

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 401 Florida Building Code

**SPONSOR(S):** Commerce Committee, Regulatory Reform Subcommittee, Fetterhoff, Overdorf and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee	18 Y, 0 N, As CS	Brackett	Anstead
2) Local Administration & Veterans Affairs Subcommittee	14 Y, 0 N	Renner	Miller
3) Commerce Committee	21 Y, 0 N, As CS	Brackett	Hamon

### SUMMARY ANALYSIS

The Florida Building Commission (Commission), located within the Department of Business and Professional Regulation (DBPR), implements and adopts the Florida Building Code. The Building Code is the statewide building code for all construction in the state. Every local government must enforce the Building Code and issue building permits. The Commission adopts a new edition of the Building Code every three years.

The Commission and local governments may adopt amendments to the Building Code provided they follow the requirements in current law. Local amendments to the Building Code expire when the newest edition of the Building Code takes effect. Current law also requires the Commission to develop and implement an approval of products for statewide use.

The bill:

- Allows a substantially affected person to petition the Commission for a non-binding advisory opinion on whether a local government regulation is an improper amendment to the Building Code, and establishes a process for such petitions;
- Allows the Commission to issue an “errata to the code” to list demonstrated errors in provisions contained within the Building Code;
- Requires the Commission to adopt rules for approving product evaluation entities in addition to the ones already listed and approved in current law;
- Clarifies that the Commission may suspend product evaluation entities;
- Clarifies that local government entities may use private providers for their own construction projects;
- Provides that a local government may use excess funds generated by Building Code enforcement for the construction of a building or structure that houses the local government’s building department or provides training programs for building officials, inspectors, or plans examiners;
- Provides that excess funds used to construct such a building or structure must be designated for such purpose by the local government and may not be carried forward for more than four years; and
- Prohibits a local government from requiring a contract between a builder and an owner as a condition to apply for or obtain a building permit.

The bill may have an insignificant negative fiscal impact on DBPR and an indeterminate fiscal impact on local governments. *See Fiscal Comments.*

The bill provides for an effective date of July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **The Florida Building Code and Florida Building Commission – Current Situation**

In 1974, Florida adopted legislation requiring all local governments to adopt and enforce a minimum building code ensuring Florida's minimum building 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.<sup>1</sup>

In 1992, Hurricane Andrew demonstrated that Florida's system of local codes did not work. Hurricane Andrew easily destroyed those structures that were built allegedly 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. The 1998 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. The 2000 Legislature authorized implementation of the Florida Building Code (Building Code), and that first edition replaced all local codes on March 1, 2002.<sup>2</sup> The current edition of the Building Code is the seventh edition, which is referred to as the 2020 Florida Building Code.<sup>3</sup>

Ch. 553, part IV, F.S., is known as the "Florida Building Codes Act" (Act). The purpose and intent of the Act is to provide a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state building code. The Building Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.<sup>4</sup>

The main purpose of the Building Code is to regulate new construction or proposed modifications to existing structures in order to give the occupants the highest level of safety and the least amount of defects.<sup>5</sup>

#### **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 19-member technical body made up of design professionals, contractors, and government experts in various disciplines covered by the Building Code.<sup>6</sup>

The Commission reviews several International Codes published by the International Code Council, the National Electric Code, and other nationally adopted model codes to determine if the Building Code needs to be updated and adopts an updated Building Code every three years.<sup>7</sup>

The Commission has 11 Technical Advisory Committees (TAC) ranging from the building structural TAC to the swimming pool TAC.<sup>8</sup> 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.<sup>9</sup>

---

<sup>1</sup> The Florida Building Commission Report to the 2006 Legislature, *Florida Department of Community Affairs*, p. 4, [http://www.floridabuilding.org/fbc/publications/2006\\_Legislature\\_Rpt\\_rev2.pdf](http://www.floridabuilding.org/fbc/publications/2006_Legislature_Rpt_rev2.pdf) (last visited Feb. 15, 2021).

<sup>2</sup> *Id.*; DBPR, *Building Code Information System*, <https://floridabuilding.org/c/default.aspx#> (last visited on Feb. 15, 2021).

<sup>3</sup> Florida Building Commission Homepage, <https://floridabuilding.org/c/default.aspx> (last visited Feb. 26, 2021).

<sup>4</sup> See s. 553.72(1), F.S.

<sup>5</sup> Florida Building Commission, *Advanced Florida Building Code Principals*, [http://www.floridabuilding.org/Upload/Courses\\_trp/421-2-MATERIAL-Adv%20FL%20Bldg%20Code%20-%20Course%20PDF%20version%207.0.pdf](http://www.floridabuilding.org/Upload/Courses_trp/421-2-MATERIAL-Adv%20FL%20Bldg%20Code%20-%20Course%20PDF%20version%207.0.pdf) (last visited Feb. 26, 2021).

<sup>6</sup> Ss. 553.73, and 553.74, F.S.

<sup>7</sup> *Id.*

<sup>8</sup> DBPR, *Florida Building Code Online*, [https://www.floridabuilding.org/c/c\\_commission.aspx](https://www.floridabuilding.org/c/c_commission.aspx) (last visited Feb. 26, 2021).

<sup>9</sup> S. 553.73(3), F.S.; Rule 61G20-2.001, F.A.C.

## Local Enforcement of the Florida Building Code

The Legislature has authorized local governments to inspect all buildings, structures, and facilities within their jurisdictions to protect the public's health, safety, and welfare.<sup>10</sup>

Every local government must enforce the Building Code and issue building permits.<sup>11</sup> It is unlawful for a person, firm, or corporation to construct, erect, alter, repair, secure, or demolish any building without first obtaining a permit from the local government enforcing agency or from such persons as may, by resolution or regulation, be directed to issue such permit, upon the payment of reasonable fees as set forth in a schedule of fees adopted by the enforcing agency.<sup>12</sup>

A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity.<sup>13</sup> A building official is a local government employee or a person contracted by a local government who supervises Building Code activities, including plan review, enforcement, and inspection to ensure work complies with the Building Code.<sup>14</sup>

## Amendments to the Building Code

The Commission and local governments may adopt 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.<sup>15</sup> All amendments adopted by the Commission require a 75 percent supermajority vote of approval.<sup>16</sup>

The Commission may approve technical amendments to the Building Code once each year for statewide or regional application upon a finding that the amendment:<sup>17</sup>

- Is needed in order to accommodate the specific needs of the state;
- Has a reasonable and substantial connection with the health, safety, and welfare of the general public;
- Strengthens or improves the Building Code, or in the case of innovation or new technology, will provide equivalent or better products or methods or systems of construction;
- Does not discriminate against materials, products, methods, or systems of construction of demonstrated capabilities; and
- Does not degrade the effectiveness of the Building Code.

In order to adopt a technical amendment to the Building Code the Commission must meet the following requirements:<sup>18</sup>

- The proposed amendment has been published on the Commission's website for a minimum of 45 days and all the associated documentation has been made available to any interested party before any consideration by a TAC;
- The proposed amendment includes a fiscal impact statement that documents the costs and benefits of the proposed amendment.
- In order for a TAC to make a favorable recommendation to the Commission, the proposal must receive a three-fourths vote of the members present at the TAC meeting and at least half of the regular members must be present in order to conduct a meeting;

---

<sup>10</sup> S. 553.72, F.S.

<sup>11</sup> Ss. 125.01(1)(bb), 125.56(1), and 553.80(1), F.S.

<sup>12</sup> See ss. 125.56(4)(a) and 553.79(1), F.S.

<sup>13</sup> S. 202 of the Building Code (Building), Sixth Edition.

<sup>14</sup> S. 468.603(2), F.S.

<sup>15</sup> S. 553.73, F.S.; Rule 61G20-2.002, F.A.C.

<sup>16</sup> Rule 61G20-2.002(13), F.A.C.

<sup>17</sup> S. 553.73(9), F.S.

<sup>18</sup> Ss. 553.73(3) and (9), F.S.

- After a TAC consideration and recommendation for approval of any proposed amendment, the proposal must be published on the Commission’s website for at least 45 days before any consideration by the Commission; and
- A proposal may be modified by the Commission based on public testimony and evidence from a public hearing held in accordance with ch. 120, F.S.

Adopted amendments to the foundation codes must be clearly marked in printed versions of the Building Code to make readily apparent the fact that the provisions are Florida-specific amendments.<sup>19</sup>

However, the Commission may adopt certain amendments at any time and only has to follow the rule adoption procedures in the Administrative Procedure Code.<sup>20</sup> The Commission may adopt amendments using the rule adoption procedure to address the following:<sup>21</sup>

- Conflicts within the updated code;
- Conflicts between the updated code and the Florida Fire Prevention Code;
- Unintended results from the integration of previously adopted Florida-specific amendments with the model code;
- Equivalency of standards;
- Changes to or inconsistencies with federal or state law;
- Adoption of an updated edition of the NEC if the Commission finds that delay of implementing the updated edition causes undue hardship to stakeholders or otherwise threatens the public health, safety, and welfare; or
- Enhancement of the construction requirements relating to wind resistance or the prevention of water intrusion.

### **Local Amendments to the Building Code**

Local governments may adopt amendments to the Building Code that are more stringent than the Building Code, which are limited to the local government’s jurisdiction. Amendments by local governments expire upon the adoption of the newest edition of the Building Code, and, thus, the local government must go through the amendment process every three years in order to maintain a local amendment to the Building Code.<sup>22</sup>

Current law allows local governments to adopt technical amendments to the Building Code every six months if:<sup>23</sup>

- The local government’s governing body holds a public hearing to discuss the amendment, which has been advertised in a newspaper of general circulation at least 10 days before the meeting;
- Following the hearing, the governing body determines that an amendment is needed to address a local need that is not addressed by the Building Code;
- The amendment is no more stringent than necessary to address the local need;
- The local amendment is not discriminatory against materials, products, or construction techniques of demonstrated capabilities;
- The local amendment does not introduce a new subject that is not addressed by the Building Code;
- The local amendment includes a fiscal impact statement which documents the costs and benefits of the amendment including the impact to local government, property and building owners, industry, and the cost of compliance; and
- The local government sends the amendment to the Commission.

---

<sup>19</sup> s. 553.73(7), F.S.

<sup>20</sup> Ch. 120, F.S.

<sup>21</sup> See ss. 120.536, 120.54, 120.541, and 553.73(8), F.S.; Rule 61G20-2.002(2), F.A.C.

<sup>22</sup> S. 553.73(4), F.S.

<sup>23</sup> *Id.*

A technical amendment adopted by a local government takes effect 30 days after the Commission receives the amendment and publishes the amendment on its website.<sup>24</sup>

The Commission may review local amendments and issue nonbinding recommendations to local governments about whether the local government complied with the requirements to adopt an amendment. If the Commission decides to review a local amendment it must send the amendment to the applicable TAC for review.<sup>25</sup> The TAC must make a recommendation to the Commission about whether the local amendment complies with the requirements of current law. The Commission must provide the nonbinding recommendation to the local government within 30 days of adopting the recommendation.<sup>26</sup>

Each county and municipality that adopts technical amendments to the Building Code must establish a countywide compliance review board by interlocal agreement. The compliance review board reviews any amendment adopted by a local government in its county that is challenged by a substantially affected party in order to determine if the amendment has been adopted in accordance with the requirements of current law.<sup>27</sup>

A local government or the substantially affected party may appeal the compliance review board's decision to the Commission within 14 days of the board's decision. The Commission must refer the appeal to the Division of Administrative Hearings for a hearing by an administrative law judge. The administrative law judge must hold a hearing within 30 days of being assigned the appeal, and must enter a recommended order within 30 days of the conclusion of the hearing.<sup>28</sup>

The Commission must enter a final order within 30 days after the administrative law judge issues a recommended order. In proceedings before a compliance review board or the Commission, the local government has the burden to prove an amendment has been adopted in accordance with the requirements of current law.<sup>29</sup>

### **Interpretations of the Building Code**

The Commission may issue declaratory statements regarding interpretations of the Building Code, review local building officials' interpretation of the Building Code, and give binding interpretations of the Building Code.<sup>30</sup>

A substantially affected person, state agency, or a local government may petition the Commission in writing for a declaratory statement relating to interpretations of the Building Code, or the enforcement or administration of the Building Code by local governments. The Commission must issue a declaratory statement or deny a petition within 90 days of receiving the petition. Declaratory statements are binding upon all jurisdictions and are subject to judicial review by a district court of appeal.<sup>31</sup>

A substantially affected person may also petition the Commission to review a local building official's interpretation of the Building Code. A substantially affected person includes an owner or builder subject to a decision of the local building official or an association of owners or builders having members who are subject to a decision of the local building official.<sup>32</sup>

A substantially affected person may petition the Commission to review a local building official's interpretation of the Building Code if:<sup>33</sup>

---

<sup>24</sup> 553.73(4), F.S.; Rule-61G20-2.003, F.A.C.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> S. 553.73(4), F.S.

<sup>28</sup> See ss. 120.569, 120.57, 553.73(4), F.S.; ch. 28-106, F.A.C.

<sup>29</sup> *Id.*

<sup>30</sup> S. 553.775, F.S.

<sup>31</sup> Ss. 553.775(3), 120.565, and 120.68, F.S.

<sup>32</sup> S. 553.775(3), F.S.

<sup>33</sup> *Id.*

- The substantially affected person has appealed the building official’s interpretation to the local board of appeals, if such board exists;
- The substantially affected person files a written petition to the Commission on a form adopted by the Commission which contains:
  - The name and address of the local government and the local building official;
  - The name, address, and phone number of the substantially affected person, and explanation of how they are substantially affected by the building official’s interpretation;
  - A statement of the provisions of the Building Code that are being interpreted, the building official’s interpretation of those sections, and the substantially affected person’s interpretation of those sections; and
  - The local building official’s response.
- The substantially affected person has given the petition to the local building official and at least five days have elapsed for the building official to respond.

Upon receiving a written petition to review a local building official’s interpretation of the Building Code, the Commission must provide copies to a panel, publish the petition and the local building official’s response on the Commission’s website, and allow for interested parties to post comments. The panel must have seven members made up of five building officials, an architect, and an engineer. The Commission must coordinate with the Building Officials Association of Florida<sup>34</sup> to designate the panel.<sup>35</sup>

The panel must conduct proceedings as necessary to issue a determination and must consider the written petition, the local building official’s response, and any comments posted on the Commission’s website. The panel must issue a determination within 21 days of the petition being filed with the Commission. The determination is binding upon all parties and all jurisdictions in Florida.<sup>36</sup> The determination must be published on the Commission’s website and the Florida Administrative Register.<sup>37</sup>

A party may appeal the panel’s determination by filing an appeal with the Commission within 30 days of the panel’s determination. The Commission must conduct a hearing in accordance with the Administrative Procedure Act. The burden of proof in the hearing is on the party appealing the panel’s determination. The Commission’s ruling is subject to judicial review by a district court of appeal.<sup>38</sup>

## **The Florida Building Code and Florida Building Commission – Effect of the Bill**

### **Errata to the Code**

The bill provides that the Commission may issue an “errata to the code,” in accordance with the rule adoption procedures in the Administrative Procedure Code, to list demonstrated errors in provisions contained within the Building Code. An “errata to the code” means a list of errors on current and previous editions of the Building Code.

The determination of such errors and the issuance of an “errata to the code” must be approved by a 75 percent supermajority vote of the Commission.

### **Petition for Advisory Opinion Relating to Technical Amendments to the Building Code**

<sup>34</sup> The Building Officials Association of Florida is the largest community of building officials, building inspectors, plans examiners, and building code compliance professionals in the state. Its goal is to ensure the health, safety, and welfare of the public through safe building practices by equipping building professions through education, advocacy, leadership, and code development. Building Officials Association of Florida, *About BOAF*, <https://boaf.net/page/About> (last visited Jan. 8, 2020).

<sup>35</sup> S. 553.775(3), F.S.

<sup>36</sup> S. 553.775(3)(c)5., F.S.

<sup>37</sup> *Id.*; The Florida Administrative Register is a daily publication which gives the public current information about the status of proposed rules, notice of agency public meetings, workshops and hearings, and anything else required by law. Florida Administrative Code & Florida Administrative Register, *FL Rules FAQ*, <https://www.flrules.org/Help/newHelp.asp#FAW> (last visited Jan. 15, 2020).

<sup>38</sup> Ss. 553.775(3), and 120.68, F.S.

The bill also provides that a substantially affected person may petition the Commission for a non-binding advisory opinion on any local government regulation, law, ordinance, policy, amendment, or land use or zoning provision (regulation) that the person believes is a technical amendment to the Building Code and was not adopted in accordance with the process for adopting local amendments to the Building Code.

A “local government” means a county, municipality, special district, or political subdivision of the state.

A “substantially affected person” includes an owner or builder subject to the local government’s regulation or an association of owners or builders with members who are subject to the regulation.

The Commission must issue a non-binding advisory opinion stating whether a local government regulation is a technical amendment to the Building Code if:

- A substantially affected person files a petition with the Commission, in accordance with the Commission’s directions for filing the petition, and on a form adopted by the Commission which contains at a minimum:
  - The name of the local government that enacted the regulation;
  - The name and address of the local government’s general counsel;
  - The name, address, and phone number of the substantially affected person;
  - An explanation of how the person is substantially affected by the local government’s regulation; and
  - A statement of why the regulation is a technical amendment to the Building Code, and which provisions of the Building Code are amended by the regulation, if any.
- The substantially affected person has given the petition to the local government’s general counsel or administrator by certified mail, return receipt requested. The local government may respond within 14 days by certified mail, return receipt requested, and send a copy of its response to the Commission.

Upon receiving a petition to review a local government’s regulation, the Commission must publish the petition and the local government’s response on the Commission’s website and allow for comments to be posted by interested parties. The Commission may provide the petition, the local government’s response, and any comments posted by interested parties to a TAC for review and a recommendation.

The Commission must consider the petition, the local government’s response, any comments posted on the Commission’s website, and any recommendation provided by a TAC. The Commission must issue a non-binding advisory opinion stating whether the local government’s regulation is a technical amendment to the Building Code within 30 days of receiving the petition. The Commission must also publish the non-binding advisory opinion on its website and the Florida Administrative Register.

### **Product Evaluation and Approval – Current Situation**

Current law requires the Commission to develop and implement an approval of products for statewide use. The Commission has created an approval methodology for products and systems comprising the building envelope and structural frame of a building.<sup>39</sup> The Commission approves the products in the following categories for statewide use:<sup>40</sup>

- Panel Walls;
- Exterior Doors;
- Roofing Products;
- Skylights;
- Windows;
- Shutters;
- Structural Components; and
- Impact Protective Systems.

---

<sup>39</sup> S. 553.842(1), F.S.; Rule 61G20-3.001, F.A.C.

<sup>40</sup> Rule 61G20-3.001, F.A.C.

To obtain state approval, a manufacturer must demonstrate a product complies with the applicable standards and provisions of the Building Code by submitting one of the following reports:

- A certification mark or listing of an approved certification agency;
- A test report from an approved testing laboratory;
- A product evaluation report developed, signed and sealed by a Florida licensed engineer or architect; or
- A product evaluation report from one of the following evaluation entities:
  - The National Evaluation Service;
  - The International Association of Plumbing and Mechanical Officials Evaluation Service;
  - The International Code Council Evaluation Services;
  - Underwriters Laboratories, LLC;
  - The International Conference of Building Officials;
  - SBCCI Public Safety Testing and Evaluation Services, Inc.;
  - Intertek Testing Services NA, Inc.; or
  - The Miami-Dade County Building Code Compliance Office Product Control Division.<sup>41</sup>

Currently, the Commission has authority to approve an entity as an approved testing laboratory or a certification agency if it meets the Commission's rules.<sup>42</sup> The Commission also has authority to assess an application and renewal fee for entities applying for approval or renewal as a testing laboratory, certification agencies, evaluation entities, and validation entities.<sup>43</sup> However, the Commission does not have authority to approve an entity as an evaluation entity. In order to be approved as an evaluation entity, the entity must be added to the list of approved evaluation entities in current law by the Legislature.

The Commission also has the authority to revoke product approvals as well as the approvals for product evaluation entities, testing laboratories, quality assurance entities, certification agencies, and validation entities.<sup>44</sup> The Commission has adopted a rule providing criteria for revoking or suspending product approvals, testing laboratories, quality assurance entities, certification agencies, and validation entities, but not product evaluation entities. According to DBPR, this is because the current list of product evaluation entities are listed in statute and the Commission does not believe it has authority to discipline them.<sup>45</sup>

### **Product Evaluation and Approval – Effect of the Bill**

The bill requires the Commission to adopt rules for approving evaluation entities in addition to the ones already approved and listed in current law.

The bill also clarifies that the Commission may suspend any product evaluation entity, including those listed in statute.

### **Required Information in Building Permit Application – Current Situation**

To obtain a permit, an applicant must complete an application for the proposed work on a form furnished by the government entity. The form must include the following information:<sup>46</sup>

- The name and address of the owner of the property;
- The name and address of the contractor;
- A description sufficient to identify the property to be improved, including the property's address and legal description;
- The name and address of the bonding company, if any;

---

<sup>41</sup> S. 553.842, F.S.; DBPR, Product Evaluation Entity List, [https://www.floridabuilding.org/pr/pr\\_org\\_lst.aspx](https://www.floridabuilding.org/pr/pr_org_lst.aspx) (last visited Mar. 18, 2021).

<sup>42</sup> Rule 61G20-3.008, F.A.C.

<sup>43</sup> S. 553.842(1), F.S.; Rule 6120-3.007(2), F.A.C.

<sup>44</sup> S. 553.842(14), F.S.

<sup>45</sup> Rule 61G20-3.013, F.A.C.; Department of Business and Professional Regulation, Agency Analysis of 2021 HB 401, p. 7 (Mar. 3, 2021).

<sup>46</sup> Ss. 713.135(5) and (6), F.S.



- The name and address of the architect/engineer, if any;
- The name and address of the mortgage company, if any; and
- The number or identifying symbol assigned to the building permit by the issuing authority.

In addition to the information that must be in the application, a government entity may require any additional information be included in the application.<sup>47</sup>

Some local governments are requiring contractors to include their contracts with private owners in an application for a building permit. The industry believes that local governments use such contracts to determine construction costs and construction value.<sup>48</sup> These contracts may contain private proprietary information, and after local governments request and obtain such documents, they may become public records available for anyone to obtain upon request.<sup>49</sup>

### **Required Information in Building Permit Application – Effect of the Bill**

The bill prohibits a local government from requiring a contract between a builder and an owner as a condition to apply for or obtain a building permit.

### **Private Providers – Current Situation**

In 2002, the Legislature created s. 553.791, F.S., allowing property owners and contractors to hire licensed building code officials, engineers, and architects, referred to as private providers, to review building plans, perform building inspections, and prepare certificates of completion.

Private providers are able to approve building plans and perform building code inspections as long as the plans approval and building inspections are within the scope of the provider’s license. Licensed building inspectors and plans examiners may perform inspections for additions and alterations that are limited to 1,000 square feet or less in residential buildings.

A building official may to audit a private provider to ensure the private provider has reviewed the building plans and is performing the required inspections. A building official may deny a building permit or a request for a certificate of completion if the building construction or plans do not comply with the Building Code. A building official may also issue a stop work order at any time if he or she determines any condition of the construction poses an immediate threat to public safety and welfare.<sup>50</sup>

When a property owner or a contractor elects to use a private provider, he or she must notify the building official at the time of the permit application or no less than two business days before the first or next scheduled inspection.<sup>51</sup>

Current law provides that any property owner or contractor may hire a private provider. However, current law is not clear if a local government entity may use private providers for projects owned by the local government entity.

### **Private Providers – Effect of the Bill**

---

<sup>47</sup> *Id.*

<sup>48</sup> See The Florida Channel, *1/27/2021 House Regulatory Reform Subcommittee*, <https://thefloridachannel.org/videos/1-27-21-house-regulatory-reform-subcommittee/> (last visited Feb. 19, 2021). (According to testimony offered during the January 27, 2021, meeting of the Florida House of Representatives Regulatory Reform Subcommittee, many local governments use the cost of construction as a factor for determining the amount of a fee for a building permit.)

<sup>49</sup> Article I, section 24(a) of the Florida Constitution sets forth the state’s public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record made or received in connection with official business of any public body, including counties, municipalities, and districts. Current law does not contain an exemption from Florida’s public records laws for proprietary business information included in a building permit application. See *generally*, ch. 119, F.S.

<sup>50</sup> S. 553.791(1), (13), and (18), F.S.

<sup>51</sup> S. 553.791(4)-(5), F.S.

The bill clarifies that a county, municipality, school district, or an independent special district may elect to use a private provider for a project owned by the county, municipality, school district, or independent special district.

### **Local Government Fees – Current Situation**

Each local government may provide a schedule of reasonable fees in order to cover the costs of inspection and enforcement of the Building Code.<sup>52</sup> A local government entity's fees must be used solely for carrying out that local government entity's responsibilities in enforcing the Building Code. The basis for the fee structure must relate to the level of service provided by the local government. The fees charged must be consistently applied.<sup>53</sup>

The fees, including any fines or investment earnings related to the fees, may only be used for the costs associated with enforcing the Building Code. "Enforcing the Building Code," includes:<sup>54</sup>

- the direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing;
- building code enforcement;
- fire inspections associated with new construction; and
- training costs associated with the 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 using fees to cover the cost of enforcing the Building Code to fund:<sup>55</sup>

- Planning and zoning or other general government activities;
- Inspections of public buildings for a reduced fee or no fee;
- Public information requests, community functions, boards, and any program not directly related to enforcement of the Building Code; and
- Enforcement and implementation of any other local ordinance, excluding excluding local amendments to the Building Code and local ordinances directly related to enforcing the Building Code.

Local governments are also prohibited from levying fees that would generate a total estimated annual revenue that exceeds the total estimated annual cost of its enforcement activities.<sup>56</sup> 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.<sup>57</sup>

Prior to 2019, there was no limit on the amount of such funds that local governments could carry forward into future years.<sup>58</sup>

In 2019, the Legislature limited the amount of funds generated by Building Code enforcement activities that local governments could carry forward.<sup>59</sup> Current law provides that local governments may not carry forward an amount that exceeds an amount equal to one year of their operating budget for Building Code enforcement activities. The amount of the operating budget is determined by averaging the local government's operating budget for Building Code enforcement activities from the previous four

---

<sup>52</sup> Ss. 125.56(2), 166.222, and 553.80(7), F.S. See e.g., Broward County website on Impact and Concurrency Fees, available at <http://www.broward.org/Planning/Development/FAQs/Pages/Impact-and-Concurrency-Fees.aspx> (last visited Mar. 15, 2019).

<sup>53</sup> Ss. 125.56(2) and (4), 166.222, and 553.80(7), F.S.

<sup>54</sup> S. 553.80(7)(a), F.S.

<sup>55</sup> S. 553.80(7)(b), F.S.

<sup>56</sup> S. 553.80(7), F.S.

<sup>57</sup> S. 553.80(7)(c), F.S.

<sup>58</sup> See s. 553.80(7), F.S. (2018).

<sup>59</sup> See House Analysis of 2019 House Bill 447 (Jun. 12, 2019).

fiscal years. A local government may not count any funds held in reserve when determining the four-year rolling average of its operating budget.<sup>60</sup>

If a local government carries forward an amount of funds that exceeds the statutory limit, it must use the excess funds to **rebate and reduce permit fees**.<sup>61</sup>

However, a local government may carry forward funds that exceed the allowed statutory limit if the local government established a Building Inspections Fund Advisory Board prior to 2019, and the board recommends to carry forward such excess funds. The board must consist of five members from the construction industry stakeholder community.<sup>62</sup>

### **Local Government Fees – Effect of the Bill**

The bill provides that in addition to using excess funds to rebate and reduce fees, a local government may use such funds for the construction of a building or structure that houses the local government's building department or provides training programs for building officials, inspectors, or plans examiners. Excess funds used to construct such a building or structure must be designated for such purpose by the local government and may not be carried forward for more than four years.

#### **B. SECTION DIRECTORY:**

- Section 1. Amending s. 553.73, F.S., allowing the Florida Building Commission to issue advisory opinions and an "errata to the code" in certain situations.
- Section 2. Amending s. 553.79, F.S., prohibiting local governments from requiring contracts in certain applications for building permits.
- Section 3. Amending s. 553.791, F.S., relating to alternative plans review and inspection.
- Section 4. Amending S. 553.80, F.S., relating to enforcement.
- Section 5. Amending s. 553.842, F.S., requiring the Commission to adopt criteria for approving certain entities.
- Section 6. Amending s. 125.01, F.S., conforming a cross-reference.
- Section 7. Amending s. 125.56, F.S., conforming a cross-reference.
- Section 8. Providing an effective date of July 1, 2021.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

According to DBPR, applicants for certification as product evaluation entities will be required to pay an initial application fee and renewals fees. DBPR estimates no more than 75 new entities will apply for certification and estimates receiving no more than \$45,000 in new application fees and \$15,000 annually in renewal fees for such applicants.<sup>63</sup>

##### **2. Expenditures:**

---

<sup>60</sup> S. 553.80(7), F.S.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Department of Business and Professional Regulation, *supra* note 45, at 5.

The Commission may see an increased workload related to establishing a process for accepting petitions from affected persons and issuing non-binding advisory opinions. According to DBPR, the technology contractor for the Florida Building Commission estimates updating the Building Code information system to implement the nonbinding advisory opinion process will cost approximately \$60,000.<sup>64</sup>

The provision allowing the Commission to adopt an “errata to the code” is not anticipated to have a significant impact on the Commission’s processes.<sup>65</sup>

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

Indeterminate. Local governments could see increased costs to address requests for nonbinding advisory opinions.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Prohibiting local governments from requiring contracts between owners and builders as a condition to apply or obtain a building permit may have a positive impact by preventing certain proprietary information from becoming public.

**D. FISCAL COMMENTS:**

None.

### **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because local governments could see increased costs to address requests for nonbinding advisory opinions. However, an exemption may apply because any costs to respond to requests for a nonbinding advisory opinion are likely to be insignificant.

2. Other:

Article VII, s. 19 of the Florida Constitution requires the imposition, authorization, or raising of a state tax or fee be contained in a separate bill that contains no other subject and be approved by two-thirds of the membership of each house of the Legislature. As such, Art, VII, s. 19 of the Florida Constitution may apply if the product evaluation entity approval provisions in the bill are interpreted to be a new or increased fee.

**B. RULE-MAKING AUTHORITY:**

The bill requires the Commission to adopt the form for the petition to request a nonbinding advisory opinion and directions for filing the form, adopt criteria for approving evaluation entities, and adopt “errata to the code.” It appears that sufficient rulemaking authority exists in sections 553.76(1) and (4), and 553.842(1), F.S.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

---

<sup>64</sup> *Id.*

<sup>65</sup> Email from Conner Mann, Legislative Affairs Coordinator, Department of Business and Professional Regulation, HB 401 Provision, (Feb. 8, 2021).

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 2, 2021, the Regulatory Reform Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The committee substitute:

- Removes the provision prohibiting DOH from requiring assisted living facilities to comply with rules relating to swimming pool lifeguards.
- Removes a cross-reference.

On April 14, 2021, the Commerce Committee adopted two amendments and reported the bill favorably as a committee substitute. The committee substitute:

- Clarifies that the Commission may adopt an errata to the Building Code to list errors in the Building Code.
- Clarifies that local government entities may elect to use private providers for their own construction projects.
- Clarifies that the Commission may suspend a product evaluation entity.
- Provides that a local government may use excess funds generated by Building Code enforcement for the construction of a building or structure that houses the local government's building code enforcement agency or provides training programs for building officials, inspectors, or plans examiners.
- Provides that excess funds used to construct such a building or structure must be designated for such purpose by the local government and may not be carried forward for more than four years.

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