

**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.

AMENDED APPENDIX TO APPELLANT'S INITIAL BRIEF

**ON APPEAL FROM THE FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

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Respectfully submitted this 5th day of June, 2018.

/s/ J. Michael Huey

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CERTIFICATE OF SERVICE

I certify that, on June 5, 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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TAB A

Exhibit 5

CHAPTER 2017-149

Committee Substitute for
Committee Substitute for House Bill No. 1021

An act relating to construction; amending s. 377.705, F.S.; revising legislative findings and intent; authorizing solar energy systems manufactured or sold in the state to be certified by professional engineers; amending s. 489.103, F.S.; revising an exemption from construction contracting regulation for certain public utilities; deleting responsibility of the Construction Industry Licensing Board to define the term "incidental to their business" for certain purposes; amending s. 553.79, F.S.; prohibiting a political subdivision from adopting or enforcing certain building permits or other development order requirement; providing construction; providing for preemption of certain local laws and regulations; providing for retroactive applicability; providing an exception; amending s. 468.603, F.S.; revising definitions; amending s. 468.609, F.S.; revising eligibility requirements for the examination for certification as a building code inspector or plans examiner to include an internship certification program; removing an eligibility condition from provisions related to provisional certificates; requiring the Florida Building Code Administrators and Inspectors Board to establish rules; amending s. 468.617, F.S.; authorizing specified entities to contract for the provision of building code administrator and building official services; amending s. 553.791, F.S.; conforming provisions to changes made by the act; revising a definition; requiring local jurisdictions to reduce certain permit fees; amending ss. 471.045 and 481.222, F.S.; conforming cross-references; amending s. 553.80, F.S.; prohibiting local enforcement agencies, independent districts, and special districts from charging certain fees; amending s. 553.73, F.S.; revising requirements for updating the Florida Building Code; providing that certain amendments to the Florida Building Code are not void under certain circumstances; providing that certain technical amendments are subject to review or modification; requiring the commission to adopt and update the Florida Building Code through certain review rather than by rule; revising requirements relating to the codes used to update the Florida Building Code; specifying minimum requirements for updates to the Florida Building Code; authorizing the commission to adopt as a technical amendment any portion of specified codes; conforming provisions to changes made by the act; prohibiting the Florida Building Commission from adopting certain code provisions or standards; amending s. 553.76, F.S.; authorizing the commission to adopt the Florida Building Code and amendments thereto by a specified number of votes; creating s. 553.9081, F.S.; requiring the Florida Building Commission to amend certain provisions of the Florida Building Code; amending s. 633.208, F.S.; prohibiting a county, municipality, special taxing district, public utility, or private utility from requiring a separate water connection or charging a specified water or sewage rate under certain conditions; prohibiting a local government from requiring a permit

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

for painting a residence; requiring the Department of Education to develop a plan for specified purposes; requiring Department of Education to provide the plan to the Construction Industry Workforce Task Force by a specified date; requiring CareerSource Florida, Inc., to develop a plan for specified purposes; requiring CareerSource Florida, Inc., to provide the plan to the Construction Industry Workforce Taskforce by a specified date; requiring the Florida Building Commission to amend specified provisions of the Florida Building Code related to door components; amending s. 489.516, F.S.; specifying that certain provisions do not prevent a certified electrical or alarm system contractor from acting as a prime contractor under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 377.705, Florida Statutes, is amended to read:

377.705 Solar Energy Center; development of solar energy standards.

(1) **SHORT TITLE.**—This act shall be known and may be cited as the Solar Energy Standards Act of 1976.

(2) **LEGISLATIVE FINDINGS AND INTENT.**—

(a) ~~Because of increases in the cost of conventional fuel, certain applications of solar energy are becoming competitive, particularly when life-cycle costs are considered. It is the intent of the Legislature in formulating a sound and balanced energy policy for the state to encourage the development of an alternative energy capability in the form of incident solar energy.~~

(b) ~~Toward this purpose, The Legislature intends to provide incentives for the production and sale of, and to set standards for, solar energy systems. Such standards shall ensure that solar energy systems manufactured or sold within the state are effective and represent a high level of quality of materials, workmanship, and design.~~

(3) **DEFINITIONS.**—As used in this section, the term:

(a) “Center” means ~~is defined as~~ the Florida Solar Energy Center of the Board of Governors.

(b) “Solar energy systems” means ~~is defined as~~ equipment which provides for the collection and use of incident solar energy for water heating, space heating or cooling, or other applications which normally require or would require a conventional source of energy such as petroleum products, natural gas, or electricity and which performs primarily with solar energy. In such other systems in which solar energy is used in a supplemental way, only those components which collect and transfer solar energy shall be included in this definition.

(4) FLORIDA SOLAR ENERGY CENTER TO SET STANDARDS, REQUIRE DISCLOSURE, SET TESTING FEES.—

(a) The center shall develop and ~~adopt~~ promulgate standards for solar energy systems manufactured or sold in this state based on the best currently available information and shall consult with scientists, engineers, or persons in research centers who are engaged in the construction of, experimentation with, and research of solar energy systems to properly identify the most reliable designs and types of solar energy systems.

(b) The center shall establish criteria for testing performance of solar energy systems and shall maintain the necessary capability for testing or evaluating performance of solar energy systems. The center may accept results of tests on solar energy systems made by other organizations, companies, or persons ~~if when~~ such tests are conducted according to the criteria established by the center and ~~if when~~ the testing entity does not have a ~~has no~~ vested interest in the manufacture, distribution, or sale of solar energy systems.

(c) The center shall be entitled to receive a testing fee sufficient to cover the costs of such testing. All testing fees shall be transmitted by the center to the Chief Financial Officer to be deposited in the Solar Energy Center Testing Trust Fund, which is ~~hereby~~ created in the State Treasury, and disbursed for the payment of expenses incurred in testing solar energy systems.

(d) All solar energy systems manufactured or sold in the state must meet the standards established by the center and shall display accepted results of approved performance tests in a manner prescribed by the center, unless otherwise certified by an engineer licensed pursuant to ch. 471 using the standards contained in the most recent version of the Florida Building Code.

Section 2. Subsection (5) of section 489.103, Florida Statutes, is amended to read:

489.103 Exemptions.—This part does not apply to:

(5) Public utilities, including municipal gas utilities and special gas districts as defined in chapter 189, telecommunications companies as defined in s. 364.02(13), and natural gas transmission companies as defined in s. 368.103(4), on construction, maintenance, and development work performed by their employees, ~~which work, including, but not limited to, work on bridges, roads, streets, highways, or railroads, is incidental to their business. The board shall define, by rule, the term "incidental to their business" for purposes of this subsection.~~

Section 3. Subsection (20) is added to section 553.79, Florida Statutes, to read:

553.79 Permits; applications; issuance; inspections.—

(20)(a) A political subdivision of this state may not adopt or enforce any ordinance or impose any building permit or other development order requirement that:

1. Contains any building, construction, or aesthetic requirement or condition that conflicts with or impairs corporate trademarks, service marks, trade dress, logos, color patterns, design scheme insignia, image standards, or other features of corporate branding identity on real property or improvements thereon used in activities conducted under chapter 526 or in carrying out business activities defined as a franchise by Federal Trade Commission regulations in 16 C.F.R. ss. 436.1, et. seq.; or

2. Imposes any requirement on the design, construction or location of signage advertising the retail price of gasoline in accordance with the requirements of ss. 526.111 and 526.121 which prevents the signage from being clearly visible and legible to drivers of approaching motor vehicles from a vantage point on any lane of traffic in either direction on a roadway abutting the gas station premises and meets height, width, and spacing standards for Series C, D, or E signs, as applicable, published in the latest edition of Standard Alphabets for Highway Signs published by the United States Department of Commerce, Bureau of Public Roads, Office of Highway Safety.

(b) This subsection does not affect any requirement for design and construction in the Florida Building Code.

(c) All such ordinances and requirements are hereby preempted and superseded by general law. This subsection shall apply retroactively.

(d) This subsection does not apply to property located in a designated historic district.

Section 4. Section 468.603, Florida Statutes, is reordered and amended to read:

468.603 Definitions.—As used in this part:

(2)(1) “Building code administrator” or “building official” means any of those employees of municipal or county governments, or any person contracted, with building construction regulation responsibilities who are charged with the responsibility for direct regulatory administration or supervision of plan review, enforcement, or inspection of building construction, erection, repair, addition, remodeling, demolition, or alteration projects that require permitting indicating compliance with building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other construction codes as required by state law or municipal or county ordinance. This term is synonymous with “building official” as used in the administrative chapter of the Standard Building Code and the South Florida Building Code. One person employed or contracted by each municipal or county government as a building code administrator or building official and

who is so certified under this part may be authorized to perform any plan review or inspection for which certification is required by this part, including performing any plan review or inspection as a currently designated standard certified building official under an interagency service agreement with a jurisdiction having a population of 50,000 or less.

~~(4)(2)~~ “Building code inspector” means any of those employees of local governments or state agencies, or any person contracted, with building construction regulation responsibilities who themselves conduct inspections of building construction, erection, repair, addition, or alteration projects that require permitting indicating compliance with building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other construction codes as required by state law or municipal or county ordinance.

~~(1)(3)~~ “Board” means the Florida Building Code Administrators and Inspectors Board.

~~(7)(4)~~ “Department” means the Department of Business and Professional Regulation.

~~(6)(5)~~ “Certificate” means a certificate of qualification issued by the department as provided in this part.

~~(5)(6)~~ “Categories of building code inspectors” include the following:

(a) “Building inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed in accordance with the provisions of the governing building codes and state accessibility laws.

(b) “Coastal construction inspector” means a person who is qualified to inspect and determine that buildings and structures are constructed to resist near-hurricane and hurricane velocity winds in accordance with the provisions of the governing building code.

(c) “Commercial electrical inspector” means a person who is qualified to inspect and determine the electrical safety of commercial buildings and structures by inspecting for compliance with the provisions of the National Electrical Code.

~~(h)(d)~~ “Residential electrical inspector” means a person who is qualified to inspect and determine the electrical safety of one and two family dwellings and accessory structures by inspecting for compliance with the applicable provisions of the governing electrical code.

(e) “Mechanical inspector” means a person who is qualified to inspect and determine that the mechanical installations and systems for buildings and structures are in compliance with the provisions of the governing mechanical code.

~~(g)(f)~~ “Plumbing inspector” means a person who is qualified to inspect and determine that the plumbing installations and systems for buildings

and structures are in compliance with the provisions of the governing plumbing code.

~~(f)~~(g) “One and two family dwelling inspector” means a person who is qualified to inspect and determine that one and two family dwellings and accessory structures are constructed in accordance with the provisions of the governing building, plumbing, mechanical, accessibility, and electrical codes.

~~(d)~~(h) “Electrical inspector” means a person who is qualified to inspect and determine the electrical safety of commercial and residential buildings and accessory structures by inspecting for compliance with the provisions of the National Electrical Code.

~~(8)~~(7) “Plans examiner” means a person who is qualified to determine that plans submitted for purposes of obtaining building and other permits comply with the applicable building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes. The term includes a residential plans examiner who is qualified to determine that plans submitted for purposes of obtaining building and other permits comply with the applicable residential building, plumbing, mechanical, electrical, gas, energy, accessibility, and other applicable construction codes. Categories of plans examiners include:

- (a) Building plans examiner.
- (b) Plumbing plans examiner.
- (c) Mechanical plans examiner.
- (d) Electrical plans examiner.

~~(3)~~(8) “Building code enforcement official” or “enforcement official” means a licensed building code administrator, building code inspector, or plans examiner.

Section 5. Paragraph (c) of subsection (2), paragraphs (a) and (d) of subsection (7), and subsection (10) of section 468.609, Florida Statutes, are amended to read:

468.609 Administration of this part; standards for certification; additional categories of certification.—

(2) A person may take the examination for certification as a building code inspector or plans examiner pursuant to this part if the person:

(c) Meets eligibility requirements according to one of the following criteria:

1. Demonstrates 5 years' combined experience in the field of construction or a related field, building code inspection, or plans review corresponding to the certification category sought;

2. Demonstrates a combination of postsecondary education in the field of construction or a related field and experience which totals 4 years, with at least 1 year of such total being experience in construction, building code inspection, or plans review;

3. Demonstrates a combination of technical education in the field of construction or a related field and experience which totals 4 years, with at least 1 year of such total being experience in construction, building code inspection, or plans review;

4. Currently holds a standard certificate issued by the board or a firesafety inspector license issued pursuant to chapter 633, has a minimum of 3 years' verifiable full-time experience in inspection or plan review, and has satisfactorily completed a building code inspector or plans examiner training program that provides at least 100 hours but not more than 200 hours of cross-training in the certification category sought. The board shall establish by rule criteria for the development and implementation of the training programs. The board shall accept all classroom training offered by an approved provider if the content substantially meets the intent of the classroom component of the training program;

5. Demonstrates a combination of the completion of an approved training program in the field of building code inspection or plan review and a minimum of 2 years' experience in the field of building code inspection, plan review, fire code inspections and fire plans review of new buildings as a firesafety inspector certified under s. 633.216, or construction. The approved training portion of this requirement shall include proof of satisfactory completion of a training program that provides at least 200 hours but not more than 300 hours of cross-training that is approved by the board in the chosen category of building code inspection or plan review in the certification category sought with at least 20 hours but not more than 30 hours of instruction in state laws, rules, and ethics relating to professional standards of practice, duties, and responsibilities of a certificateholder. The board shall coordinate with the Building Officials Association of Florida, Inc., to establish by rule the development and implementation of the training program. However, the board shall accept all classroom training offered by an approved provider if the content substantially meets the intent of the classroom component of the training program; ~~or~~

6. Currently holds a standard certificate issued by the board or a firesafety inspector license issued pursuant to chapter 633 and:

a. Has at least 5 years' verifiable full-time experience as an inspector or plans examiner in a standard certification category currently held or has a minimum of 5 years' verifiable full-time experience as a firesafety inspector licensed pursuant to chapter 633.

b. Has satisfactorily completed a building code inspector or plans examiner classroom training course or program that provides at least 200 but not more than 300 hours in the certification category sought, except for one-family and two-family dwelling training programs, which must provide at least 500 but not more than 800 hours of training as prescribed by the board. The board shall establish by rule criteria for the development and implementation of classroom training courses and programs in each certification category; or

7.a. Has completed a 4-year internship certification program as a building code inspector or plans examiner while employed full-time by a municipality, county, or other governmental jurisdiction, under the direct supervision of a certified building official. Proof of graduation with a related vocational degree or college degree or of verifiable work experience may be exchanged for the internship experience requirement year-for-year, but may reduce the requirement to no less than 1 year.

b. Has passed an examination administered by the International Code Council in the certification category sought. Such examination must be passed before beginning the internship certification program.

c. Has passed the principles and practice examination before completing the internship certification program.

d. Has passed a board-approved 40-hour code training course in the certification category sought before completing the internship certification program.

e. Has obtained a favorable recommendation from the supervising building official after completion of the internship certification program.

(7)(a) The board shall provide for the issuance of provisional certificates valid for 1 year, as specified by board rule, to any ~~newly employed or promoted~~ building code inspector or plans examiner who meets the eligibility requirements described in subsection (2) and any newly employed or promoted building code administrator who meets the eligibility requirements described in subsection (3). The provisional license may be renewed by the board for just cause; however, a provisional license is not valid for longer than 3 years.

(d) ~~A newly employed or hired~~ person may perform the duties of a plans examiner or building code inspector for 120 days if a provisional certificate application has been submitted if such person is under the direct supervision of a certified building code administrator who holds a standard certification and who has found such person qualified for a provisional certificate. Direct supervision and the determination of qualifications may also be provided by a building code administrator who holds a limited or provisional certificate in a county having a population of fewer than 75,000 and in a municipality located within such county.

(10)(a) The board may by rule create categories of certification in addition to those defined in s. 468.603(5) and (8) ~~468.603(6) and (7)~~. Such certification categories shall not be mandatory and shall not act to diminish the scope of any certificate created by statute.

(b) The board shall by rule establish:

1. Reciprocity of certification with any other state that requires an examination administered by the International Code Council.

2. That an applicant for certification as a building code inspector or plans examiner may apply for a provisional certificate valid for the duration of the internship period.

3. That partial completion of an internship program may be transferred between jurisdictions on a form prescribed by the board.

4. That an applicant may apply for a standard certificate on a form prescribed by the board upon successful completion of an internship certification program.

5. That an applicant may apply for a standard certificate at least 30 days and no more than 60 days before completing the internship certification program.

6. That a building code inspector or plans examiner who has standard certification may seek an additional certification in another category by completing an additional nonconcurrent 1-year internship program in the certification category sought and passing an examination administered by the International Code Council and a board-approved 40-hour code training course.

Section 6. Subsection (3) of section 468.617, Florida Statutes, is amended to read:

468.617 Joint building code inspection department; other arrangements.

(3) Nothing in this part shall prohibit any county or municipal government, school board, community college board, state university, or state agency from entering into any contract with any person or entity for the provision of building code administrator, building official, or building code inspection services regulated under this part, and notwithstanding any other statutory provision, such county or municipal governments may enter into contracts.

Section 7. Paragraphs (d) and (i) of subsection (1) and subsection (2) of section 553.791, Florida Statutes, are amended to read:

553.791 Alternative plans review and inspection.—

(1) As used in this section, the term:

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(d) "Building code inspection services" means those services described in s. 468.603(5) and (8) ~~468.603(6) and (7)~~ involving the review of building plans to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes.

(i) "Private provider" means a person licensed as a building code administrator under part XII of chapter 468, as an engineer under chapter 471, or as an architect under chapter 481. For purposes of performing inspections under this section for additions and alterations that are limited to 1,000 square feet or less to residential buildings, the term "private provider" also includes a person who holds a standard certificate under part XII of chapter 468.

(2)(a) Notwithstanding any other 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. All such services shall be the subject of a written contract between the private provider, or the private provider's firm, and the fee owner or the fee owner's contractor, upon written authorization of the fee owner. The fee owner may elect to use a private provider to provide plans review or required building inspections, or both. However, if the fee owner or the fee owner's contractor uses a private provider to provide plans review, the local building official, in his or her discretion and pursuant to duly adopted policies of the local enforcement agency, may require the fee owner or the fee owner's contractor to use a private provider to also provide required building inspections.

(b) It is the intent of the Legislature that owners and contractors not be required to pay extra costs related to building permitting requirements when hiring a private provider for plans review and building inspections. A local jurisdiction must calculate the cost savings to the local enforcement agency, based on a fee owner or contractor hiring a private provider to perform plans reviews and building inspections in lieu of the local building official, and reduce the permit fees accordingly.

Section 8. Section 471.045, Florida Statutes, is amended to read:

471.045 Professional engineers performing building code inspector duties.—Notwithstanding any other provision of law, a person who is currently licensed under this chapter to practice as a professional engineer may provide building code inspection services described in s. 468.603(5) and (8) ~~468.603(6) and (7)~~ to a local government or state agency upon its request, without being certified by the Florida Building Code Administrators and Inspectors Board under part XII of chapter 468. When performing these building code inspection services, the professional engineer is subject to the disciplinary guidelines of this chapter and s. 468.621(1)(c)-(h). Any

complaint processing, investigation, and discipline that arise out of a professional engineer's performing building code inspection services shall be conducted by the Board of Professional Engineers rather than the Florida Building Code Administrators and Inspectors Board. A professional engineer may not perform plans review as an employee of a local government upon any job that the professional engineer or the professional engineer's company designed.

Section 9. Section 481.222, Florida Statutes, is amended to read:

481.222 Architects performing building code inspection services.—Notwithstanding any other provision of law, a person who is currently licensed to practice as an architect under this part may provide building code inspection services described in s. 468.603(5) and (8) ~~468.603(6) and (7)~~ to a local government or state agency upon its request, without being certified by the Florida Building Code Administrators and Inspectors Board under part XII of chapter 468. With respect to the performance of such building code inspection services, the architect is subject to the disciplinary guidelines of this part and s. 468.621(1)(c)-(h). Any complaint processing, investigation, and discipline that arise out of an architect's performance of building code inspection services shall be conducted by the Board of Architecture and Interior Design rather than the Florida Building Code Administrators and Inspectors Board. An architect may not perform plans review as an employee of a local government upon any job that the architect or the architect's company designed.

Section 10. Paragraph (d) of subsection (7) of section 553.80, Florida Statutes, is amended to read:

553.80 Enforcement.—

(7) The governing bodies of local governments may provide a schedule of reasonable fees, as authorized by s. 125.56(2) or s. 166.222 and this section, for enforcing this part. These fees, and any fines or investment earnings related to the fees, shall be used solely for carrying out the local government's responsibilities in enforcing the Florida Building Code. When providing a schedule of reasonable fees, the total estimated annual revenue derived from fees, and the fines and investment earnings related to the fees, may not exceed the total estimated annual costs of allowable activities. Any unexpended balances shall be carried forward to future years for allowable activities or shall be refunded at the discretion of the local government. The basis for a fee structure for allowable activities shall relate to the level of service provided by the local government and shall include consideration for refunding fees due to reduced services based on services provided as prescribed by s. 553.791, but not provided by the local government. Fees charged shall be consistently applied.

(d) The local enforcement agency, independent district, or special district may not require at any time, including at the time of application for a permit, the payment of any additional fees, charges, or expenses associated with:

1. Providing proof of licensure pursuant to chapter 489;
2. Recording or filing a license issued pursuant to this chapter; or
3. Providing, recording, or filing evidence of workers' compensation insurance coverage as required by chapter 440.

Section 11. Subsection (3) of section 553.73, Florida Statutes, is amended, paragraph (d) is added to subsection (4) of that section, subsections (7) and (8) and paragraphs (a) and (b) of subsection (9) of that section are amended, and subsection (20) is added to that section, to read:

553.73 Florida Building Code.—

(3) The 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 for updates to needed to ~~develop the base code in Florida to form the foundation for the Florida Building Code. The Florida Building~~ commission may approve technical amendments to the code as provided in, ~~subject to~~ subsections (8) and (9), ~~after the amendments have been~~ subject to all of the following conditions:

(a) The proposed amendment must have ~~has~~ been published on the commission's website for a minimum of 45 days and all the associated documentation must have ~~has~~ been made available to any interested party before ~~any~~ consideration by a technical advisory committee;

(b) In order for a technical advisory committee to make a favorable recommendation to the commission, the proposal must receive a two-thirds ~~three-fourths~~ vote of the members present at the ~~technical advisory committee meeting.~~ and At least half of the regular members must be present in order to conduct a meeting;

(c) After ~~the~~ technical advisory committee has considered and recommended ~~consideration and a recommendation for~~ approval of any proposed amendment, the proposal must be published on the commission's website for at least 45 days before ~~any~~ consideration by the commission; and

(d) A proposal may be modified by the commission based on public testimony and evidence from a public hearing held in accordance with chapter 120.

The commission shall incorporate within ~~sections of~~ the Florida Building Code provisions that ~~which~~ address regional and local concerns and variations. The commission shall make every effort to minimize conflicts between the Florida Building Code, the Florida Fire Prevention Code, and the Life Safety Code.

(4)

(d) A technical amendment to the Florida Building Code related to water conservation practices or design criteria adopted by a local government pursuant to this subsection is not rendered void when the code is updated if the technical amendment is necessary to protect or provide for more efficient use of water resources as provided in s. 373.621. However, any such technical amendment carried forward into the next edition of the code pursuant to this paragraph is subject to review or modification as provided in this part.

(7)(a) ~~The commission, by rule adopted pursuant to ss. 120.536(1) and 120.54, shall adopt an updated update the Florida Building Code every 3 years through review of. When updating the Florida Building Code, the commission shall select the most current updates version of the International Building Code, the International Fuel Gas Code, International Existing Building Code, the International Mechanical Code, the International Plumbing Code, and the International Residential Code, all of which are copyrighted and published by adopted by the International Code Council, and the National Electrical Code, which is copyrighted and published adopted by the National Fire Protection Association. At a minimum, the commission shall adopt any updates to such codes or any other code necessary to maintain eligibility for federal funding and discounts from the National Flood Insurance Program, the Federal Emergency Management Agency, and the United States Department of Housing and Urban Development, to form the foundation codes of the updated Florida Building Code, if the version has been adopted by the applicable model code entity. The commission shall also review and adopt updates based on select the most current version of the International Energy Conservation Code (IECC) as a foundation code; however, the IECC shall be modified by the commission shall to maintain the efficiencies of the Florida Energy Efficiency Code for Building Construction adopted and amended pursuant to s. 553.901. The commission shall adopt updated codes by rule.~~

(b) Codes regarding noise contour lines shall be reviewed annually, and the most current federal guidelines shall be adopted.

(c) The commission may adopt as a technical amendment to the Florida Building Code modify any portion of the foundation codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state. Standards or criteria adopted from these referenced by the codes shall be incorporated by reference to the specific provisions adopted. If a referenced standard or criterion requires amplification or modification to be appropriate for use in this state, only the amplification or modification shall be set forth in the Florida Building Code. The commission may approve technical amendments to the updated Florida Building Code after the amendments have been subject to the conditions set forth in paragraphs (3)(a)-(d). Amendments that 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.

(d) 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. A change made by an institute or standards organization to any standard or criterion that is adopted by reference in the Florida Building Code does not become effective statewide until it has been adopted by the commission. Furthermore, the edition of the Florida Building Code which is in effect on the date of application for any permit authorized by the code governs the permitted work for the life of the permit and any extension granted to the permit.

(e) A rule updating the Florida Building Code in accordance with this subsection shall take effect no sooner than 6 months after publication of the updated code. Any amendment to the Florida Building Code which is adopted upon a finding by the commission that the amendment is necessary to protect the public from immediate threat of harm takes effect immediately.

(f) Provisions of the Florida Building Code ~~foundation codes~~, including those contained in referenced standards and criteria, relating to wind resistance or the prevention of water intrusion may not be modified to diminish those construction requirements; however, the commission may, subject to conditions in this subsection, modify the provisions to enhance those construction requirements.

(g) ~~Amendments or modifications to the foundation code pursuant to this subsection shall remain effective only until the effective date of a new edition of the Florida Building Code every third year. Amendments or modifications related to state agency regulations which are adopted and integrated into an edition of the Florida Building Code shall be carried forward into the next edition of the code, subject to modification as provided in this part. Amendments or modifications related to the wind resistance design of buildings and structures within the high-velocity hurricane zone of Miami-Dade and Broward Counties which are adopted to an edition of the Florida Building Code do not expire and shall be carried forward into the next edition of the code, subject to review or modification as provided in this part. If amendments that expire pursuant to this paragraph are resubmitted through the Florida Building commission code adoption process, the amendments must specifically address whether:~~

1. ~~The provisions contained in the proposed amendment are addressed in the applicable international code.~~

2. ~~The amendment demonstrates by evidence or data that the geographical jurisdiction of Florida exhibits a need to strengthen the foundation code beyond the needs or regional variations addressed by the foundation code, and why the proposed amendment applies to this state.~~

3. ~~The proposed amendment was submitted or attempted to be included in the foundation codes to avoid resubmission to the Florida Building Code amendment process.~~

~~If the proposed amendment has been addressed in the international code in a substantially equivalent manner, the Florida Building commission may not include the proposed amendment in the foundation Code.~~

(8) Notwithstanding ~~the provisions of~~ subsection (3) or subsection (7), the commission may address issues identified in this subsection by amending the code pursuant ~~only to the rule adoption procedures contained in chapter 120. Provisions of Updates to the Florida Building Code, including provisions~~ those contained in referenced standards and criteria which relate, relating to wind resistance or the prevention of water intrusion, may not be amended pursuant to this subsection to diminish those standards construction requirements; however, the commission may, ~~subject to conditions in this subsection, amend the Florida Building Code the provisions to enhance such standards~~ those construction requirements. Following the approval of any amendments to the Florida Building Code by the commission and publication of the amendments on the commission's website, authorities having jurisdiction to enforce the Florida Building Code may enforce the amendments. The commission may approve amendments that are needed to address:

- (a) Conflicts within the updated code;
- (b) Conflicts between the updated code and the Florida Fire Prevention Code adopted pursuant to chapter 633;
- (c) Unintended results from the integration of previously adopted ~~Florida-specific~~ amendments with the model code;
- (d) Equivalency of standards;
- (e) Changes to or inconsistencies with federal or state law; or
- (f) Adoption of an updated edition of the National Electrical Code if the commission finds that delay of implementing the updated edition causes undue hardship to stakeholders or otherwise threatens the public health, safety, and welfare.

(9)(a) The commission may approve technical amendments to the Florida Building Code once each year for statewide or regional application upon a finding that the amendment:

- 1. Is needed in order to accommodate the specific needs of this state.
- 2. Has a reasonable and substantial connection with the health, safety, and welfare of the general public.

3. Strengthens or improves the Florida Building Code, or in the case of innovation or new technology, will provide equivalent or better products or methods or systems of construction.

4. Does not discriminate against materials, products, methods, or systems of construction of demonstrated capabilities.

5. Does not degrade the effectiveness of the Florida Building Code.

The Florida Building Commission may approve technical amendments to the code once each year to incorporate into the Florida Building Code its own interpretations of the code which are embodied in its opinions, final orders, declaratory statements, and interpretations of hearing officer panels under s. 553.775(3)(c), but only to the extent that the incorporation of interpretations is needed to modify the code foundation codes to accommodate the specific needs of this state. Amendments approved under this paragraph shall be adopted by rule after the amendments have been subjected to subsection (3).

(b) A proposed amendment must include a fiscal impact statement that documents the costs and benefits of the proposed amendment. Criteria for the fiscal impact statement shall be established by rule by the commission and shall include the impact to local government relative to enforcement, the impact to property and building owners, and the impact to industry, relative to the cost of compliance. The amendment must demonstrate by evidence or data that the state's geographical jurisdiction exhibits a need to strengthen the foundation code beyond the needs or regional variations addressed by the foundation code and why the proposed amendment applies to this state.

(20) The Florida Building Commission may not:

(a) Adopt the 2016 version of the American Society of Heating, Refrigerating and Air-Conditioning Engineers Standard 9.4.1.1(g).

(b) Adopt any provision that requires a door located in the opening between a garage and a single-family residence to be equipped with a self-closing device.

Section 12. Subsection (2) of section 553.76, Florida Statutes, is amended to read:

553.76 General powers of the commission.—The commission is authorized to:

(2) Issue memoranda of procedure for its internal management and control. The commission may adopt rules related to its consensus-based decisionmaking process, including, but not limited to, super majority voting requirements for commission actions relating to the adoption of the Florida Building Code or amendments to the code. However, the commission must adopt the Florida Building Code, and amendments thereto, by at least a two-thirds vote of the members present at a meeting.

Section 13. Section 553.9081, Florida Statutes, is created to read:

553.9081 Florida Building Code; required amendments.—The Florida Building Commission shall amend the Florida Building Code-Energy Conservation to:

(1)(a) Eliminate duplicative commissioning reporting requirements for HVAC and electrical systems; and

(b) Authorize commissioning reports to be provided by a licensed design professional, electrical engineer, or mechanical engineer.

(2) Prohibit the adoption of American Society of Heating, Refrigerating and Air-Conditioning Engineers Standard 9.4.1.1(g).

Section 14. Subsection (8) of section 633.208, Florida Statutes, is amended to read:

633.208 Minimum firesafety standards.—

(8)(a) The provisions of the Life Safety Code, as contained in the Florida Fire Prevention Code, do not apply to one-family and two-family dwellings. However, fire sprinkler protection may be permitted by local government in lieu of other fire protection-related development requirements for such structures. While local governments may adopt fire sprinkler requirements for ~~one-family one-~~ and two-family dwellings under this subsection, it is the intent of the Legislature that the economic consequences of the fire sprinkler mandate on home owners be studied before the enactment of such a requirement. After the effective date of this act, any local government that desires to adopt a fire sprinkler requirement on ~~one-family one-~~ or two-family dwellings must prepare an economic cost and benefit report that analyzes the application of fire sprinklers to ~~one-family one-~~ or two-family dwellings or any proposed residential subdivision. The report must consider the tradeoffs and specific cost savings and benefits of fire sprinklers for future owners of property. The report must include an assessment of the cost savings from any reduced or eliminated impact fees if applicable, the reduction in special fire district tax, insurance fees, and other taxes or fees imposed, and the waiver of certain infrastructure requirements including the reduction of roadway widths, the reduction of water line sizes, increased fire hydrant spacing, increased dead-end roadway length, and a reduction in cul-de-sac sizes relative to the costs from fire sprinkling. A failure to prepare an economic report shall result in the invalidation of the fire sprinkler requirement to any ~~one-family one-~~ or two-family dwelling or any proposed subdivision. In addition, a local jurisdiction or utility may not charge any additional fee, above what is charged to a non-fire sprinklered dwelling, on the basis that a ~~one-family one-~~ or two-family dwelling unit is protected by a fire sprinkler system.

(b)1. A county, municipality, special taxing district, public utility, or private utility may not require an impact fee or payment for a separate water

connection for a one-family or two-family dwelling fire sprinkler system if the capacity required is hydraulically available at the property line. The accountholder of the one-family or two-family dwelling must notify the county, municipality, special district, public utility, or private utility of the installation of the separate water connection in the applicable permit. The separate water connection may only be used for one-family or two-family dwelling fire sprinkler systems and if used for other purposes, full base and volume charges may be applied.

2. A county, municipality, special district, public utility, or private utility may not charge a water or sewer rate to a one-family or two-family dwelling that requires a larger water meter solely due to the installation of fire sprinklers above that which is charged to a one-family and two-family dwelling with a base meter. If the installation of fire sprinklers in a one-family or two-family dwelling requires the installation of a larger water meter, only the difference in actual cost between the base water meter and the larger water meter may be charged by the water utility provider.

Section 15. A local government may not require an owner of a residence to obtain a permit to paint such residence, regardless of whether the residence is owned by a limited liability company.

Section 16. The Department of Education, in conjunction with the Department of Economic Opportunity, shall develop a plan to implement the recommendations of the Construction Industry Workforce Task Force Report dated January 20, 2017. The Department of Education shall provide the plan to the Construction Industry Workforce Task Force on or before July 1, 2018.

Section 17. CareerSource Florida, Inc., shall develop and submit a plan to the Construction Industry Workforce Taskforce of the potential opportunities for training programs to implement the recommendations of the Construction Industry Workforce Taskforce Report dated January 20, 2017, using existing federal funds awarded to the corporation and using the previous statewide Florida ReBuilds program as an implementation model for such programs. CareerSource Florida, Inc., shall provide the plan to the Construction Industry Workforce Taskforce on or before July 1, 2018.

Section 18. The Florida Building Commission shall adopt an amendment to the Florida Building Code-Residential, relating to Door Components, to provide that, relating to substitution of door components, such components must either:

(1) Comply with ANSI/WMA 100; or

(2) Be evaluated by an approved product evaluation entity, certification agency, testing laboratory, or engineer and may be interchangeable in exterior door assemblies if the components provide equal or greater structural performance as demonstrated by accepted engineering practices.

Section 19. Present subsection (5) of section 489.516, Florida Statutes, is renumbered as subsection (6), and a new subsection (5) is added to that section, to read:

489.516 Qualifications to practice; restrictions; prerequisites.—

(5) This part does not prevent any certified electrical or alarm system contractor from acting as a prime contractor when the majority of the work to be performed under the contract is within the scope of his or her license or from subcontracting to other licensed contractors any remaining work that is part of the project contracted.

Section 20. This act shall take effect July 1, 2017.

Approved by the Governor June 23, 2017.

Filed in Office Secretary of State June 23, 2017.

TAB B

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 17-6578RP

FLORIDA BUILDING COMMISSION,

Respondent.

_____ /

FINAL ORDER

By agreement of the parties, this proposed rule challenge has been submitted for determination by Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH), based on the parties' stipulations and a stipulated record in lieu of an evidentiary hearing.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether certain proposed amendments to Florida Administrative Code Rule 61G20-2.002 enlarge, modify, and/or contravene the cited provisions of law implemented, so as to render the proposed amendments invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On December 6, 2017, Petitioner Florida Association of the American Institute of Architects, Inc. (FAAIA or Petitioner), filed a Petition for the Administrative Determination of the Invalidity of a Proposed Rule. The petition challenges the validity of certain amendments proposed by Respondent Florida Building Commission (Commission or Respondent) to rule 61G20-2.002. The case was assigned to the undersigned on December 12, 2017. By Notice of Hearing and Order of Pre-hearing Instructions issued December 13, 2017, the final hearing was set for January 11, 2018, and an expedited schedule was established for discovery and other pre-hearing matters.

On January 2, 2018, the parties filed a Joint Motion to Cancel Hearing and Order Submission of Proposed Final Orders. The parties represented that they believed there were no disputed issues of material fact and that the case could be submitted for determination on the basis of the parties' stipulations of fact and submission of joint exhibits, in lieu of a hearing record

developed in an evidentiary hearing. Conditionally accepting the parties' representation (conditioned on the undersigned ultimately agreeing that all material facts were addressed by the parties' stipulations and joint exhibits), the undersigned issued an Order on January 3, 2018, that cancelled the final hearing and adopted the parties' proposed deadlines of January 9, 2018, to file a joint stipulation including stipulated facts and a joint exhibit list, and January 19, 2018, to file proposed final orders (PFOs). The Order added a deadline of January 19, 2018, for delivery of a set of the joint exhibits listed in the joint stipulation to DOAH.

The parties timely filed their Joint Stipulation on January 9, 2018. Joint Exhibits 1 through 5, listed in the Joint Stipulation, were delivered to DOAH on January 18, 2018. On January 19, 2018, the parties timely filed their PFOs, which have been considered in the preparation of this Final Order. In addition, following a brief telephone conference, the parties filed a Supplemental Joint Stipulation on February 12, 2018, setting forth additional agreed facts related to FAAIA's associational standing.

FINDINGS OF FACT

1. The Commission is the state agency responsible for the development and maintenance of the Florida Building Code under chapter 553, Florida Statutes (2017),^{1/} and chapter 61G20-2. The

Commission is created as a distinct agency, but is located within the Department of Business and Professional Regulation for administrative purposes. § 553.74(1), Fla. Stat.

2. The subject matter at issue in this case is the Florida Building Code update and amendment process, as recently changed in section 553.73. On November 15, 2017, the Commission published a Notice of Proposed Rule to substantially rewrite rule 61G20-2.002 (the proposed rule), "in order to conform with changes made to section 553.73" by the 2017 Legislature.

3. FAAIA is a professional association representing roughly 2,700 architects licensed in Florida. These Florida-licensed architects are the overwhelming majority of FAAIA's members.

4. FAAIA's Florida-licensed architect members are subject to the requirements of the Florida Building Code in the practice of their profession. A failure to comply with the requirements of the Florida Building Code exposes a licensed architect to discipline against his or her license, as well as potential liability for negligence. See, e.g., Seibert v. Bayport Beach & Tennis Club Ass'n, 573 So. 2d 889, 891 (Fla. 2d DCA 1990) (statutory remedy and common law negligence each provided independent basis for finding liability derived from architect's violation of the building code); Juhn v. Dep't of Prof'l Reg., 431 So. 2d 190 (Fla. 1st DCA 1983) (architect can be disciplined by licensing board for failing to comply with applicable codes).

5. The subject matter of the proposed rule is within the scope of FAAIA's representation of its members in the normal course of its business and activities.

6. As a professional association, FAAIA routinely represents its members before the Florida Legislature as well as before state agencies, and in DOAH administrative proceedings on matters of policy and regulation of its members' practice.

7. On behalf of its members, FAAIA challenges two aspects of the proposed rule, asserting that in two respects, the proposed rule does not square with the "unambiguous" provisions of the 2017 law intended to be implemented. As the parties represented, FAAIA's objections to the proposed rule present legal questions that must be answered by comparing the statutory language before and after amendment in 2017, so as to determine whether the proposed rule implements the amended law, as the Commission contends, or whether the proposed rule enlarges, modifies, and/or contravenes the amended law, as FAAIA contends. The parties offered no extrinsic aids as evidence to consider in interpreting the 2017 law, such as legislative staff analyses or other evidence regarding the 2017 legislative action. Instead, both parties contend that the statutory changes at issue are clear and unambiguous, albeit they manage to reach diametrically opposed interpretations of the "clear and unambiguous" statutory changes.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the subject matter and the parties to this action, pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes.

9. Section 120.56(1)(a) provides that any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. Pursuant to section 120.56(2)(a), Petitioner has the initial burden to prove its standing.

10. One is "substantially affected" by a proposed rule if the proposed rule will result in a real and immediate injury in fact, and the alleged interest is within the zone of interest to be protected or regulated. This test is met if a proposed rule will regulate a person's occupation or profession. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

11. An association such as FAAIA that seeks to represent the interests of its members must meet the three-part test for associational standing, first set forth in the context of rule challenges under the Administrative Procedure Act in Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 353-354 (Fla. 1982), as follows:

To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members,

although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

12. The facts found above, based on the parties' stipulations, establish that a substantial number of FAAIA's members would be substantially affected by the proposed rule if it were adopted, and that the subject matter of the proposed rule falls within the general scope of FAAIA's interest and activity. In addition, the relief requested--a determination that the proposed rule is invalid as to the objections raised--is of a type appropriate for a professional association to receive on behalf of its members. FAAIA has associational standing.

13. As for the merits of the proposed rule challenge, the Commission has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. In this proceeding, the proposed rule is not presumed valid or invalid.^{2/} § 120.56(2)(c), Fla. Stat.

14. 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. A rule is an "invalid exercise of delegated legislative

authority" if, among other reasons, the rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by section 120.54(3)(a)1.

§ 120.52(8)(c), Fla. Stat. FAAIA challenges two aspects of the proposed rule only on the grounds in section 120.52(8)(c), as illuminated by the "flush left" language after section 120.52(8)(a) through (e), providing as follows:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

§ 120.52(8), Fla. Stat. See also § 120.52(9), Fla. Stat.

(defining "law implemented" as "the language of the enabling statute being carried out or interpreted by an agency through rulemaking").

The Florida Building Code Update and Amendment Process Prior to the 2017 Statutory Amendments

15. Section 553.73(7), both before and after the 2017 statutory amendments, addresses the triennial process to update the Florida Building Code. The 2016 law required that the Florida Building Code be updated every three years. See § 553.73(7)(a), Fla. Stat. (2016) (“The commission, by rule adopted pursuant to ss. 120.536(1) and 120.54, shall update the Florida Building Code every 3 years.”).

16. Under the 2016 law, the triennial update process resulted in a re-adoption of a new Florida Building Code. Every three years, the Commission was required to “select the most current version” of certain international and national model codes to “form the foundation codes of the updated Florida Building Code, if the version has been adopted by the applicable model entity.” § 553.73(7)(a), Fla. Stat. (2016).

17. The specific model codes that would form the foundation of the updated Florida Building Code were enumerated in the law, as follows: 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 National Electrical Code; and the International Energy Conservation Code (collectively, the “Model Codes”). Id.

18. As part of the triennial update process, the Commission had authority to modify any portion of the foundation codes, but "only as needed to accommodate the specific needs of this state." § 553.73(7)(c), Fla. Stat. (2016). The Commission also had authority to incorporate the Commission's own interpretations, declaratory statements, appellate decisions, and approved statewide and local technical amendments into the updated Florida Building Code, but "only to the extent needed to modify the foundation codes to accommodate the specific needs of the state." § 553.73(7)(d), Fla. Stat. (2016).

19. In other words, for the triennial update process, the Model Codes were the foundation of the updated Florida Building Code, and could only be deviated from to the extent "needed to accommodate the specific needs of this state," pursuant to the requirements in section 553.73(7)(c) and (d), Florida Statutes (2016).

20. With few exceptions, for each new triennial update process, the slate would be wiped clean of changes made to the Model Codes as part of the prior triennial update process. The process would start anew with the most recent versions of the Model Codes serving as the foundation for the re-enacted new edition of the Florida Building Code, and prior changes to the Model Codes would have to be resubmitted for consideration during the triennial update process. § 553.73(7)(g), Fla. Stat. (2016).

21. In between each triennial re-adoption of a new Florida Building Code, the Commission was authorized to adopt technical amendments to the Florida Building Code once each year, by meeting the requirements in section 553.73(9), Florida Statutes (2016). These interim annual technical amendments, like the amendments to Model Codes made as part of the triennial update process, had to meet the standard that the change "is needed in order to accommodate the specific needs of this state." § 533.73(9)(a)1., Fla. Stat. (2016). Beyond that common standard, the interim annual technical amendments were also tested by four additional standards, enumerated in section 553.73(9)(a)2. through 5., Florida Statutes (2016). Interim annual technical amendments were also authorized to incorporate the Commission's interpretations of the Florida Building Code, "but only to the extent that the incorporation of interpretations is needed to modify foundation codes to accommodate the specific needs of this state." § 553.73(9)(a), Fla. Stat. (2016) (flush-left language after paragraph (9)(a)1. through 5.).

22. Like prior changes made to the Model Codes in a past triennial update process, interim technical amendments were not automatically carried forward into the re-enacted Florida Building Code. The interim amendments could be considered by the Commission during the triennial update and incorporated into the

updated Building Code “to the extent they are needed to modify the foundation codes to accommodate the specific needs of the state.” § 553.73(7)(d), Fla. Stat. (2016).

23. Finally, the Commission was also authorized to amend the Florida Building Code at any time to address such issues as conflicts within the code itself, conflicts with the Florida Fire Prevention Code, unintended results from previously adopted Florida-specific amendments, and changes to or inconsistencies with state or federal law. § 553.73(8), Fla. Stat. (2016).

The Florida Building Code Update and Amendment Process as Modified by the 2017 Legislative Changes

24. In 2017, the Florida Legislature made changes to section 553.73 with regard to the adoption and amendment of the Florida Building Code.

25. Under the newly amended statute, the Commission still must “adopt an updated Florida Building Code every 3 years.” § 553.73(7)(a), Fla. Stat.

26. However, instead of directing the Commission to adopt the most recent versions of the Model Codes as the foundation for a new version of the Florida Building Code, subject to changes as needed to accommodate specific needs of this state, the statute now provides that the Commission is to conduct its triennial update process through a “review of . . . the most current updates of the [Model Codes].” Id.

27. The new statute does not require the Commission to adopt any of the updates to the Model Codes that it reviews, with one possible exception: "The Commission must, at a minimum, adopt any updates to [the Model Codes] or other code necessary to maintain eligibility for federal funding and discounts from the National Flood Insurance Program, the Federal Emergency Management Agency, and the United States Department of Housing and Urban Development." Id. If there are no Model Code updates or other code provisions that must be adopted to maintain the specified eligibility, then the new law does not require the Commission to adopt any of the Model Code updates; the Commission is only required to review them.

28. While not required to adopt any other Model Code updates, the Commission is given the discretion to adopt Model Code updates reviewed under section 553.73(7)(a) as technical amendments to the existing Florida Building Code, but only as needed to accommodate the specific needs of this state, as determined after following the process in section 553.73(3) (providing for notice of proposed amendments, consideration by a Technical Advisory Committee, public input, and recommendation to the Commission). § 553.73(7)(c), Fla. Stat.

29. The 2016 law providing for automatic expiration of Florida-specific amendments made to the Model Codes during the prior triennial update process (wiping the slate clean for each

triennial update process) was deleted in the 2017 law. See ch. 2017-149, § 11, Laws of Fla. (deleting section 553.73(7)(g), Florida Statutes (2016)).

30. The 2017 law retains the Commission's authority to make additional technical amendments to the Florida Building Code in between triennial updates pursuant to section 553.73(8) and (9), which were retained with only minor amendments, primarily to reflect the discontinuance of using Model Codes as "foundation codes" for the triennial re-adoption of the Florida Building Code.

31. The Commission will head into the first triennial update process under the new law with the last edition of the Florida Building Code in place, which has as its foundation the most recent versions of the Model Codes in effect at the last triennial update. Specific provisions of the Model Code foundation would have been changed in the last triennial update process only to the extent needed to accommodate specific needs of this state, and those Florida-specific amendments to the foundation codes are also reflected in the last edition of the Florida Building Code. The existing Florida Building Code also reflects any interim technical amendments meeting the same Florida-specific need standard plus additional standards, pursuant to section 553.73(9), Florida Statutes (2016), and amendments resolving code conflicts under section 553.73(8).

32. Whereas under the 2016 law, the existing Florida Building Code was put aside, and the triennial process began anew with the most recent versions of the Model Codes as the foundation, now the starting place and foundation for the triennial update process is the existing Florida Building Code, with prior updates and changes carried forward.^{3/}

33. The 2016 law plainly reflected a policy choice to primarily use the Model Codes for the Florida Building Code, with only necessary tweaks made to meet specific needs of this state. Just as plainly, the 2017 law reflects a policy change. While the existing Florida Building Code may largely reflect the Model Code provisions in effect at the last triennial update, on a going-forward basis, the 2017 law inverts the presumption that Model Code updates should be used, absent a showing of changes needed to the Model Codes to accommodate Florida-specific needs. Under the new law, the Model Code updates themselves--and not changes to the Model Codes--must be shown to be needed to accommodate the specific needs of this state. The Commission is given discretion to adopt Model Code updates to amend the existing Florida Building Code "only as needed to accommodate the specific needs of this state[,]" using the technical amendment procedures set forth in section 553.73(3). See § 553.73(7)(c), Fla. Stat. (emphasis added). The only exception, as noted above, is for any Model Code updates or other code provisions necessary

to maintain eligibility for federal funding and discounts, which must be adopted by the Commission.

34. This policy shift can best be seen by viewing the amendment to section 553.73(7)(c) in bill form (i.e., words ~~stricken~~ are deletions; words underlined are additions), as set forth in chapter 2017-149, section 11, Laws of Florida:

The commission may adopt as a technical amendment to the Florida Building Code ~~modify~~ any portion of the ~~foundation~~ codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state. Standards or criteria adopted from these ~~referenced by the~~ codes shall be incorporated by reference to the specific provisions adopted. If a referenced standard or criterion requires amplification or modification to be appropriate for use in this state, only the amplification or modification shall be set forth in the Florida Building Code. The commission may approve technical amendments to the updated Florida Building Code after the amendments have been subject to the conditions set forth in paragraphs (3)(a)-(d). Amendments that ~~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.

The Proposed Rule

35. The proposed rule seeks to change the current rule provisions addressing the triennial update process in order to conform with the 2017 changes made to section 553.73.

36. The proposed rule provides that the Commission may amend the Florida Building Code "[t]o 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]." Proposed Fla. Admin. Code R. 61G20-2.002(2) and (2)(a). To this extent, the parties stipulated that the proposed rule is consistent with the 2017 statute.

37. Petitioner's challenge is directed to two aspects of proposed rule 61G20-2.002(2), providing as follows:

(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.

(b) To amend the Florida Building Code pursuant to Subsection 553.73(8), F.S.

(c) To amend the Florida Building Code, once each year, pursuant to Subsection 553.73(9), F.S.

38. FAAIA's first objection is that the proposed rule provides that during the triennial update process, the Commission is only authorized to adopt portions of the most current updates to the Model Codes that are determined to be "needed to accommodate the specific needs of this state." FAAIA contends that this standard is not found in the 2017 law with regard to the triennial update of the Florida Building Code.

39. FAAIA's contention is rejected. As the Commission points out, the amendment to section 553.73(7)(c) specifically provides for this standard: "The commission may adopt as a technical amendment to the Florida Building Code any portions of the codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state."

40. FAAIA seizes on the use of the phrase "technical amendment" in the above-quoted sentence to argue that this entire paragraph is a misplaced reference to the interim annual technical amendments authorized in section 553.73(9). FAAIA's argument is belied by a comparison of the 2016 and 2017 versions of section 553.73(7)(c). The statutory amendment in bill format in paragraph 34 above demonstrates that this provision represents the inverse of the prior law whereby as part of the triennial update process, specific provisions in the updated Model Codes could be changed, but only as needed to accommodate the specific needs of the state. FAAIA concedes that under the 2016 law, the

Commission's authority in section 553.73(7)(c) to modify Model Code provisions as needed to accommodate Florida-specific needs was part of the triennial update process. The 2017 law amended this part of the triennial update process, to authorize the Commission to adopt Model Code updates as technical amendments to the existing Florida Building Code, but only as needed to accommodate the specific needs of this state. The new law simply reflects the inverted priorities, with Model Code updates no longer occupying the preferred foundational position. The new law also reflects the change, not disputed by FAAIA, from re-adoption of a new Florida Building Code at each triennial update, to a process of considering amendments to the existing Florida Building Code to update the code.

41. FAAIA's argument also cannot be squared with the organizational structure of the statute. Subsection (7) addresses the triennial update process, as made clear in the first sentence of proposed rule 61G20-2.002(2)(a) ("To update the Florida Building Code every three years pursuant to Subsection 553.73(7), Florida Statutes"), which was not challenged by FAAIA. The technical amendments authorized by paragraph (c) are part of the triennial update process addressed by subsection (7).

42. It bears noting that the last sentence of section 553.73(7)(c) now provides: "Amendments 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). By virtue of the numbering system used in the Florida Statutes, "subsection" means all of section 553.73(7). Section 553.73(7)(c) is a paragraph, not a subsection. See Preface to Florida Statutes, Numbering system ("Chapters are identified by whole Arabic numbers; sections, by numbers containing a decimal point; subsections, by whole Arabic numbers enclosed by parentheses; paragraphs, by lowercase letters enclosed by parentheses; subparagraphs, by whole Arabic numbers followed by a period; sub-subparagraphs, by lowercase letters followed by a period" and so forth).

43. This same sentence read as follows in the 2016 law: "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." § 553.73(7)(c), Fla. Stat. (2016). The contrast between the 2016 and 2017 versions of this sentence makes plain the legislative intent to shift from a Model-Code-first approach, with Model Code provisions amended only as needed for Florida-specific needs, to a Florida-specific

Florida Building Code, amended to incorporate Model Code updates only to the extent needed to accommodate specific Florida needs.^{4/}

44. FAAIA's argument that section 553.73(7)(c) is a misplaced reference to the interim annual technical amendments authorized by section 553.73(9) would render section 553.73(7)(c) meaningless, because interim annual technical amendments are already fully addressed in section 553.73(9). Indeed, FAAIA's argument, if accepted, would create conflict between the existing standards for interim annual technical amendments in section 553.73(9) and the standards in section 553.73(7)(c) for technical amendments to adopt Model Code updates as part of the triennial review and update process.

45. Although FAAIA argues that section 553.73(7)(c) does not apply to the triennial update process, FAAIA does not identify any other statutory authority or standards that address whether and when the Commission may adopt Model Code updates that are not required to maintain eligibility for federal funding and discounts. Section 553.73(7)(a) used to provide the statutory authority to adopt all of the updated Model Codes as the foundation codes, but the 2017 amendment removed that blanket authority. Now, section 553.73(7)(a) only authorizes the Commission to review updates to the Model Codes, and directs the Commission to, "at a minimum," adopt updates of Model Codes or any other code necessary to maintain eligibility for specified

federal funding and discounts. Section 553.73(7)(c) completes the delegation by providing the authority, the standards, and the procedures^{5/} by which the Commission “may” go beyond the “minimum” to adopt other Model Code updates. Unless construed this way, as it should be, there would be no standards and no authority to adopt Model Code updates as part of the triennial update process outside of the limited parameters specified in paragraph (a) (i.e., when necessary to maintain eligibility for certain funding and discounts). FAAIA’s argument would remove an integral part of the inverted triennial update process called for by the 2017 legislative changes, whereby Model Code updates can find their way into the Florida Building Code, but only if they are demonstrably needed to accommodate Florida needs.

46. The standard in proposed rule 61G20-2.002 for adopting updates to Model Codes as part of the triennial update process does not modify, enlarge, or contravene the cited laws implemented. Rather, the standard carries out, and is consistent with, the Commission’s specific powers and duties, particularly those set forth in section 533.73(7)(c). The proposed rule is not an invalid exercise of delegated legislative authority as to this FAAIA objection.

47. FAAIA’s other objection raised in this challenge is directed to proposed rule 61G20-2.002(2)(a)1., part of the

triennial update process, providing: "The Commission shall select the model codes that will be used to conduct its review."

48. There is no dispute that section 553.73(7)(a) requires the Commission to review updates to specifically named codes, which have been collectively identified throughout this Final Order as the Model Codes, as part of the triennial update process. The statute directs the Commission to review "the most current updates of the International Building Code, the International Fuel Gas Code, International Existing Building Code, the International Mechanical Code, the International Plumbing Code, . . . the International Residential Code, . . . the National Electric Code, . . . and . . . the International Energy Conservation Code." § 553.73(7)(a), Fla. Stat.

49. FAAIA's objects to proposed rule 61G20-2.002(2)(a)1. on the grounds that it would allow the Commission to select which Model Codes it will review, and which to exclude from review, as the first step of the triennial update process. FAAIA's objection would be well-founded if the rule stood alone and were considered in isolation from the lead-in language preceding it.

50. Proposed rule 61G20-2.002(2)(a), preceding and leading into the challenged subparagraph 1., however, sets forth the actual first step of the triennial update process pursuant to section 553.73(7): "When updating the code, the Commission shall review the most current updates to the model codes, including but

not limited to [the Model Codes] for the purpose of determining whether the latest changes to the model codes are needed to accommodate the specific needs of this state.” Each Model Code enumerated in the statute is listed in proposed rule 61G20-2.002(2)(a). This part of the proposed rule clearly incorporates the statutorily-mandated review of updates to all Model Codes.

51. The last sentence of paragraph (2)(a) serves as the lead-in to subparagraphs 1. through 4., providing: “For the purpose of conducting this review, the following steps will be undertaken[.]”

52. In arguing for the validity of this challenged proposed rule provision, the Commission first contends that the seemingly broad language is not intended to give the Commission carte blanche to exclude any of the Model Codes, which are specifically designated in the statute, nor could it be read to give that authority, because the obligation to review the most recent updates to all of the Model Codes named in the statute is repeated in proposed rule 61G20-2.002(2)(a), and all of those Model Codes are listed. The undersigned agrees that proposed rule 61G20-2.002(2)(a)1. must be read in conjunction with the lead-in paragraph (2)(a), and that the proposed rule provision for the Commission to select model codes to review is reasonably interpreted to authorize a selection of model codes in addition to the listed Model Codes in paragraph (2)(a), which must be

reviewed. Indeed, paragraph (2)(a) says that the Commission will review updates to model codes, "including but not limited to" the Model Codes listed in the statute. Subparagraph 1., then, addresses the "not limited to" part of paragraph (2)(a), while not undermining the "including" part of paragraph (2)(a), which is the obligation, consistent with the statute, to review updates to all of the named Model Codes.

53. FAAIA does not object to the proposed rule insofar as it might be read to authorize the Commission to review additional model codes beyond the Model Codes enumerated in the statute, as part of the triennial review process. In this regard, the Commission notes that it is required to adopt updates to Model Codes "or any other code necessary to maintain eligibility" for certain federal funding and discounts. § 553.73(7)(a), Fla. Stat. (emphasis added). The Commission maintains that proposed rule 61G20-2.002(2)(a)1. is directed to this statutory provision, to allow the Commission to select additional codes to review for purposes of identifying provisions necessary to maintain eligibility for the specified funding and discounts. While the proposed rule is not worded in a way to limit the Commission's selection of additional codes for review to only those codes that could arguably trigger the statutory mandate referred to in section 553.73(7)(a), this concern is beyond the scope of the objection raised by FAAIA. FAAIA's objection is only that the

proposed rule could authorize the Commission to exclude specified Model Codes.

54. For these reasons, proposed rule 61G20-2.002(2)(a)1. is determined to be a valid exercise of delegated legislative authority as to the objection raised. The proposed rule, when properly read in conjunction with the lead-in paragraph (2)(a), does not modify, enlarge, or contravene the cited laws implemented by allowing the Commission to exclude review of updates to the Model Codes named in section 553.73(7)(a). Instead, the Commission is obligated to review updates to all of the Model Codes, pursuant to proposed rule 61G20-2.002(2)(a).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the challenged provisions of proposed rule 61G20-2.002(2) are valid exercises of delegated legislative authority as to the objections raised, and the Petition is dismissed.

DONE AND ORDERED this 15th day of February, 2018, in
Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2018.

ENDNOTES

^{1/} References to Florida Statutes are to the 2017 codification, unless otherwise indicated.

^{2/} By expressly providing that a challenged proposed rule is not entitled to a presumption of validity, and by allocating the burden of proving the validity of a proposed rule on the agency, section 120.56(2) dictates against according deference to an agency's interpretation of a statute that it administers, at least where, as here, the sole evidence of the agency's interpretation of the statute is the proposed rule itself. The Commission's argument that it should be accorded such deference by judging the validity of its proposed rule under a "clearly erroneous" standard must be rejected as contrary to section 120.56(2).

^{3/} As reasonably interpreted by the Commission in the proposed rule and not challenged by FAAIA, the existing Florida Building Code remains in place, but may be amended by the Commission for the purpose of updating the code every three years, pursuant to section 553.73(7). See proposed rule 61G20-2.002(2) and (2)(a) ("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.”) (emphasis added). The 2017 law could have been clearer in this regard, but the Commission’s interpretation is the reasonable, logical, and necessary result of eliminating the requirement to start anew with the most recent versions of the Model Codes serving as the foundation codes, and also eliminating the automatic expiration of prior amendments or modifications to the foundation codes.

^{4/} FAAIA does not contend that the standard in the proposed rule for adopting Model Code updates--that they are needed to accommodate the specific needs of this state--is inconsistent with the statutory mandate that the Commission adopt any code provisions necessary to maintain eligibility for certain federal funding and discounts. That is perhaps because the proposed rule standard allows for the Commission to comply with that statutory mandate. See proposed rule 61G20-2.002(1)(a)2.c. (defining technical amendments “needed to accommodate the specific needs of this state” to include amendments that “[m]aintain eligibility for federal funding and discounts from the National Flood Insurance Program, the Federal Emergency Management Agency, and the United States Department of Housing and Urban Development.”).

^{5/} Apparently as part of FAAIA’s objection to the standard for adopting Model Code updates as technical amendments in the triennial update process, FAAIA notes with disapproval that along with this standard, the proposed rule sets forth a four-step process for determining whether the standard is met. FAAIA does not appear to lodge a distinct challenge to this four-step process, but if it had, such a challenge would meet the same result as the challenge to the standard. Section 553.73(7)(c), which is the source of the standard to which FAAIA objects, also references the procedure, by providing that technical amendments cannot be approved until “after the amendments have been subject to the conditions set forth in paragraphs (3)(a)-(d).” Section 553.73(3)(a) through (d) contains the requirements for notice of proposed amendments, consideration by a technical advisory committee, recommendation to the Commission, and public input, leading to the Commission’s determination. Apart from section 553.73(7)(c), the procedures in section 553.73(3) expressly apply to technical amendments under section 553.73(8) (authorizing amendments at any time to resolve conflicts and similar issues) and (9) (authorizing annual technical amendments based on specified standards). Section 553.73(7)(c) makes these same procedures applicable to technical amendment proposals to adopt Model Code updates as part of the triennial update process, to determine if the applicable standard--different from the standards in 553.73(8) and (9)--is met. The proposed rule simply

lays out the procedures in section 553.73(3)(a) through (d), as part of the process to consider whether to adopt Model Code updates as technical amendments pursuant to section 553.73(7)(c), since the statute only incorporates the procedures by reference.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.