

SUMMARY OF THE COMMENT OF GREENBERG TRAUERIG, PA, IN SUPPORT OF PROPOSED FLORIDA BUILDING CODE MODIFICATION SP 6623

Adopting Section 453.8.3 without modification SP6623 will be an *invalid exercise of delegated legislative authority* for the following reasons:

1. Section 453.8.3 addresses issues that are not specific needs of this state.

- Strong winds, fire prevention, high humidity, and termites are not unique or specific to Florida. Other states and regions are also vulnerable to hurricanes, fires, humid environments and termites.
- The 2015 edition of the International Building Code already contains requirements to protect buildings (including those built using Type III and Type V construction) from, wind, rain, fire, and termites.

2. Section 453.8.3 discriminates against the use of wood, a construction material and product of demonstrated capabilities.

- Section 453.8.3 effectively prohibits the use of wood (except heavy timber) in the construction of public schools and colleges.
- Wood is the second oldest building material. Millions of structures are constructed out of wood. This experience plus Chapter 23 of both the IBC and FBC demonstrate the capabilities of wood framing type construction.
- The 2015 edition of the International Building Code permits wood construction (Types III and V) in all schools and the 5th edition Florida Building Code permits wood construction in all schools, except non-charter public schools.

3. The impact of Section 453.8.3 on small counties has not been taken into account during the 2017 Florida Building Code adoption process.

- The prohibition of the use of Type III and Type V construction in public schools has obvious potential of imposing a hardship on counties with a small tax base (which are subject to the same constitutional requirements regarding maximum class size as larger counties). However, no information regarding this potential hardship to *small counties* and how it might be addressed can be found on the record of the rulemaking for the 2017 edition of the Florida Building Code.

4. Section 453.8.3, without proposed modification SP6623, is arbitrary and capricious.

- Section 453.8.3 creates an arbitrary ownership-based distinction between certain public schools and private schools which is not supported by logic.
- Construction and maintenance of charter schools is funded all or in part by the state using Public Education Capital Outlay (PECO) funds—the same funding source used for construction and maintenance of public schools which are subject to the limitations set forth in Section 453.8.3.
- There is no health, safety or public welfare public based reason to justify the existence of differing construction standards for school facilities and the students they serve.

5. Section 453.8.3, without proposed modification SP6623, discriminates based on ownership type which is inappropriate in the Florida Building Code.

- The only rationale for imposing the implicit prohibition on Type III and Type V construction in some school buildings and facilities vs. others is discrimination based on ownership type. However, building codes are not supposed to discriminate based on ownership type—apartment buildings and residential condominiums have the same code requirements since the only difference is ownership type. Office buildings and government owned office buildings of the same occupancy group share the same code requirements. Government owned hospitals share the same code requirements as privately owned hospitals. For the building code to provide differently for one use type only—educational occupancies (Groups E and B)—is arbitrary.

6. When building code requirements for schools were promulgated by DOE, it was within DOE's purview to implement its empowering statute. Building Code requirements for schools are now in the Florida Building Code and promulgated by the Commission pursuant to the Commission's authority and responsibility.

- Once the Legislature moved jurisdiction over building code requirements for school buildings and facilities to the Commission, building code requirements for schools became subject to the rules, policies and governing statutes of the Commission.
- Owners of school buildings and facilities such as school boards may choose to use better, more expensive materials than the Florida Building Code mandates. The building code is just the least expensive way an owner can legally build his building. An Owner can always choose to do better.

Memorandum

TO: Richard Browdy, Chair
Members of the Florida Building Commission

CC: April Hammonds, Esq.
Nick Duval, Esq.
Thomas Campbell, Executive Director
Mo Madani

FROM: Robert S. Fine, Esq., AIA
David Ashburn, Esq.
Carlos Diaz, Esq.

DATE: January 2, 2017

RE: **Comment to Proposed Code Modification SP 6623 and Section 453.8.3
of the Proposed Sixth Edition of the Florida Building Code**

**SECTION 453.8.3 OF FLORIDA BUILDING CODE, PROPOSED CODE
MODIFICATION SP 6623 AND THE FLORIDA BUILDING COMMISSION**

INTRODUCTION

Section 453.8.3 of the Florida Supplement to the 2015 International Building Code (“IBC-2015”) is an amendment to the IBC-2015 which specifies the Construction Types allowed in the construction of school board and Florida college buildings including auxiliary, ancillary and vocational facilities and in so doing implicitly prohibits the use of Types III and V construction, i.e., prohibiting wood framing-based construction. Proposed Code Modification SP6623 (the “Modification”) removes the construction type restriction in Section 453 for public schools which conflicts with construction type provisions for schools in Chapters 5 and 6 of IBC-2015. For the reasons set forth below, the Florida Building Commission should adopt the Modification because if it does not, and the 6th Edition of the Florida Building Code (the “FBC-2017”) is finalized and takes effect without the Modification being adopted, the FBC-2017 will constitute an *invalid exercise of delegated legislative authority*.

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THE COMMENTER

The submitter of this comment is the law firm of Greenberg Traurig, PA, including Robert Fine, David Ashburn and Carlos Diaz, in support of the position of the American Wood Council (the “AWC”) in this matter and the Modification. The AWC is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. The AWC provides an organizational structure for wood products companies and associations to work together on building codes and standards, green building policy issues, and a focused set of environmental regulations. In addition, the AWC supports the utilization of wood products by developing and disseminating consensus standards, comprehensive technical guidelines, and tools for wood design and construction, as well as providing education regarding their application. AWC members who are located or do business in Florida include Boise Cascade, LLC, Georgia-Pacific, LLC, Louisiana-Pacific, Masonite, Plum Creek Timber, Sierra Pacific Industries, Weyerhaeuser Company, West Fraser, and Potlatch Corp., to name just a few.

BACKGROUND

In 1998, the Florida Legislature directed the Florida Building Commission (created by HB 4181 that same year) (the “Commission”), to develop a single statewide building code to be adopted by state rule.¹ In 2000, the Legislature took the necessary steps to implement the inclusion of state agency regulations within the Florida Building Code (the “FBC”) by transferring rulemaking authority for those regulations to the Commission. At least 27 separate sections of Chapter 2000-141, Laws of Florida, are dedicated to transferring rulemaking authority for specific construction regulations to the Commission from a variety of state agencies, including the Departments of Environmental Protection, *Education*, Management

¹ A significant part of the Background section of this memorandum is based on an article from the Florida Bar’s Administrative Law Section Newsletter, dated December 2000, titled Chapter 2000-141, Florida Laws: *Administrative Procedural Aspects of the New Building Code Law*. The author of the article was Suzanne H. Schmith, Esq., who at the time served as staff attorney to the Florida Building Commission, a position currently held by April Hammonds, Esq., and prior to that, Jim Richmond, Esq.

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Services, Health, Business and Professional Regulation-Division of Hotels and Restaurants, Community Affairs and the Agency for Health Care Administration.

The purpose of the law (Chapter 2000-141) was to transfer rulemaking authority to the Commission from other state agencies (including the Department of Education) and eliminate duplicative rulemaking by granting the Commission additional authority to adopt, within the FBC, technical construction requirements previously set forth in the statutes (and corresponding rules) themselves. *See* Footnote 1. To ensure a total transfer of rulemaking authority to the Commission, Chapter 2000-141 required that these agencies repeal their existing construction regulations by July 1, 2001.

It should further be noted that in regard to the Department of Education's construction standards being repealed and the transfer of authority to promulgate standards to the Commission, the legislation stated: "[i]t is not a purpose of the Florida Uniform Building Code to inhibit the use of new materials or innovative techniques; nor may it specify or prohibit materials by brand names." Section 11, Chapter 2000-141, Laws of Florida. This is noteworthy because if the Department of Education did not permit the use of wood at the time this legislation was adopted, then "wood" should be considered a new material or innovative technique, especially in light of the higher standards for wood construction that were and still are being imposed by the International Building Code than was the case in the several building codes that were previously authorized by the legislature for use in this State.

THE FLORIDA BUILDING CODE

"The [*FBC*] is based on national model building codes and national consensus standards which are amended where necessary for Florida's specific needs." *FBC*, Preface.² "The purpose of [the *FBC*] is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and

² Unless otherwise indicated, citations to the *FBC* in this memorandum shall be to the 2014 (or 5th) edition.

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other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations.” § 101.3, FBC.

The Legislature mandated that “[t]he Commission... shall update the [FBC] every 3 years.” § 553.73(7)(a), Fla. Stat. (2016).³ “When updating the FBC, the Commission must select the most current version of the International Building Code ... to form the foundation codes of the updated FBC.” *Id.* “The Commission may modify any portion of the foundation *codes only as necessary to accommodate the specific needs of this state.*” § 553.73(7)(c), Fla. Stat. (emphasis added). In addition, the Commission may approve amendments to the FBC upon a finding that the amendment: (1) has a reasonable and substantial connection to the health, safety and welfare of the general public; (2) strengthens or improves the FBC, or (3) 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) and does not degrade the effectiveness of the FBC. § 553.73(9)(a), Fla. Stat. (emphasis added); *see also* Rule 61G20-2.002, F.A.C., and as implemented by Form 61G20-1.001, F.A.C. The Commission’s updates to the FBC must be adopted pursuant to Sections 120.536(1) and 120.54, Florida Statutes. § 553.73(7)(a), Fla. Stat.

COMMENT

The FBC is an administrative rule. § 553.73(1)(a), Fla. Stat. It is comprised of a group of base codes, referred to in the building code statutes as the *foundation codes*, which the Commission may modify “only as needed to accommodate the specific needs of this state.” §§ 553.73(7)(a), (c), Fla. Stat.(emphasis added).⁴ Because the rulemaking process for the adoption of the new edition of the FBC is subject to Section 120.536(1), Florida Statutes, the Commission may only adopt a rule that implements or interprets the specific powers and duties granted by Section 553.73, Florida Statutes, and which is not arbitrary or capricious. § 120.536(1), Fla. Stat.

³ From this point forward, citations to Florida statutes are intended to refer to the 2016 edition unless otherwise cited.

⁴ Among the base codes, and as relevant to this comment, is the IBC-2015.

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Therefore, any modification to the foundation codes that is not necessary to accommodate the specific needs of this state will constitute an invalid exercise of delegated legislative authority. *Id.*, § 553.73(7)(c), Fla. Stat.⁵

The Modification is attached to this Comment as Exhibit 1. It essentially strikes proposed Sections 453.8.3.1 – 453.8.3.4 from the Florida Supplement to the 2015-IBC and slightly modifies proposed Section 453.8.3. The effect of the Modification is to eliminate the implicit prohibition on the use of Type III and Type V construction in the construction of school board and Florida college buildings including auxiliary, ancillary and vocational facilities. If the Modification is not approved, then the FBC-2017 will be an invalid exercise of delegated legislative authority for the reasons set forth and discussed below.

1. If the Modification is not Approved, then the Commission will have Exceeded its Grant of Rulemaking Authority.

The statute and administrative rule that give the Commission the authority to approve amendments to the foundation codes and promulgate the FBC-2017, as well as the procedural requirements of Chapter 120, Florida Statutes, require that any amendments to the foundation codes are necessary to accommodate the specific needs of this state, and do not discriminate against materials, products, methods or systems of construction. §§ 553.73(7)(c), 553.73(9)(a)(4), Fla. Stat. In addition, there is nothing in the rulemaking record for the FBC-2017 code adoption process indicating that the Commission has considered and taken into

⁵ “Invalid exercise of delegated legislative authority” means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

* * *

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

* * *

(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 ...

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account the potential hardship(s) of the FBC-2017, without the Modification, on small counties (and their respective school boards). § 120.54(3)(b)(2), Fla. Stat.

(a) The amendment to the foundation code (i.e., the IBC-2017) proposed by Section 453.8.3 is not necessary to accommodate the specific needs of this state.

The complete rulemaking record to date in regard to Section 453.8.3 of the FBC-2017 clearly shows that the arguments in support of the amendment to the 2015-IBC proposed by Section 453.8.3 are limited to the following issues:

1. wind/hurricane resistance;
2. fire prevention;
3. high humidity and rainy environment; and
4. termites.

While these are important considerations, none of these issues are unique to the State of Florida such that they raise a subject not addressed in the IBC-2015 which itself accounts for regional differences in weather and other conditions. As such, prohibiting Type III and Type V construction in certain public schools⁶ and universities violates the statutory authorization for rulemaking (to create the FBC) set forth in Section 553.73(7)(c), Florida Statutes (“The commission may modify any portion of the foundation codes only as needed to accommodate the specific needs of this state.”).

Residents of Florida live with the threat of hurricanes and high-wind tropical weather systems and the subject certainly occupies a large percentage of the collective concern in the building code writing, and building code compliance communities, in how to design Florida structures to safely withstand these weather systems. That being said, residents of New Orleans (Hurricane Katrina—Category 5, 3 at landfall), Galveston (Hurricane in 1900), Myrtle Beach (Hurricane Hugo—Category 4), Hawaii (Hurricane Iniki—Category 4) and recently New York and New Jersey (Sandy) would strongly disagree that hurricanes and high wind events are Florida-specific events. The International Code Council would also disagree with this

⁶ The arbitrary nature of the prohibition against wood construction that is the subject of this memorandum is further demonstrated by the fact that it does not apply to all public schools. It does not apply to charter schools, which are public schools. *See*, § 1002.33(1), Fla. Stat.; *see also* Page 14, below.

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characterization, which is why the IBC-2015 adopts ASCE 7-10 as its wind loads resistance standard, the same as proposed for the FBC-2017.

Fire prevention is always a significant concern, especially in buildings with high occupancy and even more so when the bulk of the occupancy is children. However, there is no factual basis for arguing that fire prevention in Florida is somehow uniquely different and more severe than in other states. Florida adopts the fire prevention provisions of the IBC and also of NFPA 1 and 101, each with Florida-specific amendments, and these codes apply to structures constructed of wood just as they do to structures constructed of other materials so that wood framed structures in Florida, including public schools if they were to be constructed of Type III or Type V construction, are required to meet the same level of fire-safety as any other newly constructed buildings in Florida, whether constructed of concrete or CMU, steel framing, or wood.

Floridians consider their state to be the capital and home turf of humidity and wet/rainy environments and for good reason. But, as Exhibit 2 indicates, residents all along the Gulf Coast, the Deep South and even Seattle, Washington, have essentially equal claims to the high humidity and wet/rainy environment title. While Florida has its share of high humidity and wet/rainy days, this is certainly not an issue or concern that is unique to Florida.

Termites are clearly problematic in Florida. But the problem is not specific to this state. Exhibit 3 which depicts the geographic areas of the country that are affected by termites dispels that notion without need for further discussion. Furthermore, the IBC and FBC each contain provisions mandating and specifying termite prevention.

This Commenter does not doubt that the four issues discussed immediately above are serious problems, all of which require being addressed in the design, construction and maintenance of all buildings in Florida, including public schools. None of these four issues, however, are specific to Florida. And each of them is addressed in the IBC-2015 which establishes minimum requirements to protect newly constructed buildings from wind, rain, flood, and termites based on well-researched and continually-evolving engineering standards. However, the statutes authorizing the Commission to undertake rulemaking to promulgate the

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FBC and its triennial updates are very clear—the modifications that the Commission is authorized to make to the foundation codes are expressly limited to those intended to address issues that are specific to Florida. Not issues that are serious to Florida, but issues that are specific to Florida. To date, none of the issues of concern raised in the rulemaking record during the FBC-2017 code adoption process in connection with Section 453.8.3 and the Modification are specific to Florida. As such, relying on any one of them to justify a modification to the IBC-2015 would be an *invalid exercise of delegated legislative authority*. § 553.73(7)(c), Fla. Stat.

(b) By not approving the Modification and thereby approving an amendment to the IBC-2015 that prohibits the use of Type III and Type V construction, which effectively prohibits the use of wood (except heavy timber) in the construction of certain public schools and colleges, the Commission would be discriminating against the use of wood, a construction material and product of demonstrated capabilities, causing the FBC-2017 to be an *invalid exercise of delegated legislative authority*.

Wood—yes, wood. The proponents of maintaining Section 453.8.3 without being modified by the Modification, are asking the Commission to violate Section 553.73(9)(a)(4), Florida Statutes, and Rule 61G20-2.002, F.A.C., as implemented by Form 61G20-1.001, F.A.C., by continuing the discrimination against the world’s oldest construction material (after brick). Materials in Architecture, Rory Scott and Nuphap Aunyanuphap, [http://images.adsttc.com/media/images/52fb/9080/e8e4/4ea7/5800/013c/large_jpg/Archdaily_Infographic_01_option1_1056_width_\(1\).jpg?1392218193](http://images.adsttc.com/media/images/52fb/9080/e8e4/4ea7/5800/013c/large_jpg/Archdaily_Infographic_01_option1_1056_width_(1).jpg?1392218193) (last visited January 2, 2017). This discrimination against a material and construction techniques of very clearly documented capabilities is exactly what the building code statutes and administrative rules are designed to prevent.⁷ The FBC’s purpose is to specify a level of safety and performance that each building material and assembly must meet and typically, the prescribed level of performance is the same regardless of the construction materials used. For example, a two hour fire-rated wall is a two

⁷ It is unnecessary to list wood’s demonstrated capabilities (to the extent it is, however, *see* Chapter 23, FBC-2014 or IBC-2015). Buildings such as the Barnacle House in Miami (constructed in 1891) and the Buddhist temples of Horyu-ji, Japan (built in the 6th and 7th centuries) are a testament to the material’s capabilities and its durability. And evolving technologies have only enhanced the capability and durability of wood construction since the construction of those other structures.

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hour fire-rated wall whether it is constructed from the appropriate assembly of fire-rated drywall and metal studs, or from concrete block.

Chapter 23 of the 2014 edition of the FBC (“2014-FBC”) sets forth comprehensive standards and requirements for wood in the construction of buildings as does the IBC-2015. Most notable however, is the fact that the IBC-2015 and the FBC-2014 allow for the use of Type III and Type V construction (allowing for wood framing) in Occupancy Group E buildings which include, among others, K-12 schools (all schools in the IBC-2015 and all but public schools in the FBC-2015). *See, e.g.*, Tables 504.3, 504.4 and 506.2 in both the IBC-2015 and the FBC-2014. Surely, the IBC and the FBC would not allow for the use of wood framed construction in schools of well over 50,000 square feet if the writers of those codes were not comfortable with the demonstrated capabilities of wood, as a building material, and wood framing as a construction technique. Since wood (as a construction material), wood framing (as a construction technique), and Type III and Type V construction (which utilize wood framing), are clearly *materials and methods of demonstrated capabilities*, if the Modification is not adopted by the Commission, the FBC-2017 will discriminate against the use of Type III and Type V construction, and by extension, the use of wood and wood framing. Accordingly, the FBC-2017 will be in violation of Section 553.73(9)(a)(4), Florida Statutes, and Rule 61G20-2.002, F.A.C., as implemented by Form 61G20-1.001, F.A.C., rendering the FBC-2017 an *invalid exercise of delegated legislative authority*.

- (c) Because the impact of the addition of Section 453.8.3 to the base code for the FBC-2017, without the Modification being adopted by the Commission, on *small counties* (as defined in Section 120.52, Florida Statutes) has not been taken into account so as to reduce any disproportionate impact on the small counties, adoption of the FBC-2017 without the Modification will violate Section 120.54, Florida Statutes rendering the FBC-2017 an *invalid exercise of delegated legislative authority*.**

The State of Florida has 67 counties. Of those, at least 27 counties fall within the definition of *small county* as set forth in Section 120.52(19), Florida Statutes. US-Places.com, <http://www.us-places.com/Florida/population-by-County.htm> (last visited December 30, 2016).

The Commission’s legislative grant of authority and mandate to update the FBC every three

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years requires it to conduct rulemaking pursuant to Sections 120.536(1) and 120.54, Florida Statutes. § 553.73(7)(a), Fla. Stat. Section 120.54(3)(b)2, Florida Statutes mandates that “[e]ach agency, before the adoption, amendment, or repeal of a rule, shall consider... the impact of the rule on small counties or small cities as defined by s. 120.52.” § 120.54(3)(b)2.a., Fla. Stat.

The agency shall consider each of the following methods for reducing the impact of the proposed rule on...small counties...:

* * *

- IV) Establishing performance standards or best management practices to replace design or operational standards in the rule.
- (V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

Id.

The population of Florida’s largest county (population-wise), Miami-Dade County, is 2,592,710. The population of the smallest county (population-wise), Liberty County, is 8,267. The population of the largest of the 27 counties that is a *small county*, as defined in Section 120.52(19), Putnam County, is 72,023. US-Places.com, <http://www.us-places.com/Florida/population-by-County.htm> (last visited December 30, 2016).

On November 2002, Florida’s voters approved a statewide constitutional amendment (Article IX, Section 1) setting limits for the maximum number of students in classrooms by the start of the 2010-2011 school year. Florida Department of Education, Class Size Reduction Amendment History, <http://www.fldoe.org/finance/budget/class-size> (last visited December 30, 2016). This amendment imposed a constitutional obligation on public school districts requiring them to add classrooms (and by extension, build schools) as necessary to lower the number of students in each class. One can only imagine the potential difference in hardship on a county with 25,000 or 50,000 residents with the relatively small number of homes available to increase school board taxes on compared with counties with populations of 500,000, 1,000,000, and even Miami-Dade County with almost 3 million residents upon which their tax base lies, and the large counties’ tax bases—when having to build new class rooms and schools. However, there is nothing in the rulemaking record for the FBC-2017, in particular Section 453.8.3, that evidences any effort to assess qualitatively or quantitatively the additional hardship on smaller counties due

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to the costs imposed by the modification to the IBC-2015 to build any additional needed classrooms without having the option of using typically less expensive Type III or Type V construction. Since the impact of the addition of Section 453.8.3 to the 2015-IBC as part of creating the base code for the FBC-2017 on *small counties* (as defined in Section 120.52, Florida Statutes) has not been taken into account so as to reduce any disproportionate impact on the small counties (including by considering adopting the Modification), the adoption of the FBC-2017 with Section 453.8.3 included but without the Modification being adopted and applied will violate Section 120.54, Florida Statutes rendering the FBC-2017 an *invalid exercise of delegated legislative authority*.

- 2. The adoption of the FBC-2017 without the Modification will result in a rule that enlarges, modifies, or contravenes the specific provisions of law implemented.**
- 3. The adoption of FBC-2017 without the Modification will result in a rule that is arbitrary and/or capricious resulting in the FBC-2017 being an *invalid exercise of delegated legislative authority*.**

The IBC-2015 does not contain Section 453.8.3 as it appears in the proposed FBC-2017 (without the Modification). Section 453.8.3 proposes an amendment to the IBC-2015 which is not logical or supported by justifying facts and will result in a FBC-2017 which contains provisions governing the construction of schools and colleges based solely on ownership. This ownership-based distinction is not only against the Commission's stated purpose, it is also against its Legislative mandate and wholly irrational.

The IBC-2015 (and building codes generally) provides different regulations for buildings (including educational facilities) based on their usage, siting, size, etc., but not on their ownership or type of ownership. Section 305.1 of the IBC-2015 defines Occupancy Group E as the use of a building or structure by six or more persons at any one time for educational purposes through the 12th grade. Section 304.1 of the IBC-2015 defines Business Group B occupancy to include, among other things, "educational occupancies for students above the 12th grade." Sections 304.1 and 305.1 of the proposed FBC-2017, however, proposes the following amendment to the IBC-2015 :

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305.3 Public and private educational occupancies shall comply with Section 443.

305.4 Public education occupancies shall comply with Section 453.

§§ 305.3, 305.4, FBC-2017 (Proposed). The proposed FBC-2017 does not contain a Section 443. Therefore, Section 305.3 of FBC-2017 is either a scrivener's error and should be removed or it is arbitrary and irrational on its face.

Section 453 of the FBC-2017 (without the Modification) is titled *State Requirements for Educational Facilities*. Section 453.1 indicates that the requirements for public educational facilities are found in Section 453. Section 453.8 provides "General requirements for new construction, additions, renovation, and remodeling." Section 453.8.3 governs "Construction type." This Comment concerns the Modification, which contains language modifying Section 453.8.3 of the proposed FBC-2017, and without which, Section 453.8.3 results in a code, and a rule, that is arbitrary and capricious.

K-12 schools and universities and colleges that are not *public educational facilities*, Occupancy Groups E and B, respectively, have their construction standards provided in the IBC-2015. Tables 504.3, 504.4, 506.2 and Section 507.11 (of 2015-IBC) are just some examples demonstrating that Type III and Type V construction may be used in the construction of K-12 schools and universities and colleges. In the IBC-2015, there is no additional limitation on public schools (whether K-12 or universities and colleges) that preclude their being built of Type III or Type V construction. The authors of the IBC have not found a need to differentiate schools based on whether they are owned by the public or private entities.

The FBC-2017 (without the Modification) regulates K-12 schools and universities and colleges that are not *public educational facilities* exactly the same as does the IBC-2015 (except for a provision in Section 507.11 that is not relevant to the discussion of Section 453.8.3 of Proposed FBC-2017 that is the ultimate subject of this Comment). However, the FBC-2017 (without the Modification) sees K-12 schools and universities and colleges that are *public educational facilities* as warranting a different set of construction requirements, or more accurately, limitations. In effect, Section 453.8.3 of Proposed FBC-2017 (without the

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Modification) mandates that *public educational facilities* shall not be constructed of Type III or Type V construction. This mandate, for all practical purposes, prohibits the use of wood framing in the construction of *public educational facilities*.

The Proposed FBC-2017 states as follows:

The purpose of this code is to establish the minimum requirements to provide a *reasonable level of safety*, public health and general welfare *through structural strength*, means of egress facilities, *stability*, sanitation, adequate light and ventilation, *energy conservation*, and *safety to life and property from fire* and other hazards attributed to the built environment and to provide a reasonable level of safety to fire fighters and emergency responders during emergency operations.

§ 101.3, Proposed FBC-2017 (emphasis added). This language is the same as is found in the IBC-2015 and FBC-2014. This is what the building code is about, and should be about. And it should be about this to all occupants of all buildings covered by and built under these codes regardless of who the owner of the building is.

The Florida Legislature, in authorizing and mandating the creation of the Florida Building Code, set down in statute its purpose and intent for what the Florida Building Code was to be, and what it is supposed to do:

The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code, to be called the Florida Building Code, which consists of a single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state and to the enforcement of such requirements and *which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida* at the most reasonable cost to the consumer.

§ 553.72(1), Fla. Stat. (emphasis added).

The Legislature directed the Commission to create and adopt a uniform statewide building code “which will allow effective and reasonable protection for public safety, health, and general welfare *for all the people of Florida.*” *Id.* (emphasis added). This is what the FBC is intended to do, is commanded by the Legislature to do...and what it does!

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Charter schools are an illustrative example of Section 453.8.3's arbitrariness. Section 453.8.3 applies to *public educational facilities* but not to charter schools even though "all charter schools in Florida are public schools" and their construction and maintenance is funded all or in part by the state using Public Education Capital Outlay (PECO) funds—the same funding source used for construction and maintenance of public schools which are subject to the limitations set forth in Section 453.8.3. § 1002.33(1), Fla. Stat.

There are over 270,000 students currently enrolled in charter schools in Florida. Charter Schools, Florida Department of Education, <http://www.fldoe.org/schools/school-choice/charter-schools/> (last visited December 30, 2016). With the first charter schools in the state being built in 1996 and the FBC taking effect in 2002, the vast majority of charter schools in Florida were likely constructed under the FBC. Since the provisions of proposed Section 453 of the FBC-2017 (without the Modification), Section 453 of the FBC-2014, Section 443 of the 2010-FBC and Section 423 of the FBC-2007, FBC-2004 and FBC-2001 (which all contain the same substantive requirements as Section 453.8.3 of Proposed FBC-2017 (without the Modification)) all govern only *public educational facilities*, all charter schools in Florida constructed or altered since the FBC first took effect in 2002 were constructed under a building code that did and still does (as applicable) permit the use of Type III and Type V construction. This means that all of the children and young adults who have gone to charter schools in Florida that were constructed or altered from 2002 to the present, including the 270,000 students who are currently enrolled,⁸ attended school in buildings and facilities that were constructed under a building code that was written to provide "effective and reasonable protection for public safety, health and general welfare for all the people of Florida," *id.*, and under a set of building code provisions that did not (or do not) prohibit the use of Type III and Type V construction.

⁸ 270,000 students currently enrolled in charter schools in Florida is approximately 10% of the approximately 2,748,000 students enrolled in public schools in Florida. See, <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.stml> (last visited January 2, 2017); see also, <http://www.fldoe.org/schools/school-choice/charter-schools/> (last visited January 2, 2017).

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In addition to all of those students who went, or who are still going to charter schools, all of the children and young adults (not to mention faculty and administration) who have gone to private schools in Florida in buildings and facilities that were constructed or have undergone alterations since 2002, likewise were educated in buildings and facilities constructed under the same building code provisions as those discussed above relating to charter schools.

Both the Legislature's mandate in creating the FBC, and the FBC's stated purpose, make clear that those millions of students, teachers and administrators who currently attend or work in, or who attended or formerly worked in, all of the charter schools and private schools in Florida constructed or renovated since 2002, spent their time in school in buildings and facilities that were built under a code designed to "*allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida* at the most reasonable cost to the consumer." § 553.72(1), Fla. Stat. These students, teachers and administrators spent many years in buildings built under a building code that by its own terms provided "*a reasonable level of safety, public health and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire.*" § 101.3, 2014-FBC (as well as Proposed FBC-2017).

The proponents of the amendment to the IBC-2015 to include Section 453.8.3 argue that public schools cannot be constructed using Type III or Type V construction because they will not be safe enough. But such comments fly in the face of the mandate of the legislature and the FBC's own terms. Millions of Floridians have attended or worked in (charter and private) schools built under code requirements that provided *effective and reasonable protection for public safety, health, and general welfare for all the people of Florida* at the most reasonable cost to the consumer. § 553.72(1), Fla. Stat. If the requirements in the FBC that charter schools and private schools are constructed under meet the standard set forth by the Legislature, then what are the heightened requirements set forth in Section 453.8.3 based on? The provisions of Section 453.8.3 of the Proposed FBC-2017 (without the Modification) do not conform to the IBC. The code provisions that charter schools and private schools are constructed under are consistent with the IBC. Disallowing wood construction, as discussed in detail above, does not

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satisfy a need specific to Florida (a mandatory requirement for any modification to the IBC) and does not track the requirements of the model code the Legislature selected as the base code for Florida. From a building code perspective, it is therefore an arbitrary requirement. Allowing the modification to the IBC-2015 to include Section 453.8.3 (without the Modification) to create the FBC-2017 will result in the FBC-2017 containing an arbitrary provision and thus be an *invalid exercise of delegated legislative authority*.

Building and fire prevention codes typically do not discriminate in corresponding code requirements based on ownership type. For example, there is no difference in code requirements between two virtually identical buildings of Group R2 occupancy where one building contains rental apartments and the other residential condominium units. *See* § 310.1, Commentary- Vol. 1, Florida Building Code 2004 Edition (“Individual dwelling units in Group R-2 are either rented by tenants or owned by the occupants. The code does not make a distinction between either type...”). University of Florida’s UF Health Shands Hospital, which is Occupancy Group I-2, is not governed by a different set of code requirements than North Florida Regional Medical Center (a full-service acute care hospital) a mile or so down the street based on one hospital being government owned and the other privately owned. Likewise for office buildings, Orlando’s City Hall which is Occupancy Group B, is not subject to different building code requirements than the privately owned office building (also Occupancy Group B) across the street from it because one of the buildings is owned by government and the other, by a private owner. It is therefore arbitrary and capricious to impose differing building code requirements on buildings containing K-12 educational facilities, Occupancy Group E, and educational facilities for grades 12+, Occupancy Group B, that are privately owned, and buildings of the same occupancy groups with the only difference being ownership by governmental entities such as school boards versus private ownership.

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CLOSING COMMENT

It has often been said, “[t]he building code is nothing more than the least expensive way one can legally build a building.”⁹ And, in fact, the Florida Legislature legislated this very concept in authorizing the creation of the FBC:

The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of *a single, unified state building code*, to be called the Florida Building Code, *which consists of a single set of documents* that apply to the design, construction, erection, alteration, modification, repair, or demolition of *public or private buildings, structures, or facilities in this state* and to the enforcement of such requirements and which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida *at the most reasonable cost to the consumer*.

§ 553.72(1), Fla. Stat. (emphasis added). The FBC is intended to be a code that sets forth the minimum requirements (at the most reasonable cost) that one can build a building in Florida. It is not a policy statement on how one *should* build a building or facility or a guidebook on how one can spend a little (or a lot) more money and get a better building than the FBC requires. The statutory mandate for the FBC is to be, no more and no less than, a *single set of documents* that apply to *public or private buildings, structures or facilities in this state...* which will allow effective and reasonable protection for public safety, health, and general welfare for all the people of Florida *at the most reasonable cost to the consumer. Id.* (emphasis added).

The IBC (without the addition of Section 453.8.3) contains provisions regarding construction type (which allow the use of Type III and Type V construction) for educational facilities which must, by law, provide reasonable protection for public safety, health and general welfare for students attending and teachers teaching in private schools and charter schools in Florida (because they are part of all the people of Florida) at the most reasonable cost because these provisions were adopted into previous editions of the FBC and are now proposed for FBC-2017 for privately owned educational institutions and charter schools. If the provisions adopted for private schools and charter schools provide the requisite public safety in Occupancy Groups

⁹ The originator of this quote is unknown to the Commenter and is therefore not cited to.

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E and B buildings and facilities at the *most reasonable cost to the consumer*, then the request of the Department of Education to continue the prohibition of Type III and Type V construction in Occupancy Groups E and B buildings and facilities must exceed the statutory authorization of the Commission to adopt the FBC-2017.

A commenter opposing the Modification is making a request to the Commission:

1. to exceed its statutory mandate by amending the IBC-2015 to address issues that are not specific to the needs of this state;
2. to permit continued discrimination against a material and construction technique of demonstrated capabilities;
3. to allow the continuation of discrimination based on economics against smaller counties who may be required to add classrooms or schools based on maximum class-size mandates or a desire to add programs; and
4. to discriminate in code requirements based on ownership type, something the FBC generally does not do.

If the Commission adopts the Modification and allows the use of Type III and Type V construction in public schools, then any school district in Florida that wishes to do so may adopt a policy to allow the use of Type I, II and IV construction in the schools it builds, or has built, for itself. Such school boards are likewise free to adopt policies to require construction standards using other materials such as CMU or steel framing if they choose. However, if the Commission does not adopt the Modification, then school boards in smaller, less affluent, counties that wish to build schools or otherwise add classrooms either due to maximum class size requirements or because it wishes to expand its programs, may not be able to afford to do so.

The use of Type III and Type V construction in schools is a proven construction technique. Wood, as a construction material, has been used in the construction of millions of buildings in this country and its capabilities and properties have been exhaustively documented. When the Department of Education was the agency charged with writing its own building code, it could do what it wanted within its own statutory mandate. The Legislature, however, made the

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decision to take building code writing away from DOE's (and a number of other state agencies') responsibilities and charge the Commission with adopting building code provisions for schools in Florida—public schools, charter schools, and private schools—under the statutes and rules governing the Commission and the FBC. And in concert with its governing statutes and rules, the Commission:

- does not support or allow discrimination against materials of demonstrated capabilities;
- does not adopt rules that discriminate against small counties;
- does not adopt amendments to the foundation codes the need for which are not specific to the needs of Florida;
- does not adopt code provisions that are, and which would cause the FBC to be, arbitrary or capricious;
- did not, and does not write the FBC to discriminate in code requirements based on ownership; and
- does not purport to tell owners how they *should* build their buildings beyond the minimum standards necessary for the health safety and welfare of Floridians at the lowest reasonable cost.

However, adopting the FBC-2017 as the IBC-2015 with Section 453.8.3 added (along with other changes not relevant to this comment) but without the Modification, would be doing all of the items listed above which the Commission “does not do.”

Accordingly, and for the reasons set forth above, this Commenter respectfully requests that the Commission adopt the Modification, Proposed Code Modification SP 6623, as it adopts the FBC-2017 because to do otherwise would be (1) out of character for the Commission and (2) adopting a rule, the FBC-2017, that is an *invalid exercise of delegated legislative authority*.

EXHIBIT 1

453.8.3 Construction type. School board and Florida college buildings including auxiliary, ancillary and vocational facilities shall comply with the construction type provisions of the Florida Building Code, the following:

453.8.3.1 Noncombustible Type I, II or IV. The minimum construction type for one- and two-story public educational facilities shall be noncombustible Type I, II or IV construction or better.

453.8.3.1.1 Interior nonload-bearing wood studs or partitions shall not be used in permanent educational and auxiliary facilities or relocatable buildings.

Exception: Historic buildings to maintain the fabric of the historic character of the building.

453.8.3.2 Type I. Facilities three stories or more shall be Type I construction.

453.8.3.3 Type IV. When Type IV construction is used, wood shall be exposed and not covered by ceilings or other construction.

453.8.3.4 Exceptions to types of construction:

1. Covered walkways open on all sides may be Type V construction.
2. Single story dugouts, press boxes, concession stands, related public toilet rooms, detached covered play areas, and nonflammable storage buildings that are detached from the main educational facility by at least 60 feet (1829 mm), may be Type V construction.

EXHIBIT 2

January 01, 2015 Annual Observed Precipitation

Created on: December 28, 2016 - 20:18 UTC

Valid on: January 01, 2016 12:00 UTC

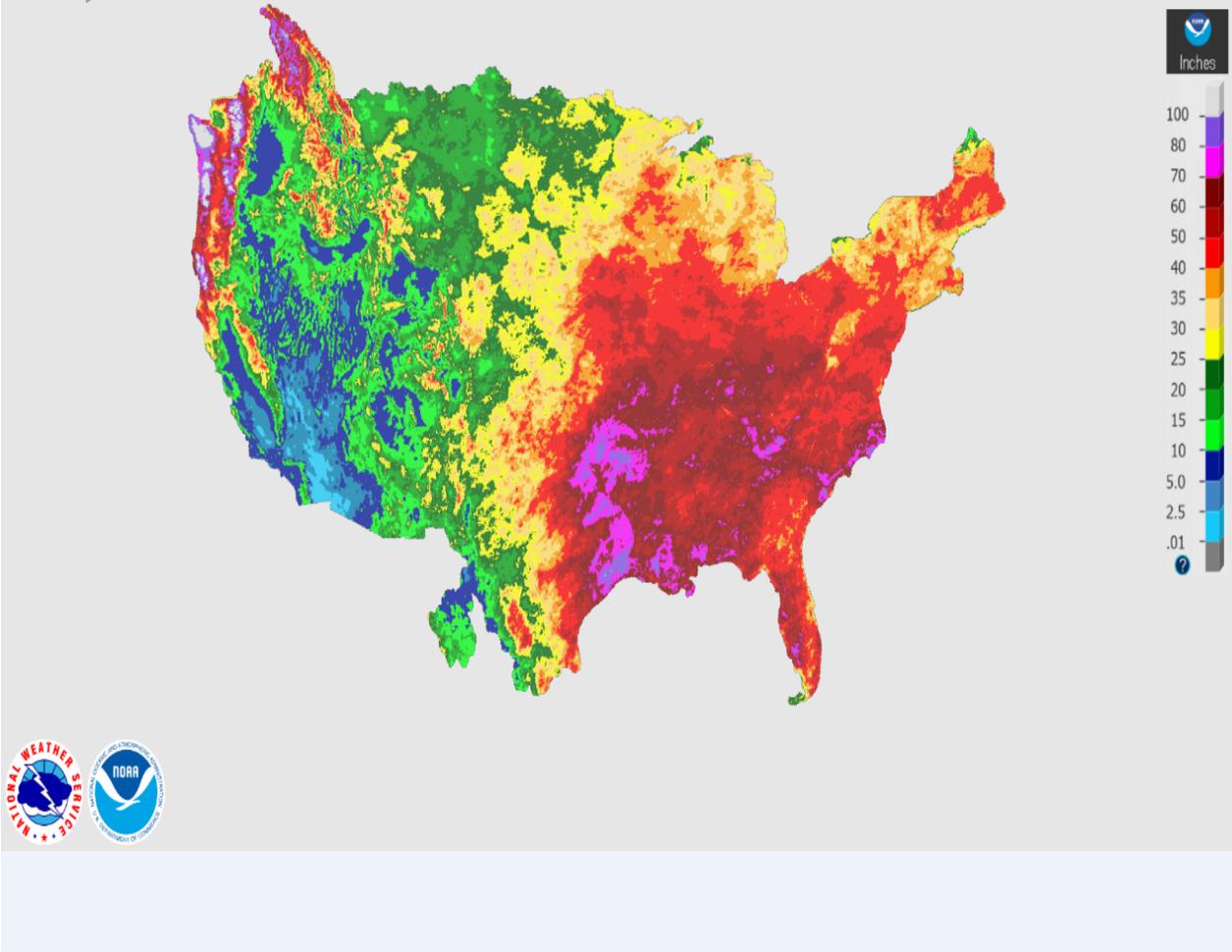
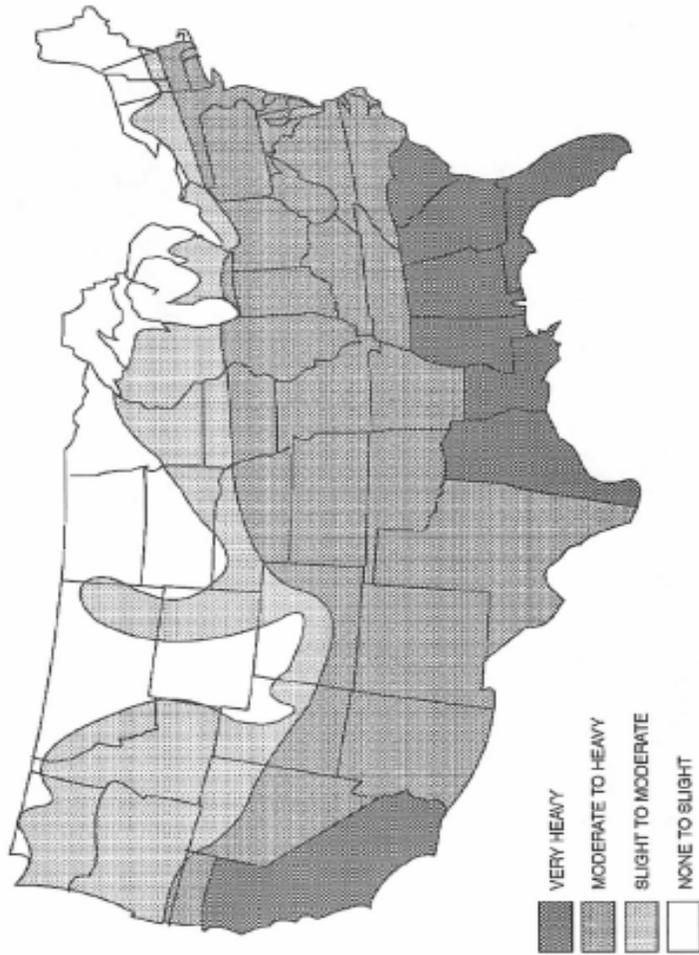


EXHIBIT 3

BUILDING PLANNING



Note: Lines defining areas are approximate only. Local conditions may be more or less severe than indicated by the region classification.

FIGURE R301.2(6)

TERMITE INFESTATION PROBABILITY MAP