. The Commission does not believe that this was the Legislature’s intent.

III. FAAIA Mischaracterizes the Intent and Effect of the Amendments.

This change to the process could conceivably result in the Florida Building Code deviating more from the model codes than in the past, since their provisions

are no longer adopted by default. In its initial brief, FAAIA expands on a policy argument that it first presented in its original challenge – its opinion that the new process could subject building professionals and the public to “unsafe or unreasonable requirements.” (See R at 7.) FAAIA argues that it is “risky” to have an update process that does not automatically incorporate all of the updates to the “learned Model Codes,” as it rather poetically describes the technical documents, by default.

As a preliminary matter, no evidence was presented in the proceedings below about the nature of the changes that are made in the model codes during the course of their own three-year update cycles. Thus, when FAAIA characterizes the model code updates as apparently all “technological advancements” and “cutting-edge industry standards,” this Court should take those assertions with a grain of salt, if it considers them at all. The Commission notes that there may exist differences of opinion among the many impacted stakeholders in the state concerning the general nature, quality, and necessity of the various changes made within the model codes during their own update cycles.

The Commission itself takes no position on the matter, because it is not tasked with developing policy – rather, it is tasked with implementing the policy that the Florida Legislature has decided upon. And while FAAIA characterizes the Proposed Rule as a “reviled” overreach, it was only promulgated in response to

duly enacted legislative changes beyond the control of the Commission – whose own role is to carry out the will of the Legislature, rather than question its wisdom.

The policy considerations set forth by FAAIA were presumably considered by the Legislature during the lawmaking process, and the Legislature arrived at its conclusions, and passed the bill that it did. The changes to the triennial update process do not have the effect of “rejecting” the model codes, as FAAIA suggests; rather, they change the way that model code provisions are integrated into the Florida Building Code to a more targeted approach than was used previously. Whatever the ultimate merits of that change might prove to be, the Proposed Rule accurately implements the legislative changes in a manner that is consistent with the plain language of the statute and its overall logical structure.

Furthermore, the unchallenged provisions of Proposed Rule 61G20-2.002 specifically provide for the inclusion of model code provisions that provide for “the latest technical research and engineering standards” which establish life safety requirements to protect against fire, wind, flood, and storm surge, and provide for the latest industry standards and design in construction. (See R at 17-19.) The Proposed Rule thus already accounts for the very topics about which FAAIA expresses concern, but in a fashion that is consistent with the statutory framework and clear legislative intent.

In addition to bringing the rule into conformance with the new requirements of the statute, the Proposed Rule provisions provide multiple avenues for stakeholder participation in the code development process. This is in line with the traditional consensus-driven procedures utilized by the Commission, which have long brought together interested parties, promoted beneficial discussions of complex technical topics, and contributed to the great success this state has seen in creating a building code that enhances the health, safety, and welfare of its citizens in the structures that they live and work in every day. Interested parties can, and should, continue to make use of these provisions of the Proposed Rule to contribute their perspectives as the Commission engages in its required review of the model codes. If FAAIA wants the process to return to the way it used to be prior to the statutory changes, however, then it should appropriately address its concerns to the Legislature.

CONCLUSION

Because the proposed changes to rule 61G20-2.002 do not constitute an invalid exercise of delegated legislative authority, the Commission requests that this Honorable Court affirm the Final Order in all respects.

Respectfully submitted on this the 28th day of June 2018.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished via electronic mail to Counsel for Appellant, J. Michael Huey, at mike.huey@gray-robinson.com, D. Ty Jackson, at ty.jackson@gray-robinson.com, Allison G. Mawhinney, at allison.mawhinney@gray-robinson.com, and Andy Bardos, at andy.bardos@gray-robinson.com, on June 28, 2018.

/s/ W. Justin Vogel

W. Justin Vogel

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ W. Justin Vogel

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