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 REPLY BRIEF

ON APPEAL FROM THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

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ARGUMENT

The central flaw in the Commission's brief and the Order on appeal is the claim that the triennial adoption of an updated Building Code is now the same as a technical amendment, and that, despite clear and consistent differences in their terminology, and a longstanding distinction between updates and amendments, paragraphs (a) and (c) of section 553.73(7) describe a single process to accomplish the triennial adoption of an updated Building Code. (Answer Br. at 5),[1] (R 110-112, 116, 120).

This strained interpretation—which conflates paragraphs (7)(a) and (7)(c), leaps over paragraph (7)(b), and treats different words as the same—is the only way the Commission can escape the conclusion that its Proposed Rule improperly injects the "need" standard that governs technical amendments under paragraph (7)(c) into the triennial update process described in paragraph (7)(a). The effect of the Commission's interpretation and Proposed Rule would be to leave the Florida Building Code stuck in time, and to permit further advances only if they pass an exacting showing of Florida-specific need. This would hamper—if not prohibit—adoption of the most current and state-of-the-art designs, construction techniques, materials, and safety processes that would be appropriate regardless of geographic location—an absurd and dangerous result, and one unsupported by statutory text.

[1] Subsections and paragraphs of section 553.73, Florida Statutes, will be identified in some instances by their subsection and paragraph numbers only.

As argued below, the 2017 amendments to the Florida Building Codes Act altered paragraph 7(c) to permit technical amendments to incorporate Model Code changes outside of the paragraph 7(a) triennial update. (R 84)[2] It did not (as the Commission argues) mandate a static Building Code and reduce the triennial update to a mere platform for technical amendments that address state-specific needs. Rather, the alteration of paragraph 7(c) to create a new avenue for Model Code influence reinforced the logical structure of section 553.73(7) to address Model Code influence over the Florida Code in a cohesive and orderly fashion.

I. THE COMMISSION'S ARGUMENT THAT THE 7(C) "NEED" STANDARD GOVERNS THE 7(A) TRIENNIAL UPDATE CONTRADICTS THE BUILDING CODE, THE STATUTE'S PLAIN LANGUAGE, AND PRINCIPLES OF STATUTORY INTERPRETATION

The Commission's view that 7(a) and 7(c) describe one process, and that the need standard in 7(c) governs the 7(a) triennial update, contradicts all relevant authorities, including the current Building Code. Although the 2017 amendments have been in effect since July 1, 2017,[3] and Florida's current Building Code did not

[2] The entire basis for FAAIA's challenge to the Rule was that the "need" standard found in amended paragraph 7(c) does not apply to the triennial update required in paragraph 7(a). This is not a "new line of argument," as the Commission suggests. (Answer Br. at 10).

[3] Ch. 2017-149, § 20, at 19, Laws of Fla. (providing an effective date of July 1, 2017, for the statutory amendments).

take effect until December 31, 2017,[4] the Code continues to recognize the distinction between triennial updates and technical amendments. The Code states that it "is adopted and *updated with new editions triennially* by the Florida Building Commission. It is *amended annually* 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 (emphases added). The Commission's interpretation as expressed in the Code is consistent with section 553.73(3), which first mandates that Florida have a statewide Building Code, "updated" every three years and "amended" in the interim. *Id.* The Legislature revised this subsection in 2017 but left the distinction between "updates" and "amendments" intact and the Code appropriately reflects that split. Ch. 2017-149, § 11, at 12, Laws of Fla.

The Commission has now reversed the position stated in its own Code, arguing that "triennial updates now consist of reviewing the model codes and adopting specific provisions from them as technical amendments into the existing Florida Building Code." (Answer Br. at 5). The Commission cites no legal authority for its about-face. Instead, its argument is based largely on the statute as

[4] *Florida Building Codes and Effective Dates*, Florida Building Commission (May 2, 2018), *available at* http://www.floridabuilding.org/fbc/publications/currentdates 05-2-18.pdf (providing an effective date of December 31, 2017, for the current Florida Building Code).

it existed before 2017. The Commission argues that paragraph 7(c) modifies 7(a) because it did so before 2017. (Answer Br. at 11). Its recollection of the pre-2017 statutory scheme is correct, but its belief that the statute's historical structure guides its current meaning is not: the Commission's argument ignores the plain language of the 2017 amendments.

Before 2017, section 553.73(7)(a) required the Commission to triennially adopt an updated Code by incorporating changes to the Model Codes. Paragraph 7(b) governed adoption of federal authorities concerning noise contour lines. Paragraph 7(c) followed logically, providing that deviation from the Model Codes' accepted standards was authorized only to accommodate Florida's needs.

The post-2017 statute no longer requires adoption of all Model Code updates, but it still requires the Commission to review them and to update the Code. The amendments did not "invert" the Code revision process or impede Model Code influence, as the Commission argues. (Answer Br. at 6). To the contrary, the Legislature recognized the importance of the Model Codes and balanced the change to paragraph 7(a) with an amendment to paragraph 7(c) that added a pathway for Model Code influence through technical amendments. The result is a straightforward distinction between paragraphs 7(a), which governs the triennial update, and 7(c), which governs Model Code technical amendments, that

did not exist before 2017.[5] While 7(c) is no longer an add-on to 7(a), it remains a logical corollary of the Legislature's commonsense framework to address Model Code influence and retain the Model Codes as the guide for Florida's Code.

The Commission points to paragraph (7)(e), which refers to the procedure for enacting "rule[s] updating the Florida Building Code in accordance with this subsection." (Answer Br. at 12–13). From this, the Commission infers that all Code changes described in the subsection must be "updates." But paragraph 7(c) contemplates an entirely separate procedure for enacting "technical amendments *to the updated Florida Building Code*" and states that "[a]mendments that 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 amendments is readily apparent." (emphasis added). Any unconvincing inference from 7(e) is offset by 7(c)'s mention of "amendments . . . in accordance with this subsection." And 7(c)'s reference to technical amendments to an already updated Building Code raises a far more compelling inference than the one advanced by the Commission: technical amendments alter a Building Code that has already been updated, and therefore are distinct from the Code "update."

[5] The Commission suggests that a reading of the 2017 amendments that creates a distinction between 7(a) and 7(c) is too radical a deviation from the prior statutory scheme. (Answer Br. at 11–12). However, it is the Commission that argues that the 2017 amendments represent an entire "inversion of the prior process," requiring a threshold showing of need before a single Model Code provision may be adopted.

Beyond inferences, the plain language of paragraph 7(e) requires that the Commission triennially adopt "updated codes by rule." § 553.73(7)(a), Fla. Stat. Paragraph (7)(c) describes a different process for approving technical amendments to the updated Code: the process set forth in section 553.73(3)(a) through (d). *Id*. § 553.73(7)(c). This is the same process that applies to technical amendments under subsections (8) and (9) as well. *Id.* § 553.73(3). The Legislature preserved separate processes for the adoption of updates and technical amendments because updates and technical amendments are not the same.

The plain language of section 553.73(3) reveals the same dichotomy, stating that "[t]he commission *shall use [the Model Codes] for updates* to the Florida Building Code. The commission *may approve technical amendments* to the code" in accordance with the four-part technical advisory committee review process set forth at paragraphs (3)(a) through (d). *Id.* (emphasis added). By conflating compulsory updates with permissive amendments, the Commission erases this crystal-clear distinction and imports not only the "need" standard, but also (for the first time) the process requirements of section 553.73(3) into the 7(a) triennial update. The result is an irreconcilable conflict between the language of 7(a), which mandates triennial adoption of an updated Code by rule, and 7(c), which (in the Commission's view) authorizes the adoption of an updated Code through the technical advisory committee review process that governs technical amendments.

The absurd results of the Commission's argument do not end there. If Code updates and amendments were the same, then the requirement in paragraph 7(c) that amendments "be clearly marked in printed versions of the Florida Building Code"—and thus differentiated from the rest of the Code—would be nonsense. It would require the entire Code to be "clearly marked," obviating the purpose of the marking, and rendering the statutory requirement superfluous and absurd. These results cannot be reconciled with basic principles of statutory interpretation. *See G.G. v. Fla. Dep't of Law Enf't*, 97 So. 3d 268, 272–73 (Fla. 1st DCA 2012) (explaining that the Legislature is presumed not to enact useless provisions and that courts should avoid interpretations that render statutory language meaningless or unreasonable).

The Commission's argument presumes that the Legislature carelessly used two different words—"update" and "amendment"—interchangeably to describe the same process, and carelessly omitted the "need" standard *only* from the provision that describes the update process. The precise opposite is true: the Legislature is presumed to act intentionally and to ascribe different meanings to different words. *See Ahearn v. Mayo Clinic*, 180 So. 3d 165, 171 (Fla. 1st DCA 2015) (explaining that, where it uses different words, the Legislature is presumed to have intended different meanings); *L.K. v. Dep't of Juvenile Justice*, 917 So. 2d 919, 921 (Fla. 1st DCA 2005) (concluding that a time computation formula in one paragraph of a

statute did not apply to a similar paragraph because "when the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally"). This is true even when the disputed statutory terms are strikingly similar. *See, e.g.*, *Maddox v. State*, 923 So. 2d 442 (Fla. 2006) (finding the terms "any trial" and "any trial, civil or criminal," to have different meanings because legislative use of different terms in the same statute is strong evidence that different meanings are intended, and courts may not imply the presence of a term where it was excluded).

In the Florida Building Codes Act, the Legislature used the words "update" and "amendment" in consistent juxtaposition. Still, the Commission recognizes no difference between "updates" and "amendments," but combines them to create a single, triennial process. And while claiming that the entire subsection forms a cohesive whole, it leaps over 7(b), which stands between the two paragraphs that the Commission blends into one.

The Commission offers no cogent reason to set aside the presumption that different words have different meanings. It merely argues that the statute uses many words—such as "modify," "incorporate," "amend," "adopt," and "update"—and suggests that the Court should not be too particular about words. (Answer Br. at 14). But while the statute uses many words (most do), a review of the Florida Building Codes Act as a whole makes clear that the Legislature's selection of the

words "update" and "amendment" was purposeful and significant. *See St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 967 (Fla. 2000) ("It is a cardinal rule of statutory construction that a statute must be construed in its entirety and as a whole."). The Commission cites no authority to suggest it would be appropriate to interpret "update" to mean "amendment," and "amendment" to mean "update." If the Legislature intended to describe a single revision process through "technical amendments" under a "need" standard, it would have done so.

Yet the Commission argues that FAAIA's interpretation of section 553.73(7) would disrupt the coherent structure of the statute, which the Commission claims "addresses generally how the triennial update is to be conducted." (Answer Br. at 12). To the contrary, amending paragraph 7(c), as the Legislature did, to permit technical amendments to incorporate Model Code changes preserves the logical structure of section 553.73(7) because that is the subsection that describes Model Code influence on Florida's Building Code. Specifically:

- 7(a) requires a triennial review of Model Codes for the purpose of adopting an updated Building Code;
- 7(b) addresses the incorporation of federal authorities regarding noise contour lines;
- 7(c) historically authorized deviations from Model Codes to accommodate Florida's needs, and now authorizes technical amendments to the updated Code to incorporate Model Code provisions to accommodate Florida's needs;

- 7(d) addresses what happens when there is a change to a Model Code after it was incorporated by reference into Florida's Code;
- 7(e) addresses the mechanics of adopting the updated Code; and
- 7(f) continues to address Florida and Model Code standards concerning wind resistance.

Rather than scattering these intertwined concepts among multiple subsections, the Legislature sensibly grouped them in section 553.73(7) to explain cohesively the methods by which Model Codes should inform Florida's Building Code.

The consistent legislative vision that emerges from section 553.73 requires Model Code influence through a triennial update under 7(a), and authorizes Model Code influence through appropriately vetted technical amendments under 7(c). The Legislature used different language to describe changes made under these different provisions and prescribed different procedures to make those changes. In doing so, it reinforced the distinction between the 7(a) triennial update and technical amendments. The Commission recognized this when the Code took effect months after the adoption of the 2017 statutory amendments. It reverses itself now solely to save its Proposed Rule, which imposes an unfounded need standard on the triennial update.

II. THE COMMISSION'S ADOPTION OF MODEL CODE UPDATES IS APPROPRIATELY GUIDED, AND ITS DISCRETION IS APPROPRIATELY CONSTRAINED

The Commission argues that if paragraph 7(c) is not merged into paragraph 7(a), then the Commission is left without guidance as to whether or how it should adopt Model Code provisions through the triennial update, and its discretion is unfettered. (Answer Br. at 15). But the mere transition from compelling adoption of all Model Code updates to reviewing Model Codes and updating the Florida Code does not deprive the Commission of any direction it previously had. Under a faithful reading of the statute, the Commission's triennial update is appropriately guided and its discretion appropriately constrained.

When a statute expresses clear policy goals and recommends resources to achieve those goals, a grant of discretion to the agency to establish the technical matters necessary to implement that policy is valid. *See Robinson v. Stewart*, 161 So. 3d 589, 592–93 (Fla. 1st DCA 2015) (upholding statutory grant of discretion to the Board of Education to establish criteria for teacher evaluations in accordance with statutory policy goals and resources, and reasoning that agency discretion is not "unbridled" where the statute provides "sufficient direction to implement the technical aspects of the law in accordance with the legislature's express policy goals," and that this "pragmatic view . . . shows respect to the legislative branch, which cannot be expected to include every technical aspect in a complex act")

(citing *Brown v. Apalachee Reg'l Planning Council*, 560 So. 2d 782 (Fla. 1990) (providing that the Legislature may delegate decisions that involve highly technical details that are matters of implementation through agency expertise rather than policy-making)).

The adoption of Model Code provisions is steered, and the Commission's discretion is constrained by section 553.72, which expresses the Legislature's intent that the Code "provide for flexibility to be exercised in a manner that meets minimum requirements, is affordable, does not inhibit competition, and promotes innovation and new technology," and "establish minimum standards primarily for public health and lifesafety, and secondarily for protection of property as appropriate." The adoption of Model Code provisions is also guided by section 553.73(2) and (3), which outlines the required building types, appurtenances, component systems, and construction materials to be addressed in the Code, and requires incorporation of Model Code provisions that "address regional and local concerns and variations."

The Commission's discretion is further limited by the Model Codes themselves. In adopting the Florida Building Codes Act, the Legislature endorsed the Model Codes as the bedrock of Florida's Code. Rather than leave the selection of sources to the Commission's discretion, it confined the triennial update to review of the widely accepted Model Codes. *See* § 553.73(3), Fla. Stat. ("The

commission shall use the International Codes published by the International Code Council, the National Electric Code (CFPA 70), or other nationally adopted model codes and standards for updates to the Florida Building Code."); *id*. § 553.73(7)(a) ("The commission shall adopt an updated Florida Building Code every 3 years through review of the most current [Model Codes], all of which are copyrighted and published by the International Code Council, and the National Electrical Code, which is copyrighted and published by the National Fire Protection Association."). Given these constraints, together with the highly technical nature of building codes and their development, discretion granted to the Commission to incorporate Model Code provisions is suitably tailored and complies with Florida's non-delegation doctrine.[6] In any event, the Commission's apprehensions of unfettered discretion do not present the grave constitutional doubts that might tip the balance between two reasonable interpretations of a statute. *See State v. Presidential Women's Ctr*., 937 So. 2d 114, 116 (Fla. 2006). Here, there is only one reasonable interpretation, and no serious constitutional question.

[6] The Commission incorrectly asserts that, under the FAAIA's interpretation, the Commission would have discretion to adopt Model Code provisions "regardless of their actual utility to the state." (Answer Br. at 15). Before the 2017 amendments, however, the Commission was *required* to adopt Model Code provisions regardless of their actual utility to the State. Now, the Commission may consider the utility of Model Code provisions to the State, in light of the related policy goals articulated in the statutes.

CONCLUSION

The Commission asks this Court to read into the triennial update a "need" threshold that does not exist. The Commission's interpretation would bring the Florida Building Code to a standstill, freezing in time the current Building Code and prohibiting further advances unless strictly "needed to accommodate the specific needs of this state." 43 Fla. Admin. Reg. 5188, 5189 (Nov. 15, 2017). Advances in building code standards appropriate for all buildings, regardless of location, would be banished from the Florida Building Code.

The statutory text and common sense reject this interpretation. Indeed, the statute's plain meaning and principles of statutory construction reveal a clear legislative mandate to review the Building Code every three years with an eye to vetted Model Codes, and to comprehensively update the Code in accordance with that review. In the interim, technical amendments outside the considered triennial update are authorized upon an appropriate showing of need, and in compliance with the technical amendment committee review process.

For these reasons, together with those stated in the Initial Brief, the Proposed Rule enlarges, modifies, and contravenes the plain language of section 553.73 and exceeds the Department of Business and Professional Regulation's rulemaking authority in violation of sections 120.68(7)(d), (7)(e)1., and 4. The Final Order should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on July 23, 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).

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