

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1333 Building Construction Procedures

SPONSOR(S): Commerce Committee, Payne

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	14 Y, 0 N	Brackett	Anstead
2) Government Operations & Technology Appropriations Subcommittee	10 Y, 0 N	Keith	Topp
3) Commerce Committee	20 Y, 0 N, As CS	Brackett	Hamon

SUMMARY ANALYSIS

The Florida Building Code (building code) is a single, uniform system for adopting, updating, interpreting, and enforcing building requirements across the state. Counties and municipalities are tasked with the primary responsibility for building code enforcement. Local governments may levy fees to cover the cost of enforcing the provisions of the building code, but those fees, as well as fines and investment earnings related to such fees, may only be used by a local government to cover the cost of carrying out building code enforcement.

The bill revises the process by which the building code is updated by allowing the Florida Building Commission to adopt amendments to the building code every three years without individually determining the amendments are needed to accommodate the specific needs of the state.

The bill prohibits a local government from carrying forward a budget balance greater than its average cost for enforcing the building code for the preceding four fiscal years. However, an exception is created for local governments that have established a Building Inspections Fund Advisory Board prior to 2019. The bill requires each local government to use any excess funds to rebate and reduce fees.

The bill also provides that serving a notice of claim alleging a construction defect does not qualify as filing a civil action or proceeding.

The bill may have an indeterminate insignificant fiscal impact on state and local governments.

The bill provides for an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

The Florida Building Code – Current Situation

The Florida Building Code

In 1974, Florida adopted legislation requiring all local governments to adopt and enforce a minimum building code that would ensure that Florida's minimum standards were met. Local governments could choose from four separate model codes. The state's role was limited to adopting all or relevant parts of new editions of the four model codes. Local governments could amend and enforce their local codes, as they desired.¹

In 1992, Hurricane Andrew demonstrated that Florida's system of local codes did not work. Hurricane Andrew easily destroyed those structures that were allegedly built according to the strongest code. The Governor eventually appointed a study commission to review the system of local codes and make recommendations for modernizing the system. In 1998, the Legislature adopted the study commission's recommendations for a single state building code and enhanced the oversight role of the state over local code enforcement. In 2000, the Legislature authorized implementation of the Florida Building Code (building code), and that first edition replaced all local codes on March 1, 2002.²

In 2004, for the second edition of the Code, the state adopted the International Code Council's I-Codes. The International Code Council (ICC) is an association that develops model codes and standards used in the design, building, and compliance process to "construct safe, sustainable, affordable and resilient structures." The ICC publishes I-Codes: a complete set of model comprehensive, coordinated building safety and fire prevention codes, for all aspects of construction, that have been developed by ICC members. All 50 states have adopted the I-Codes.³

All subsequent building codes have been adopted utilizing the I-Codes as the base code. The current edition of the building code is the sixth edition, which is referred to as the 2017 Florida Building Code.⁴ In 2017, the Legislature passed and the Governor signed into law the current method for updating and adopting the building code.⁵ In October 2017, the Florida Building Commission initiated the development of the seventh edition of the building code.

The Florida Building Commission

The Florida Building Commission (Commission) was statutorily created to implement the building code. The Commission, which is housed within the Department of Business and Professional Regulation (DBPR), is a 27-member technical body made up of design professionals, contractors, and government experts in various disciplines covered by the building code. The Commission must adopt the building code, and any amendments, by a two-thirds vote of the members present.⁶

¹ The Florida Building Commission Report to the 2006 Legislature, *Florida Department of Community Affairs*, p. 4, available at http://www.floridabuilding.org/fbc/publications/2006_Legislature_Rpt_rev2.pdf (last visited Jan. 3, 2019).

² *Id.* & DBPR, *Overview of the Florida Building Code*, <http://webcache.googleusercontent.com/search?q=cache:udG1X8b7K60J:www.floridahousing.org/docs/default-source/aboutflorida/august2017/august2017/tab4.pdf+&cd=1&hl=en&ct=clnk&gl=us> (last visited on Jan. 3, 2019).

³ International Code Council, *About the ICC*, <http://www.iccsafe.org/about-icc/overview/about-international-code-council/> (last visited on Mar. 23, 2017).

⁴ Florida Building Commission Homepage, <https://floridabuilding.org/c/default.aspx> (last visited Jan. 3, 2019).

⁵ See House Analysis of 2017 House Bill 1021 (May 8, 2017).

⁶ Ss. 553.74, & 553.76(1), F.S.

The Commission has 11 Technical Advisory Committees (TAC) ranging from the building structural TAC to the swimming pool TAC. TACs are made up of Commission members and other parties who advise the Commission on declaratory statements, proposed amendments, and any other areas of interest of the Commission.⁷

Procedures for Adopting the Florida Building Code

Prior to 2017, the Commission adopted the building code every three years by adopting the most recent version of the I-Code and the National Electric Code made up of:

- The National Electric Code (NEC); and
- The following I-codes of the ICC:
 - International Building Code;
 - International Fuel Gas Code;
 - International Mechanical Code;
 - International Plumbing Code;
 - International Existing Building Code;
 - International Energy Conservation Code;
 - International Residential Code; and
 - International Electrical Code.⁸

The Commission could modify any of the adopted codes as needed to accommodate the specific needs of the state. The Commission and local jurisdictions could also make technical and administrative amendments to the building code. A technical amendment to the building code is an alteration to the prescriptive requirements or reference standards for construction. An administrative amendment is an addition or alteration of the code enforcement requirements of the building code.⁹

In 2017, the Legislature amended the Commission's process for adopting the building code. Under the new process, the Commission is no longer required to adopt the most recent version of the I-Codes and the NEC as the foundation for the new code. Instead, the updated process requires the Commission to review the I-Codes and the NEC and then decide which provisions are needed to accommodate the specific needs of this state. Because of this 2017 change, the sixth edition of the building code will basically serve as the base code for future updates.¹⁰

The Commission must still adopt any provisions from the I-codes and NEC that are necessary to maintain eligibility for federal funding and discounts from the:

- National Flood Insurance Program;
- Federal Emergency Management Agency; and
- United States Department of Housing and Urban Development.¹¹

Technical Amendments

The Commission may also adopt any section of the reviewed I-codes and NEC as technical amendments as needed to accommodate the specific needs of the state.¹² In order to adopt a technical amendment to the building code the Commission must meet the following requirements:

- Before consideration and recommendation by a TAC, the proposed amendment must be published on the Commission's website for a minimum of 45 days and related documentation must be made available to any interested party;

⁷ DBPR, *Florida Building Code Online*, https://www.floridabuilding.org/c/c_commission.aspx (last visited on Mar. 16, 2019), & Rule 61G20-2.001, F.A.C.

⁸ S. 553.73(7), F.S. (2017).

⁹ S. 553.73, F.S.; Rule 61G20-2.002, F.A.C.

¹⁰ S. 553.73, F.S.

¹¹ *Id.*

¹² *Id.*; Rule 61G20-2.002, F.A.C.

- In order for a TAC to make a favorable recommendation, the proposed amendment must receive a two-thirds vote of the members present at the TAC meeting and at least half of the TAC members must be present in order to conduct the meeting;
- Before any consideration by the Commission and after TAC consideration and recommendation, the proposed amendment must be published on the Commission's website for at least 45 days; and
- A proposed amendment may be modified by the Commission based on public testimony and evidence from a public hearing held in accordance with ch. 120.¹³

The Commission may also adopt technical amendments once a year for statewide or regional application if they find that the amendment is needed in order to accommodate the specific needs of the state.¹⁴

In 2017, the Commission amended Rule 61G20-2.002 of the Florida Administrative Code, related to statewide amendments to the Florida Building Code, in order to implement the 2017 statutory changes to the process for adopting the building code. The amended rule became effective March 27, 2018.

The Commission determined that changes to the Code related to the following issues must be adopted by technical amendment, which requires that a determination be made that each amendment is needed to accommodate the specific needs of this state:

- Minimum life safety construction requirements to protect buildings and their occupants from fire, wind, flood, and storm surge using the latest technical research and engineering standards for buildings and materials products.
- Flood protection provisions that are consistent with the latest flood protection requirements of the National Flood Insurance Program.
- 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.
- Energy efficiency standards for buildings that meet or exceed the national energy standards as mandated by Title III of the Energy Conservation and Protection Act.
- Updates to the Florida Fire Prevention Code.
- Latest industry standards and design standards.¹⁵

Division of Administrative Hearings Rule Challenge

In December of 2017, the Florida Association of American Institute of Architects, Inc. (FAAIA) filed a rule challenge to the Commission's adoption of rule 61G20-2.002 of the Florida Administrative Code. The FAAIA challenged the rule as invalid based on their belief that the rule is an invalid exercise of the Commission's delegated authority regarding implementation of the update process for the building code. Specifically, the FAAIA argued that the rule's requirement that the Commission determine that any technical amendment added to the building code must be necessary to accommodate the specific needs of the state, placed restrictions on the updates to the building code beyond what is contemplated by statute. In February of 2018, the Division of Administrative Hearings ruled that the challenged provisions of Rule 61G20-2.002 (2) were a valid exercise of delegated authority. The decision was based on the statute, which specifically states that the Commission may adopt any portions of the I-codes or the NEC as technical amendments to accommodate the specific needs of the state, and the Division dismissed the petition.¹⁶

¹³ S. 553.73(3), F.S.

¹⁴ *Id.*

¹⁵ Rule 61G20-2.002, F.A.C.

¹⁶ Florida Association of American Institute of Architects, Inc. v. Florida Building Commission, Case No. 17-6578RP (Fla. DOAH 2018).

Florida Building Code, 7th Edition (2020) Update Timeline

The Commission completed its review of changes to the I-Codes and NEC for possible inclusion in the seventh edition of the building code in October of 2018. The period for the public to propose modifications to the sixth edition of the building code occurred from November 2018 through mid-February 2019. Proposed modifications were reviewed by the Commission's TACs in meetings from March 14-26, 2019.

The TACs' recommendations regarding proposed modifications will subsequently be posted to the Commission's website for a minimum of 45 days and the public will be provided an opportunity to comment on the TACs' recommendations during this time-frame. The TACs will meet for a second time during the week of July 8-12, 2019, to review the public comments and provide TAC feedback on the public comments to the Commission. The Commission plans to consider the TACs' recommendations concurrent with the August 2019 Commission meeting, conduct rule development workshops on February 4, 2020, and April 7, 2020, and conduct a rule adoption hearing on the final version of the seventh edition of the building code on June 8, 2020.¹⁷

The Florida Building Code – Effect of the Bill

The bill allows the Commission, upon the required review of the I-Code and the NEC, to approve amendments to the building code every three years without a specific individual finding that each of the amendments are needed to meet the specific needs of the state. However, the bill provides the Commission the discretion to require such finding if it so chooses.

The Commission may continue to adopt technical amendments once a year for statewide or regional application if they find that the amendment is needed in order to accommodate the specific needs of the state.

Local Government Building Code Enforcement Fees – Current Situation

Local governments play a significant role in enforcing the building code.¹⁸ Local governments are authorized to regulate building construction in most cases.¹⁹ Counties and municipalities may, subject to an interlocal agreement between them, create an enforcement district for the purpose of enforcing the building code.²⁰ Local governments may request the support of state and regional agencies with special expertise in building code standards and the licensing of contractors and design professionals to aid in the process of building code enforcement.²¹

Florida Building Code Fees

Local governments are authorized to levy fees to cover the cost of enforcing the provisions of the building code.²² The fees, including any fines or investment earnings related to the fees, may only be used for the costs associated with carrying out the local government's building code enforcement responsibilities. These costs include:²³

¹⁷ Florida Department of Business and Professional Regulation: Florida Building Code Information System, 2020 Code Update Process – 7th Edition, Florida Building Code (2020), available at http://www.floridabuilding.org/fbc/thecode/2020_Code_Development/2020_Code_Development_Process.htm (last visited Mar. 23, 2019)

¹⁸ See s. 553.72(2), F.S. (legislative intent for local governments to have the power to inspect all buildings, structures and facilities in their jurisdiction).

¹⁹ S. 553.80(1), F.S.

²⁰ S. 553.80(2)(a), F.S.

²¹ S. 553.80(5), F.S.

²² Ss. 553.80(7), 125.56(2), and 166.222, F.S.

²³ S. 553.80(7)(a), F.S.

- The review of building plans, building inspections, re-inspections, and building permit processing;
- Building code enforcement;
- Fire inspections associated with new construction;
- Training costs associated with enforcement of the building code; and
- Enforcement action pertaining to unlicensed contractor activity, to the extent not funded by other user fees.

Local governments are prohibited from requiring additional fees for:²⁴

- Providing proof of licensure pursuant to ch. 489, F.S.;
- Recording or filing a license issued; and
- Providing, recording, or filing evidence of workers' compensation insurance coverage required by ch. 440, F.S.

A local government may not levy fees (including fines and investment earnings related to fees) that generate total estimated annual revenue that would exceed the total estimated annual cost of its enforcement activities.²⁵ If any excess funds are accumulated, the local government has discretion to issue refunds or carry forward those funds into future years. Local governments are required to use "recognized management, accounting, and oversight practices" to ensure fees, fines, and investment earnings are maintained and used only for authorized purposes.²⁶

Local governments may not use code enforcement fees to cover:²⁷

- Planning and zoning, or other general government activities;
- Provide reduced cost or free inspections of public buildings;
- Public information requests, community functions, boards, and any program not directly related to enforcement of the building code;
- Enforcement and implementation of any other local ordinance, except for valid local amendments to the building code or ordinances directly related to enforcing the building code.

If a property owner chooses to utilize a private code inspection service operating under the provisions of s. 533.791, F.S., the local government must refund fees to the extent its expenditures were reduced by not incurring costs for inspecting the property.²⁸

Local Government Building Code Enforcement Fees – Effect of the Bill

The bill prohibits a local government from carrying forward an amount of funds generated by building code enforcement activities that exceeds the four-year rolling average of its operating budget for building code enforcement. The bill defines the term "operating budget" as excluding any amount held in reserves. If a local government would otherwise have an amount of carry-forward funds that would exceed the allowed limit, the bill requires the local government to use those funds to rebate and reduce fees.

The bill creates an exception to the limitation on carrying forward excess funds for those local governments that have established a Building Inspections Fund Advisory Board prior to 2019. If a local government has a board with five members from the construction industry stakeholder community established to review the amount carried forward each year, then a local government may carry an operating balance in excess of its average operating budget for the preceding four years upon recommendation by such advisory board.

²⁴ S. 553.80(7)(d), F.S.

²⁵ S. 553.80(7), F.S.

²⁶ S. 553.80(7)(c), F.S.

²⁷ S. 553.80(7)(b), F.S.

²⁸ S. 553.80(7), F.S.

Notice of Claim of a Construction Defect – Current Situation

Notice of Claim

Current law provides a method for resolving construction defect disputes between property owners (claimants) and contractors. Before filing suit alleging a construction defect, a claimant is required to provide the contractor, subcontractor, supplier, or design professional with a pre-suit notice of claim and to give that party the opportunity to examine the defect. If the party agrees that the defect exists, the party has a reasonable opportunity to offer to repair the defect or make some other offer in settlement. Only if the parties are still in disagreement after the notice period can the matter proceed to court.

A notice of claim alleging a construction defect must be provided to the contractor, subcontractor, supplier, or design professional at least 60 days prior to the filing of an action, or at least 120 days before filing an action involving an association representing more than 20 parcels. The notice of claim must describe in reasonable detail the nature of each construction defect and, if known, the damage or loss resulting from the defect. This requires the claimant, based upon at least a visual inspection, to identify the location of each defect in the notice.²⁹ If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted.³⁰

If a claimant files an action alleging a construction defect without first sending a timely notice of claim, the statute directs the court to stay the action, without prejudice, and the action cannot proceed until the claimant has complied with the requirements to send a notice of claim.³¹

A claimant must file an action related to a construction defect with the circuit court within 10 years from:

- the date of actual possession,
- the date of the issuance of a certificate of occupancy,
- the date of abandonment of construction, if not completed, or
- the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever is later.³²

Similar methods for pre-suit notice with an opportunity for resolution are required in many other types of civil litigation, including medical negligence, claims against nursing homes, and eminent domain.³³

Gindel v. Centex Homes

Courts have found that pre-suit notices constitute the commencement of various types of civil actions,³⁴ but until *Gindel v. Centex Homes*, Florida courts had not contemplated whether providing a notice of claim constituted the commencement of a construction defect action.³⁵ “Action” is defined as a “civil action or proceeding.”³⁶

²⁹ S. 558.004(1)(b), F.S.

³⁰ S. 558.004(1)(c), F.S.

³¹ S. 558.003, F.S.

³² S. 95.11(3)(c), F.S.

³³ See s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), F.S., related to nursing homes; and, s. 73.015, F.S., related to eminent domain.

³⁴ *Musculoskeletal Institute Chartered v. Parham*, 745 So. 2d 946 (Fla. 1999); *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017).

³⁵ *Gindel, et al. v. Centex Homes*, No. 4D17-2149, 2018 WL 4362058 (Fla. 4th DCA Sept. 12, 2018).

³⁶ S. 95.011, F.S.

The claimants in *Gindel* took possession of their properties on March 31, 2004, and later discovered construction defects in their homes. They sent a pre-suit notice of claim to Centex Homes on February 6, 2014, before the statutory timeframe for filing suit, or the statute of repose, had expired.³⁷ After the completion of the mandatory notice of claim procedures, Centex Homes notified the claimants that it would not repair the alleged defects. The claimants filed suit on May 2, 2014, after the statute of repose expired. The trial court held that their suit was untimely and barred because the notice of claim was not an action under the statute of repose. The appellate court reversed the trial court's order, finding that pre-suit notice qualifies as a "proceeding," and hence an "action," and therefore the claimants complied with the requirements of the statute of repose, and the action could continue.³⁸

The holding in *Gindel* appears to allow claimants wishing to preserve their construction defect claim the option of sending a notice of claim, simply to satisfy the statute of repose, and then potentially waiting an extended period before filing their actual claim in court. However, the *Gindel* court determined that the confusion created by the statute's silence as to whether the pre-suit notice of claim constitutes commencing an action and the fact that many other pre-suit notices do constitute such commencement were persuasive. The court found that the pre-suit notice constituted commencement of an action for purposes of the statute of repose because to "rule otherwise would result in an unconstitutional impediment to access to the courts."³⁹

Notice of Claim of a Construction Defect – Effect of the Bill

The bill provides that serving a pre-suit notice of claim alleging a construction defect does not qualify as a civil action or proceeding for purposes of determining whether an action was considered timely filed under the statute of repose.

B. SECTION DIRECTORY:

- Section 1.** Amends s. 553.73, F.S., revising building code adoption procedures.
- Section 2.** Amends s. 553.80, F.S., relating to local building code enforcement fees.
- Section 3.** Amends s. 558.004, F.S., relating to construction defect civil actions.
- Section 4.** Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues:
None.
- 2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues:

³⁷ Black's Law Dictionary (10th ed. 2014) (Statutes of Repose are legislative enactments that place limitations on certain legal rights and, if such legal rights are not acted upon within the prescribed periods, the legal rights are cut off.)

³⁸ Id.; Westlaw, *Homeowners' "Action" Against Contractor Begins to Run for Purposes of Florida's Statute of Repose Upon Owners' Filing of the Mandatory Pre-Suit Notice Under Right to Repair Act*, 40 Construction Litigation Reporter (April 2019).

³⁹ *Musculoskeletal Institute Chartered v. Parham*, 745 So. 2d 946 (Fla. 1999); *Gindel*, supra note 35.

None.

2. Expenditures:

The bill may require local governments to provide rebates to fee-payers to the extent the local government has maintained reserves in excess of its average operating budget for enforcing the Code in the previous four fiscal years.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may result in a reduction in permitting fees to the extent local governments are levying fees in excess of the amount necessary to cover authorized expenses.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority or require executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 18, 2019, the Commerce Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Revise the process by which the building code is updated by allowing the Commission to adopt amendments to the building code every three years without individually determining the amendments are needed to accommodate the specific needs of the state.
- Prohibit a local government from carrying forward a budget balance greater than its average cost for enforcing the building code for the preceding four fiscal years, with certain requirements and exceptions.
- Remove provisions of the bill related to the following:
 - Allowing building officials to limit the number of new building permits issued to qualifying agents with open or expired permits.
 - Prohibiting a contractor from allowing an active building permit to expire.
 - Requiring Building Code Administrators and Inspectors Board to create an internship program for one- and two-family dwelling building inspectors and plans examiners, and roofing plans examiners.
 - Requiring persons wanting to be licensed as a one- and two-family dwelling building inspector to complete the one- and two-family dwelling building inspector program and the one- and two-family dwelling plans examiner internship program.

- Providing that provisional building official, building inspector, and plans examiner licenses are valid for two years instead of one.
- Provide that serving a notice of claim alleging a construction defect does not qualify as a civil action.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.