

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

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

Petitioner,

v.

Case No. 17-6578RP

FLORIDA BUILDING COMMISSION,

Respondent.

NOTICE OF FILING
PETITIONER FLORIDA ASSOCIATION OF THE AMERICAN INSTITUTE OF
ARCHITECTS, INC.'s PROPOSED FINAL ORDER

Florida Association of the American Institute of Architects, Inc. hereby gives notice of filing its Proposed Final Order as ordered by Administrative Law Judge Elizabeth W. McArthur.

/s/ Allison G. Mawhinney
D. Ty Jackson (Fla. Bar No. 41216)
J. Michael Huey (Fla. Bar No. 130971)
Allison G. Mawhinney (Fla. Bar No. 44030)
GRAYROBINSON, P.A.
301 S. Bronough Street, Suite 600 (32301)
P.O. Box 11189
Tallahassee, Florida 32302-3189
Telephone: 850-577-9090
Facsimile: 850-577-3311
ty.jackson@gray-robinson.com
mike.huey@gray-robinson.com
allison.mawhinney@gray-robinson.com

Counsel for *Florida Association of the American
Institute of Architects, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by eALJ to Administrative Law Judge Elizabeth W. McArthur, Division of Administrative Hearings, The

DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, 32399-3060; and copies have been furnished by electronic mail to the following this 19th day of January 2018:

W. Justin Vogel
Chief Legal Counsel
Florida Building Commission,
Office of Codes & Standards
Florida Bar No. 112261
Department of Business and
Professional Regulation
Office of the General Counsel
2601 Blair Stone Road
Tallahassee, FL 32399-2202
wjustin.vogel@myfloridalicense.com

/s/ Allison G. Mawhinney
Attorney

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

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

Petitioner,

v.

Case No. 17-6578RP

FLORIDA BUILDING COMMISSION,

Respondent.

**PETITIONER FLORIDA ASSOCIATION OF THE AMERICAN INSTITUTE OF
ARCHITECTS, INC.'s PROPOSED FINAL ORDER**

In lieu of a hearing in the above-styled cause, the Parties submitted a Joint Stipulation of Facts, Legal Issues, and Exhibits (“Joint Stipulation”)¹ to the Honorable Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings, in Tallahassee, Florida on January 9, 2017. Proposed Final Orders were timely submitted on January 19, 2017. This Final Order is being issued based on consideration of the Joint Stipulation and Proposed Final Orders.

APPEARANCES

For Florida Association of the American Institute of Architects, Inc.:

J. Michael Huey, Esquire
D. Ty Jackson, Esquire
Allison G. Mawhinney, Esquire
GrayRobinson, P.A.
301 South Bronough Street, Suite 600 (32301)
P. O. Box 11189
Tallahassee, FL 32302-3189

For Florida Building Commission:

W. Justin Vogel, Esquire
Chief Legal Counsel
Florida Building Commission
Office of Codes & Standards
Department of Business & Professional Regulation
Office of the General Counsel
2601 Blair Stone Road
Tallahassee, FL 32399

STATEMENT OF THE ISSUES

Whether Proposed Rule 61G20-2.002, Florida Administrative Code (the “Proposed Rule”), enlarges, modifies, and / or contravenes the provisions of section 553.73, Florida Statutes (2017)², that it purports to implement and whether the Proposed Rule therefore is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On December 6, 2017, Petitioner, Florida Association of the American Institute of Architects, Inc. (“FAAIA”), filed a Petition for the Administrative Determination of the Invalidity of the Proposed Rule against Respondent, Florida Building Commission (the “Commission”), pursuant to section 120.56, Florida Statutes, on two primary grounds. First, the Proposed Rule states that only provisions of certain model codes that are “needed to accommodate the specific needs of this state” may be incorporated into the Florida Building Code (the “Code”) during the triennial update process described below. Second, the Proposed Rule purports to allow the Commission *to select* which of certain model codes it will consider in the triennial Code revision process. FAAIA asserts that the Proposed Rule thereby enlarges, modifies and contravenes section 553.73, Florida Statutes, by injecting a legal standard for approval of triennial updates into the review process, and by granting the Commission discretion to select which model codes it will consider during the triennial review, neither of which are

supported by statute. (JS ¶¶5-6)

The Commission defends the Proposed Rule, arguing that it does not grant the Commission discretion over which model codes will be used in the triennial update of the Florida Building Code and that the Proposed Rule is otherwise a valid exercise of its delegated legislative authority and should be upheld. (JS ¶¶8-9)

The Petition was referred to the Division of Administrative Hearings and assigned to Administrative Law Judge McArthur by Order entered December 12, 2017. Final hearing was scheduled for January 11, 2018.

On January 2, 2018, the Parties filed a Joint Motion to Cancel Hearing and Order Submission of Proposed Final Orders and stated that, “[s]ince this case presents only legal issues, counsel for Petitioner and Respondent agree that no final hearing is necessary and that a decision in this case be made based upon Proposed Final Orders (“PFOs”) submitted by the parties.” By their Motion, the Parties agreed that PFOs should be submitted no later than January 19, 2018. On January 3, 2018, the undersigned entered an Order granting the Motion.

On January 9, 2018, the Parties submitted their Joint Stipulation of Facts, Legal Issues, and Exhibits including statements of undisputed facts and law. The Parties stipulated there were no material factual disputes relevant to determination of the validity or invalidity of the Proposed Rule. (JS ¶16)

The Parties’ joint exhibits include:

1. Notice of Proposed Rule 61G20-2.002, Florida Administrative Code, published November 15, 2017;
2. Florida Administrative Code Rule 61G20-2.002 (2017);
3. Section 553.73, Florida Statutes (2016)³;
4. Section 553.73, Florida Statutes (2017); and
5. Ch. 2017-149, Laws of Florida.

The Parties timely submitted their PFOs on January 19, 2018, and the undersigned has carefully considered the above-described submissions in preparing this Final Order.

FINDINGS OF FACT

I. The Parties

1. The Commission is a state agency created and located within the Department of Business and Professional Regulation for administrative purposes. The Commission is the state agency responsible for the development and maintenance of the Florida Building Code under chapter 553, Florida Statutes, and Rule Chapter 61G-20, Florida Administrative Code. (JS ¶12)

2. FAAIA is a professional association representing roughly 2,700 architects licensed in the state of Florida. (JS ¶13)

3. FAAIA's licensed Florida architect members are subject to the requirements of the Code in the practice of their profession, and can be subject to discipline or found negligent if they fail to comply with the requirements of the Code. *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 theories each provided independent basis for finding liability derived from architect's violating the Code); *Juhn v. Dep't of Prof'l Reg.*, 431 So. 2d 190 (Fla. 1st DCA 1983)(architect can be subjected to discipline for failure to comply with applicable codes). (JS ¶14)

4. FAAIA and its architect members would be substantially affected should the Proposed Rule be adopted. (JS ¶15)

II. Proposed Rule Challenge

5. On November 15, 2017, the Commission published a Notice of Proposed Rule to amend Rule 61G20-2.002, Florida Administrative Code. Fla. Admin. Reg., Vol. 43, No. 221, at 5188.

6. The Proposed Rule purports to change the triennial update process for the Code to conform with changes made to section 553.73, Florida Statutes, in 2017. *Id. See also* Ch. 2017-149, Laws of Florida.

7. Among the Proposed Rule changes is the requirement that only provisions of certain model codes that are “needed to accommodate the specific needs of this state” may be incorporated into the Code when the triennial update is adopted. Fla. Admin. Reg., Vol. 43, No. 221, at 5188.

8. The Proposed Rule also sets out that the first step of the triennial update process is for the Commission to “select the model codes that will be used to conduct its review.” *Id.*

9. Beyond the above stipulated facts (JS ¶¶ 10-15), the Parties agreed that this Proposed Rule challenge poses purely legal questions and there are no material factual disputes relevant to a determination of the invalidity of the Proposed Rule. (JS ¶ 16)

CONCLUSIONS OF LAW

I. Legal Authorities Applicable to the Proposed Rule Challenge

10. At issue in this Proposed Rule challenge is the Florida Building Commission’s statutorily-mandated, triennial update of the Florida Building Code based upon review of certain model building codes.

11. The triennial update process is governed by section 553.73, Florida Statutes, and Rule 61G20-2.002, Florida Administrative Code.

12. Chapter 120, Florida Statutes, governs this proceeding. (JS ¶17)

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.54, 120.56, and 120.57(1), Florida Statutes.

14. FAAIA has standing⁴ to challenge the Proposed Rule on the ground that FAAIA and its architect members would be substantially affected should the Proposed Rule be adopted. *See NAACP, Inc. v. Florida Bd. of Regents*, 863 So. 2d 294 (Fla. 2003) (confirming that association with members who are substantially affected by proposed rule has associational standing to pursue rule challenge on behalf of members). (JS ¶15)

15. The burden therefore is on the Commission to prove by a preponderance of the evidence that the Proposed Rule is not an invalid exercise of delegated legislative authority based on FAAIA's objections. *See* § 120.56(2)(a), Fla. Stat. ("The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. The agency then 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.").

16. Section 120.58, Florida Statutes, provides

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 any one of the following, among others, applies:

- (b) The agency has exceeded its grant of rulemaking authority;
- (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented;
- (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in

the agency;

- (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
- (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

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.

(Emphasis added).

II. The Florida Building Code Update and Amendment Process

17. Prior to statutory changes effective in 2017, section 553.73(7), Florida Statutes (2016), required the Commission to update the Code every three years. The purpose of this triennial update process was to incorporate changes made in the last three years 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 National Electrical Code, and the International Energy Conservation Code (collectively, the “Model Codes”), which were statutorily-mandated to be the “foundation codes” for the Florida Building Code. § 553.73(7)(a), Fla. Stat. (2016). (JS ¶23)

18. The Commission was given no discretion in adopting the Model Codes as the foundation for the Florida Code. *Id.*

19. In addition to the triennial updates, the Commission had authority to make annual technical amendments through which the Commission could modify the Code based on its own interpretations, declaratory statements, appellate decisions, and approved statewide and local technical amendments. These technical amendments were only permitted as necessary “to accommodate the specific needs of the state.” §§ 553.73(7)(d), 553.73(9)(a), Fla. Stat. (2016).

20. In 2017, the Florida Legislature made changes to section 553.73, Florida Statutes, relating to the triennial update process. (JS ¶27)

21. The technical amendment process did not change. It continues to permit technical amendments to the Code only “as needed to accommodate the specific needs of the state.” § 553.73(9)(a), Fla. Stat. (2016-2017). (JS ¶26)

22. Under the amended statute, the Commission still must update the Florida Building Code every three years. § 553.73(7)(a), Fla. Stat. But instead of mandating that the Commission adopt the updated Model Codes, the statute now requires the Commission to review the Model Codes, and consider whether to incorporate Model Code updates into the Florida Code:

The commission shall adopt an updated Florida Building Code every 3 years through review of the most current updates of the [Model Codes].... At a minimum, the commission shall 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. (Emphasis added).

23. As noted above, technical amendments still may be adopted only “as needed to accommodate the specific needs of this state.” §§ 553.73(7)(c), 553.73(9)(a), Fla. Stat. However, there is no similar threshold requirement for adoption of Model Code updates. § 553.73(7)(a), Fla. Stat.

III. The Proposed Rule

24. The Proposed Rule provides, in relevant part:

(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.

Fla. Admin. Reg., Vol. 43, No. 221, at 5188. (Emphasis added).

25. According to the Notice of Proposed Rule, the purpose of the rule changes is to “amend the Commission’s operational procedures in order to comply with changes mandated by section 11, chapter 2017-149, Laws of Florida.” This included changing “[t]he triennial update process for the Code. . . in order to conform with changes made to section 553.73, F.S....” Fla. Admin. Reg., Vol. 43, No. 221, at 5188

26. Consistent with the amended statute, the Proposed Rule states that the Commission may update the Florida Building Code “every three years pursuant to subsection 553.73(7), Florida Statutes,” and that “when updating the code, the Commission shall review the most current updates to the [Model Codes] . . .” Fla. Admin. Reg., Vol. 43, No. 221, at 5188.

27. But contrary to the amended statute, the Proposed Rule limits the adoption of any of the Model Code updates during the three-year update process to only those that are “needed to accommodate the specific needs of this state.” *Id.*

28. The Proposed Rule carries this contrary requirement further by providing an in-depth, four-part review process for the Commission to follow in determining whether an update is needed to accommodate the specific needs of the state.

29. Thus, under the Proposed Rule, provisions of the Model Codes may be included in the updated Florida Code only if it is established that such provisions are “needed to accommodate the specific needs of this state” following a four-step review process. *Id.*

30. Section 553.73, Florida Statutes, included no such threshold requirements for adoption of Model Code updates before the 2017 amendments, and no such requirements were added in 2017.

31. The Proposed Rule also specifically states that the Commission shall begin its triennial update process by selecting the model codes that will be used to conduct its review. Fla. Admin. Reg., Vol. 43, No. 221, at 5188.

32. To the contrary, section 553.73(7), Florida Statutes, specifies the model codes that the Commission must use in conducting the triennial update process:

The commission shall adopt an updated Florida Building Code every 3 years through review of 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, and the International Residential Code, all of which are copyrighted and published by the International Code Council, and the National Electric Code, which is copyrighted and published by the National Fire Protection Association. . . . The commission shall also review and adopt updates based on the International Energy Conservation Code (IECC); however, the commission shall maintain the efficiencies of the Florida Energy Efficiency Code for Building Construction adopted and amended pursuant to s. 553.901.

§ 553.73(7)(a), Fla. Stat. (Emphasis added).

33. Whether the Proposed Rule enlarges, modifies, and / or contravenes the provisions of section 553.73, Florida Statutes that it purports to implement and therefore is an invalid exercise of delegated legislative authority is a matter of statutory interpretation.

34. Legislative intent is the keystone of statutory interpretation. *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 213 (Fla. 2009). When construing a statute and attempting to discern

legislative intent, courts must first look to the actual language used in the statute. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000).

35. Where a statute's language is clear and unambiguous, legislative intent must be derived from the words used in the statute without resort to rules of statutory construction. *Therrien v. State*, 914 So. 2d 942, 945 (Fla. 2005); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454-55 (Fla. 1992); *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960).

36. Here, the Proposed Rule language establishing a legal standard for adopting Model Code updates as part of the Florida Code, the four-step review process for determining whether Model Code updates meet that legal standard, and the discretion given to the Commission to potentially disregard Model Codes during the triennial update process, create material impediments to the inclusion of updated Model Code provisions in the Florida Code.

37. These impediments are not found in section 553.73, Florida Statutes, which—by its plain language—requires the Commission to give consideration to all Model Codes during the triennial review process and mandates triennial adoption of certain Model Code provisions “at a minimum.” § 553.73(7)(a), Fla. Stat.

38. The Proposed Rule therefore is an invalid exercise of the Commission’s delegated legislative authority insofar as it enlarges, modifies, and contravenes the plain language of section 553.73 by establishing a legal standard and adjudicatory process for adoption of Model Code updates through the Commission’s triennial review process that are not provided by statute and are contrary to sections 553.73(3) and 553.73(7)(a), Florida Statutes.

39. Neither does the statute allow the Commission to determine and select the Model Codes it will review for purposes of the triennial update process. Rather, consideration of the Model Codes is statutorily mandated for the triennial update process.

40. The Commission “disputes that the Proposed Rule has the effect of granting the Commission discretion over which model codes will be used in the triennial update of the Florida Building Code.” (JS ¶7)

41. While this may not be the Commission’s intent, it is the effect of the Proposed Rule, and it is not aligned with sections 553.73(3) and 553.73(7)(a), Florida Statutes.

42. The Proposed Rule is an invalid exercise of the Commission’s delegated legislative authority insofar as it enlarges, modifies, and contravenes the plain language of section 553.73 by granting discretion to the Commission to consider, or not consider, the Model Codes during the triennial review process when the plain language of the statute makes consideration of those authorities mandatory.

43. As the Commission has not established by a preponderance of the evidence that the Proposed Rule is a valid exercise of delegated legislative authority as to FAAIA’s objections, the Proposed Rule is hereby deemed invalid on the grounds stated above.

44. The Petitioner has requested attorneys’ fees pursuant to section 120.595. Inasmuch as this Final Order determines that the challenged Proposed Rule is an invalid exercise of delegated legislative authority, Petitioner is entitled to be heard as to entitlement and, if entitled, the amount to which they are entitled under section 120.595, Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The Florida Association of the American Institute of Architects, Inc.'s Petition for the Administrative Determination of the Invalidity of the Proposed Rule against Respondent, Florida Building Commission, is hereby GRANTED. The Proposed Rule is an invalid exercise of delegated legislative authority.

2. Jurisdiction is retained for the purpose of determining reasonable attorneys' fees and costs. Any motion to determine fees and costs shall be filed within sixty (60) days of the issuance of this Final Order.

DONE AND ORDERED this _____ day of _____, 2018,
in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the Division of
Administrative Hearings this _____ day of
_____, 2018.

COPIES FURNISHED:

W. Justin Vogel, Esquire
Department of Business and
Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399-2022
(eServed)

D. Ty Jackson, Esquire
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
Post Office Box 11189
Tallahassee, Florida 32302
(eServed)

J. Michael Huey, Esquire
GrayRobinson, P.A.
301 South Bronough Street, Suite 600 (32301)
Post Office Box 11189
Tallahassee, Florida 32302
(eServed)

Allison G. Mawhinney, Esquire
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
(eServed)

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.

¹ Citations to the Joint Stipulation will be by paragraph number, as follows (JS ¶1).

The Parties' only exhibits are legal authorities which will be referenced by their appropriate legal citation.

² Citations to the Florida Statutes will refer to Florida Statutes (2017) unless otherwise-noted.

³ Section C, Joint Exhibits, of the Joint Stipulation of Facts, Legal Issues, and Exhibits filed on January 9, 2018, contained scrivener errors in C.3. and C.4. The corrected exhibit citations are contained on pages 3 and 4 of this Final Order.

⁴ 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. § 120.56(1), Fla. Stat. (JS ¶18)