

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 17-6578RP

FLORIDA BUILDING COMMISSION,

Respondent.

_____ /

FINAL ORDER

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

APPEARANCES

For Petitioner: J. Michael Huey, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

14. An "invalid exercise of delegated legislative authority" is an "action that goes beyond the powers, functions, and duties delegated by the Legislature." § 120.52(8), Fla. Stat. A rule is an "invalid exercise of delegated legislative

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Proposed Rule

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

36. The proposed rule provides that the Commission may amend the Florida Building Code "[t]o update the Florida Building Code every three years pursuant to Subsection 553.73(7), Florida Statutes. When updating the code, the Commission shall review the most current updates to the [Model Codes]." Proposed Fla. Admin. Code R. 61G20-2.002(2) and (2)(a). To this extent, the parties stipulated that the proposed rule is consistent with the 2017 statute.

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

(2) The Florida Building Commission may amend the Florida Building Code for the following purposes:

(a) To update the Florida Building Code every three years pursuant to Subsection 553.73(7), Florida Statutes. When updating the code, the Commission shall review the most current updates to the model codes including but not limited to the International Building Code, the International Fuel Gas Code, the International Existing Building Code, the International Mechanical Code, the International Plumbing Code, the International Residential Code, the International Energy Conservation Code, and the National Electrical Code (NEC) for the purpose of determining whether the latest changes to the model codes are needed to accommodate the specific needs of this state. The Commission shall also consider its own interpretations, declaratory statements, appellate decisions, and local technical amendments. For the purpose of conducting this review, the following steps will be undertaken:

1. The Commission shall select the model codes that will be used to conduct its review.
2. No sooner than ninety days after the latest updates of the model codes are published, a complete listing of the changes to the model codes will be posted and made available for public review on the Commission's website.
3. No sooner than one hundred fifty days after the listing of the changes to the model codes is posted, the Commission's Technical Advisory Committees (TACs) will meet to review the changes to the model codes and make recommendations to the Commission regarding those changes that are needed to accommodate the specific needs of this state. The TACs' recommendations will be posted on the Commission's website for further public review.
4. No sooner than ninety days after posting the TACs' recommendations, the Commission will meet to vote whether to approve the TACs' recommendations regarding the latest changes to the model codes that are needed to accommodate the specific needs of this state. After Commission approval, the approved changes to the Florida Building Code needed to accommodate the specific needs of this state will be made available on the Commission's website. The public will then have the opportunity to submit amendments to the Florida Building Code and the approved changes to the Florida Building Code pursuant to Subsection (3) of this rule.

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

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

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

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

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

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

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

42. It bears noting that the last sentence of section 553.73(7)(c) now provides: "Amendments that are adopted in

accordance with this subsection shall be clearly marked in printed versions of the Florida Building Code so that the fact that the provisions are amendments is readily apparent.”

(emphasis added). By virtue of the numbering system used in the Florida Statutes, “subsection” means all of section 553.73(7). Section 553.73(7)(c) is a paragraph, not a subsection. See Preface to Florida Statutes, Numbering system (“Chapters are identified by whole Arabic numbers; sections, by numbers containing a decimal point; subsections, by whole Arabic numbers enclosed by parentheses; paragraphs, by lowercase letters enclosed by parentheses; subparagraphs, by whole Arabic numbers followed by a period; sub-subparagraphs, by lowercase letters followed by a period” and so forth).

43. This same sentence read as follows in the 2016 law: “Amendments to the foundation codes which are adopted in accordance with this subsection shall be clearly marked in printed versions of the Florida Building Code so that the fact that the provisions are Florida-specific amendments to the foundation codes is readily apparent.” § 553.73(7)(c), Fla. Stat. (2016). The contrast between the 2016 and 2017 versions of this sentence makes plain the legislative intent to shift from a Model-Code-first approach, with Model Code provisions amended only as needed for Florida-specific needs, to a Florida-specific

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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



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

ENDNOTES

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

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

^{3/} As reasonably interpreted by the Commission in the proposed rule and not challenged by FAAIA, the existing Florida Building Code remains in place, but may be amended by the Commission for the purpose of updating the code every three years, pursuant to section 553.73(7). See proposed rule 61G20-2.002(2) and (2)(a) ("The Florida Building Commission may amend the Florida Building Code for the following purposes: (a) To update the Florida Building Code every three years pursuant to Subsection 553.73(7),

Florida Statutes.”) (emphasis added). The 2017 law could have been clearer in this regard, but the Commission’s interpretation is the reasonable, logical, and necessary result of eliminating the requirement to start anew with the most recent versions of the Model Codes serving as the foundation codes, and also eliminating the automatic expiration of prior amendments or modifications to the foundation codes.

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

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

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

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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