


Dudley, Sellers, Healy & Heath, P.L.

A Professional Limited Liability Company
Attorneys and Counselors at Law
SunTrust Financial Center – Suite 301
3522 Thomasville Road,
Tallahassee, Florida 32309

Memorandum


From: Fred R. Dudley, Esq., BCS (Construction Law) – Direct: 850-294-3471

To: Richard Brody, Chair – Florida Building Commission
All Commission Members
All members of the Special Occupancy Technical Advisory Committee (TAC)

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

Re: Section 453.8.3 carryover to the 2017 Florida Building Code (without modification)

Date: January 23, 2017

Dear Mr. Chair, Commissioners and Special Occupancy TAC members:

Introduction:

We represent the Masonry Association of Florida, Inc. (“MAF”), and are working with its code consultant, Joe Belcher, to urge you to support a continuation of Section 453.8.3 in the 6th edition (2017) of the Florida Building Code, WITHOUT MODIFICATION. Due to unavoidable medical testing I am not able to be available to personally participate in the Special Occupancy TAC meeting today, but wanted to share our client’s legal positions in advance of the full commission meeting in Jacksonville on February 7th, which I hope to personally attend.

MAF is a non-profit Florida corporation created in 1987, and currently represents more than 300 masonry contractors statewide, a substantial number of whom would be adversely affected by the proposed modification. The purpose of MAF is to encourage and support the use of masonry products in Florida construction projects. In addition, MAF is part of the Concrete Coalition of Florida that includes approximately 90% of the masonry producers and contractors in Florida.

Thus, MAF has legal organizational standing to challenge or defend challenges to the Florida Administrative Code Rule by which the Florida Building Code is amended and adopted. *Department of Labor and Employment Security v. Home Builders of Florida*, 412 So. 2d 351 (Fla. Sup. Ct. 1982).

Reasons to retain and continue Section 453.8.3:

As you may know, this section has been a part of the Florida Building Code since its inception in 2001, and has remained unchanged for the past 16 years.¹ This section has protected millions of public primary and post-secondary school students from the dangers of fire by requiring all Type I, II or IV construction for educational facilities to consist only of “noncombustible” materials for exterior, flooring and interior walls. Many thousands of these structures have been purchased or leased by School boards throughout Florida as temporary classrooms, and have been manufactured and priced based on the strict fire and life safety requirements of Section 453.8.3.

Other than the incorrect legal arguments that have been advanced on behalf of the American Wood Council (“AWC”) in the form of the January 2, 2017, Memorandum from Greenberg, Traurig, there is no reason to remove the fire and life safety requirements for the use of “noncombustible” materials in all public educational facilities, as the proposed modification SP6623 would do, leaving the occupants thereof without adequate protection.

While other code provisions may otherwise impose requirements on such types of construction that address plumbing, electrical, HVAC, wind, rain, termite and other issues, Section 453.8.3 specifically addresses the fire and life safety concerns by imposing the additional requirement for the use of “noncombustible” materials; the failure to continue this provision in the 6th edition of the Florida Building Code (2017) would ignore these fire and life safety concerns, and expose many thousands of public school students to unnecessary serious injury or loss of life.

AWC’s Arguments:

AWC’s arguments in support of modifying Section 453.8.3 to the point of total repeal by adoption of proposed Modification SP6623, are **based on false premises and faulty arguments, some of which, if accepted, would strip the commission of much of its powers**. Please consider the following analysis of these arguments:

AWC Argument 1: Section 453.8.3 addresses issues that are not specific to the needs of this state.

Response(s) to Argument 1: AWC first argues that Section 453.8.3 is not appropriate as a “Florida specific” code provision, while at the same time arguing “The 2015 edition of the International Building Code already contains requirements to protect [Type III and Type V] buildings.” If there are other sections of the Florida Building Code that specifically address the fire and life safety concerns by requiring the use of “noncombustible” materials, AWC has failed to cite them (and the undersigned has been unable to find them). If AWC is simply concerned that there are duplicative code requirements, the commission has the power to address and eliminate any such duplications, and MAF would support those efforts by the commission, as long as the fire and life safety concerns were not repealed, which AWC, in effect, has proposed with its support of Modification SP6623.

¹ Except for numbering; this section was numbered 423.8.3 in both the 2004 and 2010 FBC, and was a carryover from the rules of the Florida Department of Education prior to the 2001 Florida Building Code.

- A. “Florida specific” provisions of the Florida Building Code are allowed by law [see Section 553.73(7) (c)], with statutory criteria required for the commission to determine what provisions of the foundation codes (ICC, IECC, NEC, etc.) should be modified to address concerns of this state. However, *none* of the statutory criteria require a finding by the commission of “uniqueness” of any such provisions. Accordingly, and contrary to AWC’s argument, the commission has the power to adopt “Florida specific” amendments within the statutory criteria for ANY amendment to the code, and is **not** required to base such amendments on the determination or identification of any factors that may be “unique” to Florida.²
- B. In fact, not only is there an absence of any law or case decision to support AWC’s argument, acceptance of this argument effectively “guts” the statutory duties and powers of the commission, and might even eliminate the need for the commission itself. If, for example as AWC argues, each and every “Florida specific” code provision has to be based on some unique feature(s) of our state that is not shared in common with any other state, the results would likely be that the commission could never deviate from its utilization of the various national codes as the foundation for the Florida Building Code; in fact, if that were to sole purpose of the commission, there would be no need for a collegial body to consider, debate and determine any deviations at all from those national codes. In such case, the commission’s work could be most easily and far less expensively performed by state agency staff or even by the state legislature.

AWC Argument 2: Section 453.8.3 discriminates against the use of wood, a construction materials and product of demonstrated capabilities.

Response(s) to Argument 2: It appears that this argument is based on section 553.73(9) (a) 4, Florida Statutes, which lists as one of the criteria for the commission’s approval of technical amendments on an annual basis that it “does not discriminate against materials, products, methods, or systems of construction of demonstrated capabilities.” [Emphasis added]. Of course, different construction materials have different “demonstrated capabilities:” for examples: aluminum is lighter than steel, but may not be as strong as steel, and wood (generally) has a lower fire flash point than concrete. Thus, for the code to require the use of noncombustible materials does not discriminate against the “demonstrated capabilities” of wood. In fact, the test for “noncombustibility” is based on the fire rating of each material, and wood certainly has a different fire rating than concrete (depending upon its treatment, size, etc.). In addition, wood construction typically requires more maintenance, which adds to the operational expenses of such facilities.

² These same types of provisions also apply to the Florida Fire Prevention Code. See section 633.202 (2), whereby the current editions of the Life Safety Code and the NFPA 101, are required to be adopted, but “(T)he State Fire Marshal may modify the selected codes and standards as needed to accommodate the specific needs of the state.” Neither code uses the word “unique,” as has been injected by AWC.

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AWC Argument 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.

Response(s) to Argument 3: While a fiscal impact statement is required for code changes, there is no specific requirement that the commission make a determination of the impact on “small counties” in the adoption of amendments to the Florida Building Code. Certainly, the AWC has failed to cite to any such requirement. However, it is possible for the commission to easily determine that there is no such impact with this amendment since each county’s population age categories will be indicative of the number of public educational facilities that will be required...not the available tax base.

Finally, this argument appears to be based on the unproven premise that the use of wood as a construction material is cheaper than the use of other building materials; however, no evidence has been offered to support such a premise. In fact, it is possible that the use of wood might increase the costs of construction as well as the costs of maintenance, depending upon site conditions, construction design factors, local market conditions and costs, etc.

AWC Argument 4: Section 453.8.3, without proposed modification SP6623, is “arbitrary and capricious.”

Response(s) to Argument 4: While this argument appears to be based on the statutory provisions for rule challenges as set forth in Chapter 120 (Florida Administrative Code), it is simply a conclusion of law that is devoid of any factual basis or analysis.

It is clear that Section 453.8.3, as carried over from the 1st edition of the Florida Building Code in 2001, applies only to “public educational facilities,” and, thus, not to “private educational facilities,” but that distinction appears to emanate from the Florida Department of Education original rules that were promulgated prior to the 2001 Florida Building Code (and statutorily required to be carried forward into the building code). Thus, the statutory authority for this provision is very clear, thus eliminating any “arbitrary and capricious” argument; the elimination or repeal of this section may then become arbitrary and capricious.

In addition, this section may also be impacted by operation of the **Florida Fire Prevention Code** (“FFPC”), as administered, interpreted and enforced by the Office of State Fire Marshal, Department of Financial Services (“DFS”), pursuant to Chapter 633, Florida Statutes). While the use of specific construction materials for educational facilities is not governed directly by the FFPC, section 633.206(1), Florida Statutes, requires DFS to establish uniform firesafety standards that apply to” “(a) All new, existing, and proposed...**public schools**....” In fact, both Chapters 553 and 633, Florida Statutes, have specific provisions for avoiding conflicts between the Florida Building Code and the Florida Fire Prevention Code, including utilization of the “Florida Fire Code Advisory Council” pursuant to section 633.204, Florida Statutes, subsection (5) of which requires that:

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“The council and the Florida Building Commission shall cooperate through joint representation and coordination of codes and standards to resolve conflicts in their development, updating and interpretation.”

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

Response(s) to Argument 5: The only distinction set forth in Section 453.8.2 that is based on “ownership type” is its application to “School board and Florida College buildings....” These are all “public” facilities constructed, operated and maintained with state and local tax revenues.

AWC also attempts to distinguish “charter” schools from “public” schools, and argues that such a distinction is improperly based on “property ownership.” However, even assuming such a distinction to be prohibited (for which no legal authority has been cited), in fact ALL “charter” schools ARE “public” schools pursuant to section 1002.33, Florida Statutes, and must comply with the requirements of both the building code and the fire code.

AWC Argument 6: When building code requirements for schools were promulgated by the Florida Department of Education, 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.

Response(s) to Argument 6: This appears to be a historically correct depiction of the role of the Florida Department of Education, through its Office of Educational Facilities (“OEF”), until the Florida Building Commission was first enacted in 2001.

Like DOE, the construction rules of most state agencies (with the notable exception of the Florida Department of Transportation that has its own unique construction codes and standards), were required to be incorporated into the provisions of the Florida Building Code, which eliminated those agency’s own separate code requirements, just as all local authorities having jurisdiction (cities and counties) were also required to do.

MAF has no disagreement with this historical depiction, but fails to see how those facts support the commission’s adoption of Modification SP6623; instead, adoption of that modification effectively repeals Section 453.8.3., thereby unnecessarily eliminating the life safety and fire concerns regarding the use of combustible construction materials in all public educational facilities. Proposed Modification SP6623 also ignores the statutory mandate that the pre-2001 rules of the Department of Education, such as those regarding the construction of public educational facilities with noncombustible materials, be carried forward in the Florida Building Code.

Summary of Conclusions:

1. There is no reason for the commission to abandon the 16-year building code history of Section 453.8.3 by adopting the proposed Modification SP6623, which would effectively REPEAL all of the provisions of Section 453.8.3. To abandon this section also fails to meet the statutory mandate to carry forward the pre-2001 rules of the Department of Education regarding the construction of public educational facilities.
2. The arguments advanced by the American Wood Council, as set forth in the Greenberg Traurig Memorandum dated January 2, 2017, are based on false premises, and misinterpretations or misapplications of the statutory requirements for building code amendments:
 - a. There is no legal requirement that “Florida-specific” code amendments be based on any identifiable “uniqueness” of this state. To so limit the power and authority of the Florida Building Commission would be tantamount to eliminating the need for the commission as a collegial body, since its only remaining purpose would be to adopt all the foundations codes without any changes (which is a role the legislature could easily assume annually through statutory changes, and without the costs of operating a 25-member commission).
 - b. Section 453.8.3 does not discriminate against the “demonstrable capabilities” of wood as a construction material, because the “combustibility” capabilities of various materials, and their maintenance costs, will differ.
 - c. A continuation of the 16-year pre-code history of the provisions of Section 453.8.3 does not discriminate based on property ownership, because it applies to ALL public educational facilities (including charter schools), and is neither an arbitrary or capacious rule change. In fact, retention of Section 453.8.3 actually preserves the statutory mandate that the pre-2001 rules of state agencies, such as the Department of Education, be carried forward into the Florida Building Code, and the failure to do so may be contrary to that statutory mandate (resulting in an invalid rule).
3. No changes are justified or should be made to Section 453.8.3, and it should not be changed or repealed as would result from the adoption of proposed Modification SP6623.

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