

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.

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**RESPONDENT FLORIDA BUILDING COMMISSION'S PROPOSED FINAL ORDER**

The parties to this rule challenge proceeding agreed that the issues to be determined are legal matters and that a formal administrative hearing was not required. Thus, no hearing was held. All parties submitted Proposed Final Orders on January 19, 2018, which were duly considered by Elizabeth W. McArthur, Administrative Law Judge with the Division of Administrative Hearings.

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### **STATEMENT OF THE ISSUE**

1. This is a proposed rule challenge filed by the Florida Association of the American Institute of Architects, Inc., (“Petitioner”) against Respondent, Florida Building Commission (the “Commission”), pursuant to section 120.56, Florida Statutes, seeking a determination that Proposed Rule 61G20-2.002, Florida Administrative Code (the “Proposed Rule”) enlarges, modifies, and contravenes the provisions of Florida Statutes that it purports to implement and therefore is an invalid exercise of delegated legislative authority.

### **FINDINGS OF FACT**

2. 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 (Nov. 15, 2017). The Proposed Rule relates to the adoption, updating and amendment of the Florida Building Code.

3. The Proposed Rule is the subject of this case.

4. 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 61G20, Florida Administrative Code.

5. Petitioner is a professional association representing roughly 2,700 architects licensed in the state of Florida.

6. Petitioner's licensed Florida architect members are subject to the requirements of the Florida Building Code in the practice of their profession, and can potentially be subject to discipline or held liable for negligence if they fail to comply with the requirements of the Florida Building 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 Florida Building Code); Juhn v. Dep't of Prof'l Reg., 431 So. 2d 180 (Fla. 1st DCA 1983) (architect can be subjected to discipline for failure to comply with applicable codes).

### **CONCLUSIONS OF LAW**

7. Chapter 120, Florida Statutes, governs this proceeding.

8. 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. (2017).

9. Petitioner has standing to challenge the Proposed Rule on the ground that Petitioner 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 a proposed rule has associational standing to pursue rule challenge on behalf of members).

10. An "invalid exercise of delegated legislative authority" is an "action that goes

beyond the powers, functions, and duties delegated by the Legislature.” § 120.52(8), Fla. Stat. (2017). 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.

§ 120.52(8), Fla. Stat. (2017).

11. Section 120.52(8), Florida Statutes, provides that:

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.

A. The Florida Building Code Update and Amendment Process Prior to the 2017 Amendments to Section 553.73, Florida Statutes

12. Prior to the 2017 amendments brought about by chapter 2017-149, Laws of Florida, the statutory framework in section 553.73, Florida Statutes, conceived of certain model codes acting as “foundation codes” for the Florida Building Code. Subsection 553.73(3) stated that “[t]he commission shall use the International Codes published by the International Code Council, the National Electric Code (NFPA 70), or other nationally adopted model codes and

standards needed to develop the base code in Florida to form the foundation for the Florida Building Code.” § 553.73(3), Fla. Stat. (2016) (emphasis added) (amended 2017).

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

The commission, by rule adopted pursuant to ss. 120.536(1) and 120.54, shall update the Florida Building Code every 3 years. When updating the Florida Building Code, the commission shall select the most current version of the International Building Code, the International Fuel Gas Code, the International Mechanical Code, the International Plumbing Code, and the International Residential Code, all of which are adopted by the International Code Council, and the National Electrical Code, which is adopted by the National Fire Protection Association, 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 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 to 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. (2016) (emphasis added) (amended 2017).

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

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

Id.

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

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

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

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

17. Besides the triennial update process described in subsection 553.73(7), section 553.73 contained two other mechanisms to make changes to the Florida Building Code. Subsection 553.73(8) provided a means for the Commission to amend the Florida Building Code to address such issues as conflicts within the updated code, conflicts between the updated code and the Florida Fire Prevention Code, unintended results from the integration of Florida-specific amendments into the model codes, changes to or inconsistencies with state or federal law, equivalency of standards, or in order to adopt an updated edition of the National Electrical Code. See § 553.73(8)(a)-(f), Fla. Stat. (2016). Finally, subsection 553.73(9) provided a means

to make annual changes to the Florida Building Code, provided that the amendments met certain criteria:

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.

§ 553.73(9)(a)1.-5., Fla. Stat. (2016). Subsection 553.73(9) also provided that the Commission could approve technical amendments once each year to incorporate its own interpretations of the Florida Building Code. Id.

18. There were thus three separate and distinct ways for the Florida Building Code to be modified: i) during the triennial update process described in subsection 553.73(7), when the foundation codes were adopted with any necessary amendments; ii) at any time in order to address the specific situations listed in subsection 553.73(8), or; iii) once each year in accordance with subsection 553.73(9).

B. Whether the Proposed Rule Enlarges, Modifies, or Contravenes Statute by Requiring Technical Amendments to be Necessary to Accommodate the Specific Needs of the State.

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

20. Instead of adopting model codes as the foundation for the Florida Building Code and amending them as needed, triennial updates now consist of reviewing the model codes and

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

21. The Proposed Rule amends the current rule in order to bring it into conformance with the changes made to section 553.73, Florida Statutes, in 2017. See Ch. 2017-149, § 11, Laws of Florida.

22. Consistent with the amended statute, the Proposed Rule states that the Commission may amend the Florida Building Code “to 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] . . .” Proposed Rule 61G20-2.002(2)(a).

23. Under the Proposed Rule, during the triennial update process, the Commission may adopt as technical amendments to the existing Florida Building Code any portion of the model codes, but only as “needed to accommodate the specific needs of this state.”

24. Specifically, the Proposed Rule provides, in part, 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.

25. Petitioner asserts that the Proposed Rule is an invalid exercise of delegated legislative authority because it provides that in order for changes in the model codes to be adopted as amendments to the Florida Building Code during the triennial update, they must be shown to be “needed to accommodate the specific needs of this state.” Petitioner denies that the terms of subsection 553.73(7)(c) apply to the triennial update process, and instead construes them as applying to the yearly technical amendments that are governed by subsection 553.73(9). Petition ¶22. Petitioner’s argument fails for several reasons.

26. First and foremost, the plain language of subsection 553.73(7)(c) unambiguously states that “[a]mendments that are adopted in accordance with this subsection shall be clearly marked in printed versions of the Florida Building Code so that the fact that the provisions are amendments is readily apparent.” § 553.73(7)(c), Fla. Stat. (2017) (emphasis added). Subsection 553.73(7) describes the triennial update process for the Florida Building Code; it did so prior to the 2017 legislative changes, and continues to do so now. Subsection 553.73(9) is an entirely separate subsection that describes a distinctly different process for amending the Florida Building Code on an annual basis. In order to accept Petitioner’s interpretation, one would have to read out of paragraph (7)(c) the plain language that amendments may be adopted in accordance with subsection 553.73(7), and instead assume that the legislature meant to refer to subsection 553.73(9), or perhaps to paragraph (7)(c) itself. There is no reason to engage in such

contortions, however, since the statute is both unambiguous and logically coherent in how it provides for different ways of amending or updating the Florida Building Code in subsections 553.73(7)-(9).

27. Secondly, Petitioner's interpretation would render paragraph 553.73(7)(c)'s requirement that "[t]he 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)" superfluous. Subsection 553.73(3) states that "[t]he commission may approve technical amendments to the code as provided in subsections (8) and (9), subject to all of the following conditions..." § 553.73(3), Fla. Stat. (2017) (emphasis added). By requiring technical amendments made during the course of the triennial update process to be subject to the conditions of paragraphs 553.73(3)(a)-(d), the third sentence of paragraph 553.73(7)(c) serves a distinct purpose – it ties conditions that would otherwise apply only to subsections 553.73(8) and 553.73(9) to the triennial update process laid out in subsection 553.73(7).

28. The supreme court has held that "provisions in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words and provisions." Koile v. State, 934 So. 2d 1226, 1231 (Fla. 2006) (citing State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) ("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.") If paragraph (7)(c) were meant to apply to subsection 553.73(9), then its third sentence would be unnecessary, since subsection 553.73(3) already explicitly applies to the yearly technical amendments that can be adopted pursuant to subsection 553.73(9). Accordingly, paragraph (7)(c) should be read as applying to technical amendments adopted pursuant to the triennial process governed by subsection 553.73(7).

29. Finally, if Petitioner’s interpretation of the application of paragraph (7)(c) were correct, it would have the effect of nullifying the effects of the Legislature’s changes to section 553.73 and the triennial update process for the Florida Building Code.

30. Removing the condition that amendments to the Florida Building Code during the triennial update must be needed to accommodate the specific need of the state would strip away key legislative guidance regarding the composition of the “review” of the model codes that subsection 553.73(7)(a) mandates. The provision in paragraph (7)(a) that requires the commission to “[a]t a minimum . . . adopt any updates to such codes or any other code necessary to maintain eligibility for federal funding and discounts from the [federal programs]” acts as a floor for what updates the Commission must adopt. The provision in paragraph (7)(c) which states that “[t]he commission may adopt as a technical amendment to the Florida Building Code any portion of the codes identified in paragraph (a), but only as needed to accommodate the specific needs of this state,” acts as a ceiling. In other words, the Commission may adopt provisions from the reviewed model codes, but only so long as they are needed to accommodate the specific needs of this state.

31. Legislative intent is the polestar that guides the court in statutory construction. Larimore v. State, 2 So. 3d 101 (Fla. 2008) (citing Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003)). Furthermore, “[w]hen the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear.” Mangold v. Rainforest Golf Sports Ctr., 675 So. 2d 639, 642 (Fla. 1st DCA 1996).

32. Petitioner’s interpretation of the statute would strip the legislature’s changes of having any practical effect on the Florida Building Code update process, and effectively result

in maintaining the status quo of adopting the model codes as foundation codes during the triennial update, in the face of clear legislative action to alter that process.

33. Petitioner concedes in a footnote that subsection 553.73(7) states that technical amendments “may only be adopted where needed to accommodate the specific needs of this state.” Petition ¶26. Petitioner argues, however, that the adoption of an updated Florida Building Code every three years is distinct from the process for adopting technical amendments. This is true with respect to the yearly technical amendment process described in subsection 553.73(9), but again misunderstands the application of paragraph (7)(c), which explicitly envisions and provides for “amendments” being adopted in accordance with subsection 553.73(7), i.e. the triennial update.

34. Adopting technical amendments as part of the triennial update is not merely consistent with the process – after the 2017 changes, it is the process, since the update now consists of amending the existing Florida Building Code in order to accommodate the specific needs of the state, rather than adopting model codes and amending them to suit the state’s needs.

35. Under the new regime, the most recent versions of the model codes are no longer adopted as the foundation codes. Rather, the Florida Building Code as it currently exists acts as the foundation code, and the most recent versions of the model codes are to be reviewed by the Commission, which may then adopt provisions from the model codes as technical amendments to the Florida Building Code as part of its triennial update, but only as needed to accommodate the specific needs of the state.

36. This represents a clear and logical shift in how the triennial update process will work. Whereas before there was a required burden to justify deviation from the provisions of the model codes, the burden has been shifted so that one must now demonstrate that provisions

from those codes are needed to accommodate the specific needs of the State of Florida in order for them to be included as amendments to the Florida Building Code during its triennial update. This change to the process could conceivably result in the Florida Building Code deviating more from the model codes than in the past, since their provisions are no longer adopted by default. Petitioner worries that the result of this change could be to “[subject] architects and other construction professionals, as well as the public, to unsafe or unreasonable requirements.” Petition ¶4.

37. Petitioner’s concerns are a policy argument that should appropriately be addressed to the Legislature, which is the author of the new process. The parties concur that the Proposed Rule was promulgated by the Commission in response to the legislative changes made to section 553.73; this course of action is consistent with the Commission’s responsibility to implement the Legislature’s will, rather than question its wisdom.

38. The Commission’s interpretation of section 553.73, a statute it is charged with administering, is entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). When an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained, even though another interpretation may be possible or even, in the view of some, preferable. Humhosco, Inc. v. Dep’t of Health and Rehab. Servs., 476 So. 2d 258, 261 (Fla. 1st DCA 1985).

39. An agency is accorded broad discretion and deference in the interpretation of the statutes which it administers, and an agency's interpretation should be upheld when it is within a range of permissible interpretations and unless it is clearly erroneous. Pan Am. World Airways,

Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983); see also Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001).

40. Courts have, historically, given deference to agencies based on agency expertise in the areas regulated. See, e.g., Wallace Corp. v. City of Miami Beach, 793 So. 2d 1134 (Fla. 1st DCA 2001) (noting that an agency's construction of a statute it is given power to administer will not be overturned unless clearly erroneous). Traditionally, agencies generally have more expertise in a specific area they are charged with overseeing, and courts have noted the benefit of the agency's technical and/or practical experience in its field. Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008).

41. An agency is empowered to adopt rules where there is both (1) a statutory grant of rulemaking authority, or statutory language explicitly authorizing or requiring the agency to adopt rules, and (2) a specific law to be implemented. Whiley v. Scott, 79 So. 3d 702, 710 (Fla. 2011). The Legislature delegates rulemaking authority to agencies because agencies generally have expertise in the particular area for which they are given oversight. Id.

42. Section 553.76(1), Florida Statutes, grants the Commission authority to “[a]dopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this part.”

43. Section 553.76(2), Florida Statutes, permits the Commission to “adopt rules related to its consensus-based decisionmaking process, including, but not limited to, super majority voting requirements.”

44. Section 553.76(4), Florida Statutes, grants the Commission authority to “[a]dopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of the Florida Building Code and the provisions of this chapter.”

45. Section 553.77(1)(a), Florida Statutes, directs the Commission to “[a]dopt and update the Florida Building Code or amendments thereto, pursuant to ss. 120.536(1) and 120.54.”

46. Accordingly, the Proposed Rule does not enlarge, modify, or contravene the statute, because the process and requirements it lays out for updating the Florida Building Code during its triennial update process are consistent with the procedure and requirements specified by section 553.73, Florida Statutes.

C. Whether the Proposed Rule Enlarges, Modifies, or Contravenes Statute by Granting Impermissible Discretion to Select Model Codes for Review.

47. Petitioner and Respondent appear to be in agreement that section 553.73(7), Florida Statutes, provides no discretion to the Commission about which codes are to be reviewed for the triennial update to the Florida Building Code. The disagreement is rather about whether the Proposed Rule purports to give, or has the effect of giving, the Commission such discretion. The Commission maintains that the proposed language does not, and that it instead merely reflects the explicit statutory requirement for the Commission to incorporate provisions from any model code when doing so would be necessary in order to maintain eligibility for funding from certain federal programs.

48. Section 553.73(7), Florida Statutes, states as follows regarding the codes that are to be used by the Commission 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. 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. 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. (2017) (emphasis added).

49. In pertinent part, the Proposed Rule reads

(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.

50. Proposed Rule 61G20-2.002(2)(a) explicitly mandates that the Commission “shall review” all of the model codes listed in subsection 553.73(7)(a), Florida Statutes (2017). It thus does not give the Commission any discretion about whether to review these codes; they must be reviewed for the triennial update process.

51. Petitioner specifically cites Proposed Rule 61G20-2.002(2)(a)1., which states that “[t]he Commission shall select the model codes that will be used to conduct its review,” as being the source of the purported discretion to choose which codes to review for the triennial update process. That interpretation of the effect of the language can only be arrived at by failing

to read it in conjunction with the paragraph immediately preceding it, as well as the language from subsection 553.73(7)(a), which specifically directs that “[a]t 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.” § 553.73(7)(a), Fla. Stat. (2017) (emphasis added).

52. This key language reflects a specific legislative directive for the Commission to adopt updates from any code necessary to maintain eligibility for funding for the specified federal programs. It is clear that these federal programs, their funding criteria, and the model codes whose provisions they may require the adoption of are beyond the control of the State of Florida or the Commission. The federal agencies could also foreseeably require the future adoption of provisions from model codes which may not presently exist.

53. The enumerated list of model codes from subsection 553.73(7)(a), Florida Statutes, that the Commission must review therefore cannot be exhaustive; furthermore, some of the codes may not be related to the federal programs at all. In order to comply with the statute, the Commission must review the explicitly listed model codes, as well as any others that are necessary in order to maintain funding or discounts from the specified federal programs. While the Commission therefore has no discretion over the codes it selects, it still must monitor the specified federal programs for requirements to adopt provisions from any code they may cite, and include any required updates from those codes in the updated Florida Building Code as part of the triennial update process.

54. “A statutory grant of power or right carries with it by implication everything necessary to carry out the power or right and make it effectual and complete.” Deltona Corp. v.

Fla. Pub. Serv. Com., 220 So. 2d 905, 907 (Fla. 1969). Since the Commission has been tasked with the duty of adopting the required provisions from any necessary code during the triennial update, it must therefore have the ability to select those codes for inclusion in that process.

55. The rules of statutory construction also apply to the construction of rules. Brown v. State, 715 So. 2d 241, 243 (Fla. 1998). The supreme court has stated that “[i]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.” Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992) (emphasis in original). Statutes and rules “must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.” Id. (quoting Fleischman v. Dep’t of Prof’l Regulation, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983)).

56. The language in rule 61G20-2.002(2)(a)1. specifies that the first step of the triennial update process is for the Commission to select the necessary codes for review. Nothing in that language compels the interpretation that it overrides the language immediately preceding it, which plainly requires the Commission to review all of the model codes listed in paragraph (7)(a) and to update the Florida Building Code pursuant to the requirements of subsection 553.73(7). Reading the Proposed Rule language in *pari materia*, as it must be considered, it is clear that its intent and effect is to reflect that the Commission may have to review and adopt updates from model codes other than those listed explicitly in 553.73(7)(a), Florida Statutes (2017), and in Proposed Rule 61G20-2.002(2)(a).

57. The Proposed Rule therefore does not enlarge, modify, or contravene the statute, because it does not give the Commission any discretion to deviate from its review of the codes required for the triennial update of the Florida Building Code.

**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the proposed changes to rule 61G20-2.002 do not constitute an invalid exercise of delegated legislative authority. Accordingly, the petition is DISMISSED.

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

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ELIZABETH W. MCARTHUR  
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Tallahassee, Florida 32399-3060  
(850) 488-9675

Respectfully submitted this 19th day of January, 2018,

By: /s/ W. Justin Vogel  
W. Justin Vogel  
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Florida Building Commission,  
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<Certificate of Service Follows>

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent Florida Building Commission's Proposed Final Order has been filed via DOAH's electronic filing system, which shall serve a copy via email to the following counsel of record, constituting compliance with the service requirements of Fla. R. Jud. Admin. 2.516(b)(1) and Fla. R. Civ. P. 1.080(a): D. Ty Jackson at [ty.jackson@gray-robinson.com](mailto:ty.jackson@gray-robinson.com); J. Michael Huey at [mike.huey@gray-robinson.com](mailto:mike.huey@gray-robinson.com); and to Allison G. Mawhinney at [Allison.Mawhinney@gray-robinson.com](mailto:Allison.Mawhinney@gray-robinson.com), on this 19<sup>th</sup> day of January, 2018.

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