

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB RRS 11-01 Legislative Ratification of Administrative Rules

**SPONSOR(S):** Rulemaking & Regulation Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 396

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking & Regulation Subcommittee		Miller	Rubottom

### SUMMARY ANALYSIS

The Florida Building Code sets uniform, comprehensive statewide standards for all aspects of construction in Florida. The Florida Building Commission, administratively housed in the Department of Community Affairs, is responsible for adopting, amending, and updating the Code. The statute requires the Commission to fully update the Code every three years according to the review cycle followed by national authorities of the specific codes (such as plumbing and electrical) which are used as bases for the Florida Code. By law the triennial process must comply with the rulemaking procedures of the Administrative Procedures Act ("APA").

The substantive statutes guiding the Commission in adopting the Code provide detailed requirements for the scope of material included in the triennial updates. Further protection for the public is provided by the APA and by a statutory requirement that the update be adopted at least 6 months prior to its effective date. Express legislative intent requires the Code be sufficiently comprehensive to effectively protect the public health, safety, and welfare at a reasonable cost to consumers. A large number of substantive bills and amendments are considered each legislative session relating to particulars of the Code, keeping the Legislature active in policy oversight.

In November, 2010, the Legislature enacted amendments to the APA requiring legislative ratification of agency rules that exceed particular thresholds of regulatory cost or economic impact. The Commission has initiated rulemaking to adopt its most recent triennial update of the Code. DCA estimates the Code update will be adopted sometime in May or in June, 2011, after the current legislative session. Due to its comprehensive nature, DCA projects the total regulatory costs and economic impact of the updated Code will exceed the statutory threshold requiring legislative ratification. If only adopted rules are considered for ratification, the earliest the updated Code may be ratified would be during the 2012 regular session.

PCB RRS 11-01 creates a narrow exemption to legislative ratification for updates to the Florida Building Code. The exemption will allow the process to be completed without ratification, without hindering legislative oversight of the process.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### 1. Present Situation

#### **The Florida Building Code**

The Florida Building Code ("Code") is the unified building code applicable statewide as authorized by statute.<sup>1</sup> The overall purpose for the Code is to create within a single set of documents uniform standards applicable to all aspects of construction in Florida to provide effective and reasonable protection for public health, safety, and welfare "...at the most reasonable cost to the consumer."<sup>2</sup> The Florida Building Commission ("Commission")<sup>3</sup> is responsible for adopting, updating, and general administration of the Code. With certain exceptions, enforcement of the Code is through duly-authorized state and local agencies.<sup>4</sup>

The law provides detailed sections on legislative intent<sup>5</sup>, Code adoption and contents,<sup>6</sup> specific processes for different types of amendments,<sup>7</sup> the triennial comprehensive update conducted by the Commission,<sup>8</sup> and the Commission's powers.<sup>9</sup> The express intent of the law is for the Commission to use the statutory rulemaking requirements and process<sup>10</sup> for adopting, amending, or updating the Code:<sup>11</sup>

553.72 Intent. —

...

(3) It is the intent of the Legislature that the Florida Building Code be adopted, modified, updated, interpreted, and maintained by the Florida Building Commission in accordance with ss. 120.536(1) and 120.54 and enforced by authorized state and local government enforcement agencies.

This intent is made a specific requirement in the substantive sections on adoption,<sup>12</sup> amendments,<sup>13</sup> and updates.<sup>14</sup> In addition, a large number of substantive bills and amendments are considered by the Legislature each year, keeping the Legislature actively engaged in the process of continual revision.

The Commission is required to update the Code every 3 years, following the statutory rulemaking process in the APA. The statute also provides a minimum time of 6 months between adoption of the updated Code and its effective date.<sup>15</sup> The Department of Community Affairs ("DCA") publishes the notices required for rulemaking<sup>16</sup> as part of its duties to provide the Commission with administrative and staff support.<sup>17</sup>

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<sup>1</sup> Ch. 553, Part IV, Florida Building Code.

<sup>2</sup> S. 553.72(1).

<sup>3</sup> S. 553.74.

<sup>4</sup> S. 553.80.

<sup>5</sup> S. 553.72.

<sup>6</sup> S. 553.73(1)-(3).

<sup>7</sup> S. 553.73(3) & (9)-technical amendments, (4) & (5)-amendments by local authorities, (8)-substantive amendments.

<sup>8</sup> S. 553.73(7).

<sup>9</sup> S. 553.74 - 553.77

<sup>10</sup> S. 120.536(1) and 120.54. Chapter 120 is Florida's Administrative Procedures Act or "APA".

<sup>11</sup> S. 553.72(3).

<sup>12</sup> S. 553.73(1)(a).

<sup>13</sup> S. 553.73(3), (8), & (9).

<sup>14</sup> S. 553.73(7)(a).

<sup>15</sup> S. 553.73(7)(e). Under s. 120.54(3)(e)6, the normal time for an adopted rule to become effective is 20 days after being filed for adoption unless the time is properly extended for 60 days. Under s. 120.541(3), legislative ratification is a separate condition before certain rules go into effect.

<sup>16</sup> Notice of proposed rule 9N-1.001, to adopt the 2010 updates to the Code, published by DCA on January 7, 2011, at <https://www.flrules.org/gateway/ruleNo.asp?id=9N-1.001>.

<sup>17</sup> S. 553.75(3).

The statute imposes detailed requirements the Commission must follow to adopt, amend, review, and update the Code in addition to following APA procedural requirements.<sup>18</sup> The resulting Code contains or incorporates the laws and rules pertaining to all major aspects of public and private building construction in Florida, from broad areas including design, physical construction, modification, repair, and even demolition,<sup>19</sup> to specific matters from structural and mechanical systems to elevators and coastal construction standards.<sup>20</sup> The Code must reference without change the Florida Fire Prevention and Life Safety Codes adopted by Department of Financial Services rule.<sup>21</sup> When updating the Code the Commission is required to create the Code's foundation by incorporating the most current versions of a number of standard codes, such as the International Plumbing Code and the National Electrical Code.<sup>22</sup> The entire process of updating the Code is subject to extensive statutory direction,<sup>23</sup> continual legislative revision, and the procedural protections of the APA rulemaking process.<sup>24</sup>

### **Legislative Ratification**

DCA estimates compliance by businesses and consumers simply with the local construction permitting requirements resulting from the existence and enforcement of the Code readily exceed an aggregate of \$1 million over 5 years.<sup>25</sup> Where the Code is adopted in compliance with the Legislature's primary intent and protects public health, safety, and welfare at the least cost to the consumer,<sup>26</sup> the resulting direct or indirect regulatory costs are likely to exceed the statutory threshold which mandates ratification.<sup>27</sup> Legislative ratification is required when the economic impact of a proposed rule exceeds specific statutory criteria:

(3) If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.<sup>28</sup>

The terms of the statute are specific: legislative ratification is intended only as a condition before certain rules<sup>29</sup> take effect. Under current law a rule must be filed for adoption before it may take effect<sup>30</sup> thus ensuring the full availability of all procedural protections afforded to protect those who will be impacted by the new rule.<sup>31</sup> Since statutes must be read together and interpreted to give full effect to the terms of each,<sup>32</sup> a rule must be filed for adoption before being submitted for legislative ratification.

The Commission currently is completing the third triennial update to the Code and has begun the rulemaking process.<sup>33</sup> DCA anticipates the rule incorporating the final version of the updated Code will be ready to file for adoption after May 6 but before June 30, 2011.<sup>34</sup> Absent the requirement of legislative ratification the Code thus would become effective no later than December 31, 2011.<sup>35</sup> However, since the

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<sup>18</sup> S. 553.73.

<sup>19</sup> S. 553.73(1)(a).

<sup>20</sup> S. 553.73(2).

<sup>21</sup> S. 553.73(1)(c).

<sup>22</sup> S. 553.73(7)(a).

<sup>23</sup> Ch. 553, Part IV.

<sup>24</sup> S. 120.54, 120.56.

<sup>25</sup> 3/11/2011 conversation with Jim Richmond, Asst. Gen. Counsel, DCA, counsel for Florida Building Commission.

<sup>26</sup> S. 553.72.

<sup>27</sup> S. 120.541(2)(a).

<sup>28</sup> S. 120.541(3).

<sup>29</sup> A "rule" is defined as an agency statement of general applicability which implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency; the term also applies to certain agency forms. S. 120.52(16). A rule is enforceable only if promulgated pursuant to the rulemaking process in Chapter 120. *Coventry First, LLC v. OIR*, 38 So. 3d 200, 203 (Fla. 1<sup>st</sup> DCA 2010).

<sup>30</sup> S. 120.54(30)(e)6.

<sup>31</sup> S. 120.54(3)(e)3, 4.

<sup>32</sup> *Almerico v. RLI Insurance Company*, 716 So. 2d 774, 779 n. 7 (Fla. 1998); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452, 455 (Fla. 1992).

<sup>33</sup> Notice of Proposed Rule 9N-1.001, supra.

<sup>34</sup> See n. 25, above.

<sup>35</sup> S. 553.73(7)(a).

regulatory costs resulting from the operation of the Code will exceed the level of economic impact requiring legislative ratification, and the Code will not be adopted through rulemaking prior to the end of the regular session of the Legislature, under present law the earliest the Code could be considered for ratification would be during the 2012 regular session.

2. Effect of Proposed Changes

PCB RRS 11-01 exempts only the triennial update process for the Code from the requirements of legislative ratification in s. 120.541(3). This prevents delay in implementing the updated Code and reduces uncertainty for the construction industry, local governments, and consumers.

B. SECTION DIRECTORY:

Section 1 amends s. 120.541(3) to exempt the triennial update of the Florida Building Code from the requirement of legislative ratification.

Section 2 provides the act is effective upon becoming law.

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

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate but anticipated to be none.

2. Expenditures:

Indeterminate but anticipated to be none.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Indeterminate but anticipated to be none.

2. Expenditures:

Indeterminate but anticipated to be none.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate but anticipated to be none. Legislative ratification might generate an opportunity for public pressure to block or delay the effective date of a Code update containing significant economic impacts. But the ordinary process of legislative revision and public participation in rulemaking appear to be as effective for the protection of the private sector from unnecessary economic impacts.

D. FISCAL COMMENTS:

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. PCB RRS 11-01 does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

**B. RULE-MAKING AUTHORITY:**

PCB RRS 11-01 exempts the adoption of the Florida Building Code triennial update from the requirement of legislative ratification. No further authority is needed.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**