

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

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

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

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/CS/SB 1146

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**FINAL HOUSE FLOOR ACTION:** 102 Y's 12 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 401 passed the House on April 22, 2021. The bill was amended in the Senate on April 26, 2021, and was returned to the House. The House concurred in the Senate amendments as amended by the House on April 29, 2021. The Senate concurred with the House amendment and passed the bill on April 30, 2021.

Relating to local government land development regulations, the bill:

- Prohibits local governments from adopting land development regulations that require specific building design elements for single- and two- family dwellings, unless covered by an exemption.
- Provides that local governments may adopt land development regulations requiring certain building design elements when:
  - The dwelling is a historic property or a contributing property to a historic district;
  - The regulations are adopted in order to implement the National Flood Insurance Program;
  - The regulations are adopted pursuant to and meet the building construction standards in ch. 553, F.S.;
  - The dwelling is located in a community redevelopment area; or
  - The dwelling is located in a pre-existing planned unit development or master planned community.

Relating to the Florida Building Commission, 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.
- Allows the Commission to issue an "errata to the code" or a list of demonstrated errors in 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.

Relating to local governments, the bill:

- Clarifies that local governments and school districts may use private providers for their own construction projects.
  - It also allows private providers to perform virtual, single-trade, and emergency inspections, and to submit forms electronically.
- 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 a municipality, county, or special district may not use preliminary maps issued by the Federal Emergency Management Agency for any law, ordinance, rule, or other measure that has the effect of imposing land use changes or permits.
- 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 was approved by the Governor on June 29, 2021, ch. 2021-201, L.O.F., and became effective on July 1, 2021.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **The Community Planning Act – Current Situation**

Adopted in 1985, the Local Government Comprehensive Planning and Land Development Regulation Act,<sup>1</sup> also known as Florida's Growth Management Act, was significantly revised in 2011, becoming the Community Planning Act. The Community Planning Act governs how local governments create and adopt their local comprehensive plans.<sup>2</sup>

Local comprehensive plans must include principles, guidelines, standards, and strategies for the orderly and balanced future land development of the area and reflect community commitments to implement the plan. The comprehensive plan is implemented via land development regulations. Land development regulations are ordinances regulating any aspect of development including any local government zoning, rezoning, subdivision, building construction, sign regulations, or any regulation that controls the development of land.<sup>3</sup>

Each county and municipality must adopt and enforce land development regulations that are consistent with and implement their adopted comprehensive plan.<sup>4</sup> All local government land development regulations must be consistent with the local government's comprehensive plan.<sup>5</sup> Plans are also required to identify procedures for monitoring, evaluating, and appraising implementation of the plan. Plans may include optional elements, but must include the following nine elements<sup>6</sup>:

- Capital improvements;
- Future land use plan;
- Intergovernmental coordination;
- Conservation;
- Transportation;
- Sanitary sewer, solid waste, drainage, potable water and aquifer recharge;
- Recreation and open space;
- Housing; and
- Coastal management (for coastal local governments).

All local government land development regulations must be consistent with the local comprehensive plan. Additionally, all public and private development, including special district projects, must be consistent with the local comprehensive plan.<sup>7</sup>

#### **Land Development Regulations – Current Situation**

Local governments implement the comprehensive plan through the adoption of land development regulations. Land development regulations are ordinances that regulate the aspects of development including any local government zoning, rezoning, subdivision, building construction, sign regulations, or any regulation that controls the development of land.<sup>8</sup>

Counties and municipalities are required to adopt or amend land development regulations within one year after submitting its comprehensive or revised comprehensive plan for review. Section 163.3202(2), F.S., outlines the minimum provisions that counties and municipalities must

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<sup>1</sup> See ch. 85-55, s. 1, Laws of Fla.

<sup>2</sup> See ch. 2011-139, s. 17, Laws of Fla.

<sup>3</sup> Ss. 163.3164(26) & 163.3202(1), F.S.

<sup>4</sup> S. 163.3202(1), F.S.

<sup>5</sup> S. 163.3194(1)(b), F.S.

<sup>6</sup> S. 163.3177(6), F.S.

<sup>7</sup> S. 163.3194, F.S.

<sup>8</sup> Ss. 163.3164(26) & 163.3202(1), F.S.

include in their local government land development regulations. These provisions include:

- Regulating the subdivision of land;
- Regulating the use of land and water;
- Providing for protection of potable water wellfields;
- Regulating areas subject to seasonal and periodic flooding and provide for drainage and stormwater management;
- Ensuring the protection of environmentally sensitive lands designated in the comprehensive plan;
- Regulating signage;
- Addressing concurrency;
- Ensuring safe and convenient onsite traffic flow; and
- Maintaining the existing density of residential properties or recreational vehicle parks.

Under certain circumstances, the Department of Economic Opportunity (DEO), the state land planning agency, may require a local government to submit one or more land development regulations for the agency's review. DEO is required to adopt rules for review and schedules for adoption of land development regulations.<sup>9</sup>

Some local governments in Florida have adopted land development regulations that place restrictions on the design of new single- and two- family dwellings such as the:

- External paint color;<sup>10</sup>
- Architectural style of:<sup>11</sup>
  - Windows;
  - Doors, including garage doors;
  - Front porches; and
  - Roofs.
- Exterior building material;<sup>12</sup> and
- Location of windows and garage doors.<sup>13</sup>

#### *States That Prohibit Local Government Land Development Regulations For Building Design Elements*

North Carolina and Arkansas prohibit local governments from adopting regulations that require specific "building design elements" for single- and two- family dwellings unless certain conditions exist.<sup>14</sup> Tennessee and Georgia considered bills to enact laws similar to North Carolina and Arkansas; however, the bills did not pass.<sup>15</sup>

Passed in 2015 and amended in 2020, North Carolina's law prohibits cities and counties from adopting regulations that require "building design elements" or a minimum square footage for single-family and two-family dwellings. The North Carolina law also prohibits such regulations from being applied to any zoning district or conditional district unless voluntarily consented to by the owners of all the properties subject to the proposed regulation.<sup>16</sup>

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<sup>9</sup> S. 163.3202(5), F.S.

<sup>10</sup> Osceola County Land Development Code, Ch. 3, Article 3.2.2.; Code of the City of Orlando, Ch. 58, Part 3, Section 58.517; Orange County Code, Chapter 38, Article VIII, Division 8.

<sup>11</sup> Osceola County Land Development Code, Ch. 3, Article 3.2.2.; Code of the City of Orlando, Ch. 58, Part 3, Section 58.517; City of Winter Park Code of Ordinances, Ch. 58, Art. 3, Section 58-67; Orange County Code, Chapter 38, Article VIII, Division 8.

<sup>12</sup> Orange County Code, Chapter 38, Article VIII, Division 8; City of Winter Park Code of Ordinances, Ch. 58, Art. 3, Section 58-67

<sup>13</sup> Code of the City of Orlando, Ch. 58, Part 3, Section 58.517.

<sup>14</sup> N.C. Gen. Stat. § 160D-702; Ark. Code Ann. § 14-17-212 & 14-56-204.

<sup>15</sup> Georgia General Assembly, 2019-2020 Regular Session - HB 302,

<http://www.legis.ga.gov/Legislation/enUS/display/20192020/HB/302> (last visited Mar. 18, 2021); Tennessee General Assembly, 2017-2018 Session – HB 476 <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0476&ga=110> (last visited Mar. 18, 2021).

<sup>16</sup> See General Assembly of North Carolina, Session Law 2015-86 Senate Bill 25, June 9, 2015, available at <https://www.ncleg.gov/Sessions/2015/Bills/Senate/PDF/S25v3.pdf> and R. Erika Churchill, Staff Attorney for the North Carolina General Assembly, Analysis of S.L. 2015-86 (last updated 10/12/2015), available at <https://www.ncleg.gov/Legislation/Bills/Summaries/2015/S25> (both last visited Mar. 18, 2021).

The North Carolina and Arkansas laws define “building design elements” to include the:<sup>17</sup>

- Exterior building color;
- Type or style of exterior cladding material;
- Style or materials of roof structures or porches;
- Exterior nonstructural architectural ornamentation;
- Location or architectural styling of windows and doors, including garage doors;
- Number and types of rooms; and
- Interior layout of rooms.

The laws define the phrase as not including:<sup>18</sup>

- A single- and two- family dwelling’s:
  - Height;
  - Bulk;
  - Orientation; and
  - Location of a structure on a zoning lot.
- The use of buffering or screening to minimize visual impacts or impact of light and noise.

The laws allow cities and counties to adopt and enforce regulations that require “building design elements” for single- and two- family dwellings if:<sup>19</sup>

- The dwelling is located in a historic district;<sup>20</sup>
- The dwelling is individually designated as a historic landmark;
- The regulations are directly and substantially related to the requirements of the state’s building code;
- The regulations are applied to manufactured housing in a manner consistent with state and federal law; or
- The regulations are adopted as a condition for participation in the National Flood Insurance Program.

The prohibitions against local regulations relating to building design elements do not affect the validity or enforceability of private covenants or other contractual agreements relating to building design elements between property owners.<sup>21</sup>

Arkansas also allows cities and counties to adopt and enforce building design elements regulations if:<sup>22</sup>

- The dwelling is in a central business district, which can be created by a city to revitalize its urban center;
- The dwelling was subject to the local regulation prior to the prohibition being enacted;
- A majority of owners in an overlay district approve the regulation and the district determines the regulation does not violate Arkansas’ Private Property Protection Act; or
- The regulations are directly related to an immediate public health or safety hazard and the regulation is derived from the local government’s police power.

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<sup>17</sup> N.C. Gen. Stat. § 160D-702; Ark. Code Ann. § 14-17-212 & 14-56-204. Arkansas also includes minimum square footage and the location and design of a dwelling’s garage in its definition.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The National Register of Historic Places is the federal government’s official list of historic places in the United States. The National Historic Preservation Act of 1966 authorized the register, which is administered by the National Park Service. National Park Service, *What is the National Register of Historic Places*, <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm> (last visited Feb. 1, 2021).

<sup>21</sup> N.C. Gen. Stat. § 160D-702; Ark. Code Ann. § 14-17-212 & 14-56-204.

<sup>22</sup> Ark. Code Ann. § 14-17-212 & 14-56-204.

## Land Development Regulations – Effect of the Bill

The bill prohibits local governments from adopting land development regulations that relate to building design elements for single- or two- family dwellings.

The bill defines the term “building design elements” to mean:

- Exterior building color;
- Type or style of exterior cladding material;
- Style or material of roof structures or porches;
- Exterior nonstructural architectural ornamentation;
- Location or architectural styling of windows or doors;
- Location or orientation of the garage;
- Number and type of rooms; and
- Interior layout of rooms.

The term “building design elements” does not include:

- Height;
- Bulk;
- Orientation;
- Location on a zoning lot; or
- The use of buffering or screening to minimize potential adverse physical or visual impacts or to protect the privacy of neighbors.

The bill allows local governments to adopt and enforce regulations that require “building design elements” for residential dwellings if:

- The dwelling is listed in, or located in a historic district listed in, the National Register of Historic Places;
- The dwelling is listed as a historic property or located in a historic district as determined by a local preservation ordinance;
- The regulations are adopted in order to implement the National Flood Insurance Program;
- The regulations are adopted in accordance and compliance with procedures established for the adoption of local amendments to the Florida Building Code;
- The dwelling is located in a community redevelopment area;<sup>23</sup>
- The regulations are required to ensure protection of coastal wildlife in compliance with the Dennis L. Jones Beach and Shore Preservation Act or the Florida Water Resources Act of 1972;
- The dwelling is located in a planned unit development or a master planned community created by a local governing body; or
- The dwelling is located within the jurisdiction of a local government that has a design review board or architectural review board.

The bill defines a “planned unit development” and “master planned community” as an area of land that is planned and developed as a single entity or in approved stages with uses and structures substantially related to the character of the entire development, or a self-contained development in which the subdivision and zoning controls are applied to the project as a whole rather than to individual lots.

The bill also provides that the prohibition of land development regulations that relate to building design elements does not affect the validity or enforceability of private covenants or other contractual agreements relating to building design elements.

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<sup>23</sup> Community redevelopment areas are neighborhoods determined by local governments to be slums, blighted areas, areas in which there is a shortage of affordable housing, or coastal and tourist areas that are deteriorating and economically distressed, which are subject to redevelopment in accordance with a community redevelopment plan. See ch. 163, part III F.S.

## **Federal Emergency Management Agency Flood Maps – Current Situation**

The National Flood Insurance Program (NFIP) was created by the passage of the National Flood Insurance Act of 1968 to offer federally-subsidized flood insurance to property owners and to promote land-use controls in floodplains. The NFIP is administered by the Federal Emergency Management Agency (FEMA). The federal government makes flood insurance available within a community, if the community adopts and enforces a floodplain management ordinance to reduce future flood risk to new construction in floodplains.<sup>24</sup>

### *Flood Insurance Rate Maps*

In order to support the NFIP, FEMA identifies, publishes, and periodically updates flood hazard data nationwide. This data is provided to communities in the form of a Flood Insurance Rate Map (FIRM) and Flood Insurance Study (FIS) report, typically prepared in a countywide format. While an FIS report accompanies most FIRMs, it is not created for all flood studies.<sup>25</sup>

A FIRM is an official map of a community within the United States that displays the floodplains, base flood elevation, special flood hazard areas, the 100-year flood boundary, and particular hazard areas and risk premium zones, as delineated by FEMA.<sup>26</sup> FIRMs are used to determine insurability and to set insurance rates against the risk of flood. FIRMs are also used by towns and municipalities for local land use policy and zoning.<sup>27</sup>

### *Local Government Flood Map Adoption Process*

For local governments and individual homeowners to acquire property insurance and participation in the NFIP, local governments must meet or exceed the minimum requirements of the NFIP, including officially adopting FIRMs by providing for such via ordinance. Local governments must also adopt updates and revisions to FIRMs made by FEMA. FEMA is required to review community flood maps every five years and assess whether to revise or update them based on current conditions.<sup>28</sup>

FEMA's flood mapping program is called Risk Mapping, Assessment, and Planning (Risk Map). Under Risk Map, FEMA works with communities and local stakeholders to obtain a comprehensive picture of a community's flooding issues, flood risks, and potential for flood mitigation activities. If a community's FIRM needs to be updated, FEMA will perform a detailed study to determine the revised FIRM.<sup>29</sup>

### *Preliminary FIRMs*

When the study is complete, FEMA provides copies of a preliminary FIRM for community review and holds a meeting with various state and local officials involved in the study known as a Consultation Coordination Officer meeting (CCO meeting). FEMA may also hold public meetings to introduce the preliminary FIRM to community members.<sup>30</sup>

After the CCO meeting, FEMA initiates a 90-day period for communities to submit appeals about the new or modified flood hazard information shown on the preliminary FIRM. Before the appeal period is initiated, FEMA will publish a notice of proposed flood hazard determinations in the Federal Register,

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<sup>24</sup> Congressional research Service, Introduction to the National Flood Insurance Program (NFIP), updated Jan. 5, 2021, <https://fas.org/sqp/crs/homesec/R44593.pdf> (last visited May 5, 2021).

<sup>25</sup> FEMA, *Adoption of Flood Insurance Rate Maps by Participating Communities*, FEMA 495 January 2019,

[https://www.fema.gov/sites/default/files/2020-07/fema\\_adoption-flood-sites/default/files/2020-07/fema\\_adoption-flood-insurance-rate-maps-participating-communities\\_bulletin.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_adoption-flood-sites/default/files/2020-07/fema_adoption-flood-insurance-rate-maps-participating-communities_bulletin.pdf) (

<sup>26</sup> FEMA, *Flood Insurance Rate Map (FIRM)*, <https://www.fema.gov/glossary/flood-insurance-rate-map-firm> (last visited May 5, 2021).

<sup>27</sup> 44 C.F.R. § 64.3; FEMA *supra* note 26.

<sup>28</sup> FEMA *supra* note 19; FEMA, *Process to Revise a Flood Map* <https://www.fema.gov/flood-maps/change-your-flood-zone/revision-process> (last visited May 5, 2021); 42 U.S.C. § 4101(e).

<sup>29</sup> FEMA *supra* note 26.

<sup>30</sup> *Id.*

notify the community's Chief Executive Officer, and publish information at least twice in a local newspaper.<sup>31</sup>

The appeal period provides community officials and people who own or lease property in the community an opportunity to submit scientific or technical information if they believe the flood hazard determinations are scientifically or technically incorrect.<sup>32</sup>

Following the 90-day appeal period, FEMA resolves all appeals and finalizes any changes to the preliminary FIRM. FEMA then sends each affected community a Letter of Final Determination (LFD), which establishes the final flood hazard data and the effective date of the new FIRM for the community.<sup>33</sup>

#### *Six-month Community Adoption Period*

The LFD also initiates the six-month period during which each community must adopt or amend its floodplain management regulations to reference the date and title of the new FIRM and incorporate the new FIRM.<sup>34</sup>

The new FIRM becomes effective at the end of the six months. At that time, flood insurance rates will be based on the new flood data, and the community will apply any floodplain management ordinances related to the new FIRM. Federally insured or regulated lenders will also use the newly effective FIRM to determine if flood insurance is required as a condition of a loan.<sup>35</sup>

If a community does not adopt or amend floodplain management regulations before the six months, the community will be suspended from the NFIP. Suspension from the NFIP will have the following consequences:<sup>36</sup>

- Property owners are prevented from purchasing NFIP flood insurance policies, and existing policies will not be renewed.
- Federal grants or loans for development will not be available in identified flood hazard areas.
- Federal disaster assistance will not be provided to permanently repair insurable buildings in identified flood hazard areas for damage caused by a flood.
- Federal mortgage insurance or loan guarantees, such as those written by the Federal Housing Administration and the Department of Veteran Affairs, will not be provided in identified flood hazard areas.
- Federally insured or regulated lending institutions, such as banks and credit unions, are allowed to make conventional loans for insurable buildings in flood hazard areas of non-participating communities, but must notify applicants seeking such loans that there is a flood hazard and that the property is not eligible for federal disaster relief.

These sanctions can be severe on any community with a substantial number of buildings in the floodplain. Most communities with a flood problem have joined the NFIP and are in full compliance with their regulatory obligations.

#### **Federal Emergency Management Agency Flood Maps – Effect of the Bill**

The bill prohibits a municipality, county, or special district from using preliminary maps issued by FEMA for any law, ordinance, rule, or other measure that imposes land use changes or permits.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

## 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>37</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>38</sup> The current edition of the Building Code is the seventh edition, which is referred to as the 2020 Florida Building Code.<sup>39</sup>

Chapter 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>40</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>41</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>42</sup>

The Commission reviews several International Codes published by the International Code Council, the National Electric Code (NEC), 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>43</sup>

The Commission has 11 Technical Advisory Committees (TAC) ranging from the building structural TAC to the swimming pool TAC.<sup>44</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>45</sup>

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<sup>37</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>38</sup> *Id.*; DBPR, *Building Code Information System*, <https://floridabuilding.org/c/default.aspx#> (last visited on Feb. 15, 2021).

<sup>39</sup> Florida Building Commission Homepage, <https://floridabuilding.org/c/default.aspx> (last visited Feb. 26, 2021).

<sup>40</sup> See s. 553.72(1), F.S.

<sup>41</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>42</sup> Ss. 553.73, and 553.74, F.S.

<sup>43</sup> *Id.*

<sup>44</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>45</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>46</sup>

Every local government must enforce the Building Code and issue building permits.<sup>47</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 and paying reasonable fees, as set forth in a schedule of fees adopted by the enforcing agency.<sup>48</sup> Building permits are typically issued by a building official who supervises building plan review, enforcement, and inspection to ensure work complies with the Building Code.<sup>49</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 standards for construction. An administrative amendment is an addition or alteration of the code enforcement requirements of the Building Code.<sup>50</sup> All amendments adopted by the Commission require a 75 percent supermajority vote.<sup>51</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>52</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>53</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;
- 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.

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<sup>46</sup> S. 553.72, F.S.

<sup>47</sup> Ss. 125.01(1)(bb), 125.56(1), and 553.80(1), F.S. S. 202 of the Building Code (Building), Seventh Edition (A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity.)

<sup>48</sup> See ss. 125.56(4)(a) and 553.79(1), F.S.

<sup>49</sup> S. 468.603(2), F.S.

<sup>50</sup> S. 553.73, F.S.; Rule 61G20-2.002, F.A.C.

<sup>51</sup> Rule 61G20-2.002(13), F.A.C.

<sup>52</sup> S. 553.73(9), F.S.

<sup>53</sup> Ss. 553.73(3) and (9), 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>54</sup>

If the rule adoption procedures in the Administrative Procedure Act are followed, the Commission may adopt amendments at any time for the types of amendments listed below:<sup>55</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>56</sup>

Current law allows local governments to adopt technical amendments to the Building Code every six months if:<sup>57</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.

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>58</sup>

The Commission may review local amendments and issue nonbinding recommendations to local governments about whether the local government complied with adoption requirements. If the Commission decides to review a local amendment it must send the amendment to the applicable TAC

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<sup>54</sup> S. 553.73(7), F.S.

<sup>55</sup> Ch. 120, F.S.; See ss. 120.536, 120.54, 120.541, and 553.73, F.S.; and Rule 61G20-2.002(2), F.A.C.

<sup>56</sup> S. 553.73(4), F.S.

<sup>57</sup> *Id.*

<sup>58</sup> S. 553.73(4), F.S.; Rule-61G20-2.003, F.A.C.

for review.<sup>59</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>60</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>61</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>62</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>63</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>64</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>65</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>66</sup>

A substantially affected person may petition the Commission to review a local building official's interpretation of the Building Code if:<sup>67</sup>

- 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;

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> S. 553.73(4), F.S.

<sup>62</sup> See ss. 120.569, 120.57, 553.73(4), F.S.; ch. 28-106, F.A.C.

<sup>63</sup> *Id.*

<sup>64</sup> S. 553.775, F.S.

<sup>65</sup> Ss. 553.775(3), 120.565, and 120.68, F.S.

<sup>66</sup> S. 553.775(3), F.S.

<sup>67</sup> *Id.*

- The name, address, and phone number of the substantially affected person, and an 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>68</sup> to designate the panel.<sup>69</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>70</sup> The determination must be published on the Commission's website and the Florida Administrative Register.<sup>71</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>72</sup>

The procedures outlined above may also use by any substantially affected person, contractor, or designer, or a group representing a substantially affected person, contractor, or designer, to apply for a formal interpretation of the Florida Building Code or the Florida Accessibility Code for Building Construction.<sup>73</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.

<sup>68</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 professionals through education, advocacy, leadership, and code development. Building Officials Association of Florida, *About BOAF*, <https://boaf.net/page/About> (last visited May 24, 2021).

<sup>69</sup> S. 553.775(3), F.S.

<sup>70</sup> S. 553.775(3)(c)5., F.S.

<sup>71</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 May 24, 2021).

<sup>72</sup> Ss. 553.775(3), and 120.68, F.S.

<sup>73</sup> S. 553.775 (3)(d), F.S.

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

The bill 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 may consider 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>74</sup> The Commission approves the products in the following categories for statewide use:<sup>75</sup>

- Panel Walls;
- Exterior Doors;
- Roofing Products;
- Skylights;

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<sup>74</sup> S. 553.842(1), F.S.; Rule 61G20-3.001, F.A.C.

<sup>75</sup> Rule 61G20-3.001, F.A.C.

- Windows;
- Shutters;
- Structural Components; and
- Impact Protective Systems.

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>76</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>77</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>78</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>79</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>80</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.

<sup>76</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>77</sup> Rule 61G20-3.008, F.A.C.

<sup>78</sup> S. 553.842(1), F.S.; Rule 6120-3.007(2), F.A.C.

<sup>79</sup> S. 553.842(14), F.S.

<sup>80</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).

## **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>81</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;
- 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>82</sup>

Some local government entities 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>83</sup> These contracts may contain private proprietary information, and after local governments request and obtain such documents, they could become public records available for anyone to obtain upon request.<sup>84</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.<sup>85</sup>

If an owner or contractor opts to use a private provider, the local jurisdiction must calculate the cost savings to its building department and reduce the building permit fees accordingly. A local government may not charge a fee for building inspections when an owner or contractor uses a private provider, but it may charge a reasonable administrative fee.<sup>86</sup>

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<sup>81</sup> Ss. 713.135(5) and (6), F.S.

<sup>82</sup> *Id.*

<sup>83</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>84</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>85</sup> S. 553.791(1)(j) and (3), F.S.

<sup>86</sup> S. 553.791(2)(b), F.S.

A building official may 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>87</sup>

When a property owner or a contractor elects to use a private provider, he or she must notify the building official, on a form adopted by the Commission, at the time of the permit application or no less than two business days before the first or next scheduled inspection. The form must include:<sup>88</sup>

- The services to be performed by the private provider;
- The private provider's name, firm, address, telephone number, and **fax number**;
- The private provider's license number, resume, and certificate of insurance if required by the building official; and
- An acknowledgment from the owner that a private provider is being used.

An owner or contractor must post a private provider's contact information on the jobsite. If an owner or contractor changes private providers or makes changes to the services performed by the private provider, the owner or contractor must update the notice and post the changes at the job site within one business day of the changes.<sup>89</sup>

Upon receipt of a building permit application from a private provider, a building official has 30 business days to grant or deny the permit. Denying a permit automatically tolls the remaining 30 business days.<sup>90</sup>

A private provider who approves building plans must sign a sworn affidavit, on a form adopted by the Commission, that the plans comply with the Building Code and the private provider is authorized to review the plans.<sup>91</sup>

Before a private provider performs building inspections, he or she must notify the building official of each inspection the business day before the inspection. A local building official may visit a building site as often as necessary to ensure the private provider is performing the required inspections. Construction work on a building may continue as long as the private provider passes each inspection and the private provider gives proper notice of each inspection to the building official.<sup>92</sup>

A private provider must post records of every inspection, including the results of the inspections, on the jobsite and provide the records to the local building official within 2 business days of posting the records on the job site. These records must be signed by the private provider. However, a local building official may waive the requirement to provide the records to the building official as long as the inspections records are posted at the job site.<sup>93</sup>

Upon completion of all required inspections, a private provider must give the building official a record of all the inspections, a request for a certificate of completion, and a sworn statement stating the building complies with the building code. Upon receipt, the building official has two business days to issue the certificate of completion, deny the request for a certificate of completion, or issue a stop work order.<sup>94</sup>

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<sup>87</sup> S. 553.791(1), (13), and (18), F.S.

<sup>88</sup> S. 553.791(4)-(5), F.S.

<sup>89</sup> *Id.*

<sup>90</sup> S. 553.791(7), F.S.

<sup>91</sup> S. 553.791(6), F.S.

<sup>92</sup> S. 553.791(8) and (18), F.S.

<sup>93</sup> S. 553.791(9) and (10), F.S.

<sup>94</sup> S. 553.791(11)-(12), F.S.

Any notice that is provided by a local building official is deemed provided if the local building official successfully faxes the notice to the fax number listed in the permit application or if there is no fax number when the receiving party actually receives the notice.<sup>95</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.

### *Virtual Building Inspections*

As a result of COVID-19, many building departments in Florida began performing virtual inspections in order to prevent a shut down and to protect building department staff, contractors, and property owners. Virtual inspections allow a building official or inspector to perform an inspection without having to be physically present at the jobsite. They also allow building departments to continue operating during the COVID-19 pandemic, which allows contractors to keep working.<sup>96</sup>

Virtual inspections can range from roofing inspections, windows and doors inspections, to air conditioning change outs depending on the jurisdiction. Virtual inspections can be more efficient than in-person inspections by reducing jobsite travel time, by allowing contractors to immediately request an inspection once they finish work, and by allowing the contractor to remain on the jobsite.<sup>97</sup>

Virtual inspections are usually done by having the contractor or owner at the jobsite with a mobile phone or tablet with a camera. The building official or inspector calls the contractor or owner via video chat, and the building official or inspector directs the contractor or owner to allow him or her to view the specific work.<sup>98</sup>

Some building departments have indicated that they plan to continue using virtual inspections once the COVID-19 pandemic is over.<sup>99</sup>

Current law neither specifically prohibits nor allows virtual inspections by private providers.

### *Building Permits for Emergency Repairs*

The Building Code provides that a contractor is not required to obtain a building permit prior to making emergency repairs, as long as the contract applies for a building permit the next business day after making the repairs.<sup>100</sup> Current law does not indicate whether private providers can inspect such repairs.

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<sup>95</sup> S. 553.791(14), F.S.

<sup>96</sup> Monica Casey, *Tallahassee creates virtual building inspections to save jobs and keep social distancing*, WCTV.tv (Apr. 8, 2020) <https://www.wctv.tv/content/news/Tallahassee-creates-virtual-building-inspections-to-save-jobs-and-keep-social-distancing-569485561.html> (last visited Feb. 23, 2021); Orange County, *Orange County Division of Building Safety Launches Remote Inspections*, (Jul. 22, 2020) <https://newsroom.ocfl.net/2020/07/orange-county-division-of-building-safety-launches-remote-inspections/> (last visited Feb. 23, 2021) Marsha Lidskin, *Palm Coast building inspections for occupied homes go virtual for COVID-19 safety*, PalmCoastObserver.com (Aug. 27, 2020) <https://www.palmcoastobserver.com/article/palm-coast-building-inspections-for-occupied-homes-go-virtual-for-covid-19-safety> (last visited Feb. 23, 2021).

<sup>97</sup> Miami Beach, *Modified Procedures for Building Code Inspections During COVID-19 Emergency Period*, <https://www.miamibeachfl.gov/wp-content/uploads/2020/05/Virtual-inspections-procedures-2.pdf> (last visited Feb. 23, 2021); Boca Raton, *Virtual Inspections*, <https://myboca.us/1846/Virtual-Inspections> (last visited Feb. 23, 2021); Orange County, *supra* at note 34.

<sup>98</sup> *Id.*

<sup>99</sup> Kim Slowey, *Building officials turn to video inspections to mitigate COVID-19 risk*, Construction Dive (Apr. 15, 2020) <https://www.constructiondive.com/news/covid-19-forces-building-officials-to-explore-remote-video-inspections/576072/> (last visited Feb. 23, 2021).

<sup>100</sup> S. 105.2.1 of the Building Code (Building), Seventh Edition.

## Private Providers – Effect of the Bill

The bill:

- Provides that all notices related to private providers may be transmitted or submitted electronically.
  - The bill defines “electronic transmission” or “submitted electronically” to mean any form or process of communication not directly involving the physical transfer of paper or another tangible medium which is suitable for the retention, retrieval, and reproduction of information by the recipient and is retrievable in paper form by the receipt through an automated process.
- Clarifies that an owner or contractor who uses a private provider must notify the local building official **in writing**.
- Provides that an owner or contractor must notify the local building official of any changes to the services performed by the private provider or changes to the private provider within one business day **or within 2 business days before the next scheduled inspection**.
- Removes the requirement that an owner or contractor must post a private provider’s contact information on the jobsite.
- Removes the requirement that the Commission must approve the form used by a private provider to affirm that building plans comply with the Building Code.
- Allows a private provider to physically or **electronically sign** the affidavit affirming that building plans comply with the Building Code;
  - The bill defines “electronic signature” to mean letters, characters, or symbols manifested by electronic or similar means which are executed or adopted by a party with an intent to authenticate a writing or record.
- Clarifies that for purposes of reducing a building permit fee, a local government may determine its cost savings on a flat fee or percentage basis or any other reasonable means by which the local government assesses the cost for its plans review or inspection services.
- Provides that an owner or contractor must give the local building official the provider’s **email address** instead of fax number.
- Provides that any notice sent by a local building official is deemed provided if the local building official successfully **emails** the notice to the email address listed in the permit application instead of faxing the notice to the fax number listed in the permit application.
- 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.

### *Inspections Performed by Private Providers*

The bill amends the requirements for inspections performed by private providers by providing that:

- Private providers may perform inspections either in person or virtually.
- Private providers may post the results of inspections at the job site or “electronically post” them.
  - The bill defines “electronically posted” to mean providing notices of decisions, results, or records, including inspection records, through the use of a website or other form of electronic communication used to transmit or display information.
- Private providers may perform inspections for **emergency repairs** without notifying the local building official as long as the private provider performs the inspection within 3 business days of being contacted to perform the inspection and he or she submits the inspection report to the local building official the day after the inspection.
- Private providers may perform inspections within the scope of the provider’s license including single-trade inspections;
  - The bill defines “single-trade inspection” as any inspection focused on a single construction trade, such as plumbing, mechanical, or electrical.
  - The term includes, but is not limited to, inspections of door or window replacements; fences and block walls more than 6 feet high from the top of the wall to the bottom of the

footing; stucco or plastering; reroofing with structural alteration; HVAC replacements; ductwork or fan replacements; alteration or installation of wiring, lighting, and service panels; water heater change outs; sink replacements; and re-piping.

- Private providers may physically or **electronically sign** inspections records.

### **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>101</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>102</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>103</sup>

- the direct costs and reasonable indirect costs associated with review of building plans, building inspections, re-inspections, 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>104</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 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>105</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>106</sup>

Prior to 2019, there was no limit on the amount of such funds that local governments could carry forward into future years.<sup>107</sup>

In 2019, the Legislature limited the amount of funds generated by Building Code enforcement activities that local governments could carry forward.<sup>108</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

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<sup>101</sup> Ss. 125.56(2), 166.222, and 553.80(7), F.S.

<sup>102</sup> Ss. 125.56(2) and (4), 166.222, and 553.80(7), F.S.

<sup>103</sup> S. 553.80(7)(a), F.S.

<sup>104</sup> S. 553.80(7)(b), F.S.

<sup>105</sup> S. 553.80(7), F.S.

<sup>106</sup> S. 553.80(7)(c), F.S.

<sup>107</sup> See s. 553.80(7), F.S. (2018).

<sup>108</sup> See House Analysis of 2019 House Bill 447 (Jun. 12, 2019).

previous four 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>109</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>110</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>111</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.

## **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 estimated receiving no more than \$45,000 in new application fees and \$15,000 annually in renewal fees for such applicants.<sup>112</sup>

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

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>113</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>114</sup>

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

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

None.

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<sup>109</sup> S. 553.80(7), F.S.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Department of Business and Professional Regulation, *supra* note 76, at 5.

<sup>113</sup> *Id.*

<sup>114</sup> Email from Conner Mann, Legislative Affairs Coordinator, Department of Business and Professional Regulation, HB 401 Provision, (Feb. 8, 2021).

2. Expenditures:

Indeterminate. Local governments may see increased costs to address requests for nonbinding advisory opinions, and to procure or enhance electronic infrastructure to accommodate electronic submission and posting of certain inspection materials and records by private providers.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Prohibiting certain building design elements ordinances and other regulations may lead to a decrease in the cost of construction.

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.