

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 849 Building Construction and Inspection

SPONSOR(S): Rulemaking & Regulation Subcommittee, Business & Consumer Affairs Subcommittee, Davis and others

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Consumer Affairs Subcommittee	12 Y, 0 N, As CS	Creamer	Creamer
2) Rulemaking & Regulation Subcommittee	14 Y, 0 N, As CS	Miller	Rubottom
3) Economic Affairs Committee		Livingston	Tinker

SUMMARY ANALYSIS

CS/CS/HB 849 revises guidelines for the Department of Management Services to follow concerning standards for public buildings. The bill deletes references to the specified energy efficiency and sustainable materials rating standards, and redefines the term “sustainable building rating” to include the International Green Construction Code (IGCC). Specifically, these sections substitute references to the individual green code ratings with the term “sustainable building rating.”

The bill revises the membership of the 25-member Florida Building Commission by expanding the qualifications for the participating member who is a representative of the green building industry, to include “a professional who is accredited under the International Green Construction Code (IGCC), or a professional who is accredited under Leadership in Energy and Environmental Design (LEED).”

The bill requires the Department of Agriculture and Consumer Services and other state agencies to compel compliance only with minimum separation distances for liquefied petroleum gas tanks stated in the 2011 National Fire Protection Association standard 58. These standards are adopted through rulemaking and form part of the Florida Building Code and the Florida Fire Prevention Code.

The bill exempts rulemaking adopting federal standards, the triennial update of the Florida Building Code, and the triennial update of the Florida Fire Prevention Code from the requirement for legislative ratification.

The bill has no fiscal impact.

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

International Green Construction Code (IGCC)

Current Situation

Sections 255.251 – 255.2575, F.S., constitute the Florida Energy Conservation and Sustainable Buildings Act (Energy Conservation Act).¹ The Department of Management Services is required to provide an evaluation of “life-cycle costs based sustainable building ratings” before any state agency leases, builds, or has constructed a building or other structure.² Buildings constructed or financed by the state currently are to comply with one of several rating systems enumerated by s. 255.252, F.S. This list does not include the International Green Construction Code (IGCC).³

The IGCC establishes baseline green and sustainability “regulations for new and existing traditional and high-performance buildings related to energy conservation, water efficiency, building owner responsibilities, site impacts, building waste, and materials and other considerations.” The IGCC is sponsored and endorsed by the International Code Council (ICC), the American Institute of Architects, ASTM International, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), the U.S. Green Building Council (USGBC), and the Illuminating Engineering Society (IES).⁴

The ICC recently revealed the latest version of the IGCC, Public Version 2.0, in December of 2010.⁵ The ICC provides that the new code complements existing rating systems and guidelines by providing minimum baseline requirements along with a “jurisdictional electives” section of the code that allows jurisdictions to customize the codes beyond its baseline provisions. The IGCC acts as a model code that becomes law after it is adopted by the state or local government entity that governs construction standards. Previously, Rhode Island adopted the IGCC, Public Version 1.0, as part of the Rhode Island Green Buildings Act in 2010. The new Act “applies to any public project that is owned, leased or controlled by the State of Rhode Island.”⁶ The City of Richland, WA, previously adopted the IGCC, Public Version 1.0, as a non-mandatory document for commercial buildings.⁷

Proposed Changes

The bill amends s. 255.253(7), F.S., to redefine the term “sustainable building rating” by including the International Green Construction Code (IGCC). The redefined term is substituted for existing listings of green building rating systems in ss. 255.252(3), 255.252(4), 255.257(4), and 255.2575, F.S. The bill does not specify which version of the IGCC is incorporated into the statute.

The Florida Building Code and the Florida Building Commission

Current Situation

The Florida Building Code (Building Code) is authorized by statute as the unified statewide building code pertaining to all construction.⁸ The overall purpose for the Building 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

¹ s. 255.251, F.S.

² s. 255.254(1), F.S.

³ s. 255.252, F.S.

⁴ <http://www.iccsafe.org/cs/IGCC/Pages/PublicVersionDevelopment.aspx>. (Last visited on 3/31/2011).

⁵ <http://www.iccsafe.org/CS/IGCC/Pages/IGCCDownloadV2.aspx>. (Last visited on 3/31/2011).

⁶ <http://bcap-ocean.org/code-information/rhode-island-green-buildings-act>. (Last visited on 3/31/2011).

⁷ August 11, 2010, ICC news release at <http://www.iccsafe.org/newsroom/Pages/eNews.aspx>. (Last visited 3/31/2011).

⁸ Ch. 553, Part IV, Florida Building Code.

to the consumer.”⁹ The Florida Building Commission (Commission)¹⁰ is responsible for adopting, updating, and general administration of the Building Code. With certain exceptions, enforcement of the Building Code is through duly-authorized state and local agencies.¹¹

The law provides detailed sections on legislative intent¹², Building Code adoption and contents,¹³ specific processes for different types of amendments,¹⁴ the triennial comprehensive update conducted by the Commission,¹⁵ and the Commission’s powers.¹⁶ The express intent of the law is for the Commission to use the statutory rulemaking requirements and process¹⁷ for adopting, amending, or updating the Building Code.¹⁸

s. 553.72, F.S., 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, F.S., and enforced by authorized state and local government enforcement agencies.

This intent is made a specific requirement in the substantive sections on adoption,¹⁹ amendments,²⁰ and updates.²¹ 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 consists of 25 members who are appointed by the Governor and confirmed by the Senate.²² The Commission is authorized to adopt general administrative rules²³ and issue binding code interpretations.²⁴ The Commission is required to update the Building Code every 3 years, following the statutory rulemaking process in ch. 120, F.S., the Administrative Procedures Act (APA). The statute also provides a minimum time of 6 months between adoption of the updated Building Code and its effective date.²⁵ Because the Commission is housed in the Department of Community Affairs (DCA) solely for administrative purposes, DCA publishes the notices required for rulemaking²⁶ as part of its duties to provide the Commission with administrative and staff support.²⁷

The statute imposes detailed requirements the Commission must follow to adopt, amend, review, and update the Building Code in addition to following APA procedural requirements.²⁸ The resulting Building 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,²⁹ to specific matters from structural and mechanical systems

⁹ s. 553.72(1), F.S.

¹⁰ s. 553.74, F.S.

¹¹ s. 553.80, F.S.

¹² s. 553.72, F.S.

¹³ s. 553.73(1)-(3), F.S.

¹⁴ s. 553.73(3) & (9)-technical amendments, (4) & (5)-amendments by local authorities, (8)-substantive amendments.

¹⁵ s. 553.73(7), F.S.

¹⁶ s. 553.74 - 553.7, F.S.

¹⁷ s. 120.536(1) and 120.54, F.S. Chapter 120 is Florida's Administrative Procedures Act or "APA".

¹⁸ s. 553.72(3), F.S.

¹⁹ s. 553.73(1)(a), F.S.

²⁰ s. 553.73(3), (8), & (9), F.S.

²¹ s. 553.73(7)(a), F.S.

²² s. 553.74, F.S.

²³ s. 553.76(1), F.S.

²⁴ s. 553.775, F.S.

²⁵ s. 553.73(7)(e), F.S.

²⁶ 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>.

²⁷ s. 553.75(3), F.S.

²⁸ s. 553.73, F.S.

²⁹ s. 553.73(1)(a), F.S.

to elevators and coastal construction standards.³⁰ The Building Code must reference without change the Florida Fire Prevention and Life Safety Codes adopted by Department of Financial Services rule.³¹ When updating the Building Code the Commission is required to create the Building 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.³² The entire process of updating the Building Code is subject to extensive statutory direction,³³ continual legislative revision, and the procedural protections of the APA rulemaking process.³⁴

Proposed Changes

The bill amends s. 553.74(1)(v), F.S., revising the membership of the Commission. The language expands the qualifications for the participating member who is a representative of the green building industry, to include "a professional who is accredited under the International Green Construction Code (IGCC), or a professional who is accredited under Leadership in Energy and Environmental Design (LEED)".

Minimum Separation Distances for LP Tanks

Current Situation

The National Fire Protection Association (NFPA) is an international nonprofit organization established in 1896 to reduce the risks and effects of fires by establishing consensus codes and standards, research, training, and education.³⁵ NFPA 58, also known as the Liquefied Petroleum Gas Code, applies to "the storage, handling, transportation, and use of LP-Gas." Liquefied petroleum gases are defined by the code as "gasses at normal room temperature and atmospheric pressure [that] liquefy under moderate pressure and readily vaporize upon release of the pressure."³⁶

Section 527.06(3), F.S., authorizes the Department of Agriculture and Consumer Services (DACS) to adopt rules that substantially conform with NFPA's published safety standards. Subsection (3), specifically provides:

Rules in substantial conformity with the published standards of the National Fire Protection Association shall be deemed to be in substantial conformity with the generally accepted standards of safety concerning the same subject matter.

State agencies currently enforcing the LP gas container separation distances adopt changes in the NFPA safety codes as standards evolve and technology changes. DACS incorporates and makes NFPA 58 the applicable standard in Rule 5F-11.002. The rule was last updated on May 28, 2008, to adopt the 2008 version of NFPA 58.³⁷ As NFPA recently published the 2011 edition of NFPA 58,³⁸ DACS has initiated rulemaking to amend Rule 5F-11.002 and adopt the 2011 NFPA 58.³⁹

Proposed Changes

³⁰ s. 553.73(2), F.S.

³¹ s. 553.73(1)(c), F.S.

³² s. 553.73(7)(a), F.S.

³³ Ch. 553, Part IV, F.S.

³⁴ s. 120.54, 120.56, F.S.

³⁵ National Fire Protection Association Website, *Overview*, available online at

<http://www.nfpa.org/categoryList.asp?categoryID=495&URL=About%20NFPA/Overview> (last visited on April 6, 2011).

³⁶ NFPA Website, *Document Scope of NFPA 58* available online at

<http://www.nfpa.org/aboutthecodes/AboutTheCodes.asp?DocNum=58> (last visited on April 6, 2011).

³⁷ Fla. Admin. Code R. 5F-11.002; see historical note at end of rule.

³⁸ NFPA website <http://www.nfpa.org/aboutthecodes/AboutTheCodes.asp?DocNum=58>. (Last visited on April 6, 2011.)

³⁹ Administration of the LP Gas standards is through the Division of Standards in DACS. The Division filed a Notice of Proposed Rule with the Department of State which is due to be published in the April 8, 2011 edition of the Florida Administrative Weekly. (Conversation with Division Director Isadore F. Rommes on April 6, 2011).

The bill creates s. 527.06(3)(b), F.S., addressing minimum separation distances between an LP gas tank and a building, adjoining property line, other LP tank, or any source of ignition. Under this new paragraph, DACS and other state agencies are authorized to require compliance only with the standards for minimum LP gas tank separation distances included in the 2011 version of NFPA 58. The bill further provides subsection (3) would be deemed repealed on the last effective date of rules adopted by DACS, the Commission as part of the Building Code, and the Office of State Fire Marshal as part of the Florida Fire Prevention Code, of the minimum LP gas tank separation distances contained in the 2011 edition of NFPA 58.

Triennial Update of the Florida Fire Prevention Code

One of the key components of the Building Code cross-references to the separately-adopted Fire Code. The State Fire Marshall is required to adopt a new edition of the Fire Code every 3 years through the rulemaking provisions of the APA.⁴⁰ The triennial update of the Fire Code is coordinated with that of the Building Code in order to prevent undue burdens on businesses and consumers.⁴¹ As part of the triennial update, the State Fire Marshall notifies each municipal, county, and special district fire department of the pending review and update. The local officials are required to provide copies of their local fire code amendments no later than 120 days before the date the State Fire Marshall is to adopt the triennial updates, in order for the Fire Marshall to determine whether the local provisions comply with the law.⁴² Under present law, local fire code amendments are effective only until the adoption of the next triennial review.⁴³

Exemptions to Required Legislative Ratification

As part of statutory rulemaking, agencies are required to analyze the economic effect of a proposed rule and prepare a formal study if the proposal is likely to have an adverse impact on small businesses or directly or indirectly increase regulatory costs by over \$200,000 in the aggregate within a year of the rule going into effect.⁴⁴ The required elements of this economic study, or “statement of estimated regulatory costs” (SERC) include an economic analysis of the proposed rule’s impact on three specific economic factors as articulated in s. 120.541(2)(a), F.S.⁴⁵ If the proposed rule is likely to have an affect exceeding \$1 million in the aggregate within 5 years of being implemented, the rule must be submitted for legislative ratification under s. 120.541(3), F.S.

Mandatory updates to the Building Code and the Florida Fire Prevention Code (Fire Code) are required to be adopted every 3 years⁴⁶ and are developed with significant involvement of the Legislature and its substantive committees, business and industry representatives, local and state government, and the general public. Other rules involve state adoption of federal standards for operation of programs involving significant federal oversight due to funding sources or implementation of federal law and are adopted under a procedure separate from regular rulemaking, stated in s. 120.54(6), F.S. All three categories of rules are subject to economic scrutiny in the rulemaking process but the concern for additional legislative scrutiny imposed by ratification appears to be met by the standards imposed under the substantive statutes being implemented by rule.

Adoption of Federal Standards

The bill makes a technical amendment to s. 120.541(4), F.S., to exempt rules adopting federal standards from required legislative ratification. The current language exempts both emergency

⁴⁰ s. 633.0215(1), F.S.

⁴¹ 3/16/2011 memorandum from the State Fire Marshall’s office, on file with staff of the Rulemaking & Regulation Subcommittee.

⁴² s. 633.0215(3)(a), F.S.

⁴³ s. 633.0215(3)(b), F.S.

⁴⁴ s. 120.541(1)(b), F.S.

⁴⁵ These factors are 1) whether the proposed rule is likely to adversely impact economic growth, private-sector job creation or employment, or private-sector investment; 2) whether there is a likely adverse impact on business competitiveness, including the ability of Florida businesses to compete in other states or domestic markets; and 3) whether there is a likely increase in regulatory costs, including transactional costs.

⁴⁶ s. 553.73(7)(a), 633.0215(1), F.S.

rulemaking and adoption of rules incorporating federal standards only from the comprehensive economic analysis required for a SERC. The reference in the statute to “paragraph (2)(a)” appears to be inadvertent, as it created an inconsistency with the SERC requirement in s. 120.54(3)(b), F.S. The apparent intent was to exempt both emergency rulemaking and the adoption of rules incorporating federal standards from the ratification requirement, not the mandatory economic analysis required as part of a SERC under s. 120.541(2)(a), F.S. Emergency rules, being excepted from general rulemaking requirements, are exempt from SERC requirements.

Impact of Potential Legislative Ratification on Building and Fire Codes

DCA estimates compliance by businesses and consumers simply with the local construction permitting requirements resulting from the existence and enforcement of the Building Code readily exceed an aggregate of \$1 million over 5 years.⁴⁷ Where the Building Code is adopted in compliance with the Legislature’s primary intent, following extensive legislative engagement during the three-year cycle, and protects “public health, safety, and general welfare ... at the most reasonable cost to the consumer”,⁴⁸ the resulting direct or indirect regulatory costs will normally exceed the statutory threshold requiring ratification for rules.

The Commission currently is completing the third triennial update to the Code and has begun the rulemaking process.⁴⁹ 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, 2011.⁵⁰ Absent the requirement of legislative ratification the Code thus would become effective no later than December 31, 2011.⁵¹ However, since the 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 would be considered for ratification would be during the 2012 regular session.

The State Fire Marshall concurrently is preparing the triennial update of the Fire Code for adoption at the same time as the Building Code update which also incorporates the Fire Code.⁵²

Summary of Exemptions Created by the Bill

The bill amends 120.541(4), F.S., to exempt the adoption of federal standards, the triennial update of the Building Code, and the triennial update of the Fire Code from required legislative ratification. The adoption of these rules still would be subject to the preparation of a comprehensive SERC and economic analysis.

B. SECTION DIRECTORY:

Section 1: Amends s. 120.541(4), F.S., to exempt rules adopting federal standards, the triennial update of the Florida Building Code, and the triennial update of the Florida Fire Prevention Code from the requirement of legislative ratification.

Section 2: Amends s. 255.252(3) & 255.252(4), F.S., to make technical changes in the present language and to substitute the defined phrase “sustainable building rating” for separate references to four different rating systems.

Section 3: Amends s. 255.253(7), F.S., to incorporate the IGCC as an additional green building rating system which may be approved by the Department of Management Services.

⁴⁷ 3/11/2011 conversation with Jim Richmond, Asst. Gen. Counsel, DCA, general counsel for Florida Building Commission.

⁴⁸ s. 553.72(1), F.S.

⁴⁹ Notice of Proposed Rule 9N-1.001; see note 26, above.

⁵⁰ See note 47, above.

⁵¹ S. 553.73(7)(a), F.S.

⁵² See note 41, above.

Section 4: Amends s. 255.257(4), F.S., to substitute the defined phrase “sustainable building rating” for separate references to four different rating systems.

Section 5: Amends s. 255.2575(2), F.S., to substitute the defined phrase “sustainable building rating” for separate references to four different rating systems.

Section 6: Creates s. 527.06(3)(b), F.S., requiring DACS and other state agencies to compel compliance only with the minimum LP gas tank separation distances contained in the 2011 edition of NFPA 58. Provides for repeal of the subsection upon the effective date of rules adopted by the department, the Commission, and the State Fire Marshall, whichever occurs last, that adopt the minimum standards in the 2011 edition of NFPA 58.

Section 7: Amends s. 553.74(1)(v), F.S., to provide additional alternative accreditations for the one member of the Florida Building Commission who is a representative of the green building industry.

Section 8: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that the counties or municipalities have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No additional rulemaking authority is required to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides for inclusion of the International Green Construction Code (IGCC) as an alternative rating standard for public buildings. The bill does not specify which of the available versions of the IGCC is referenced in the amendments. The amendment to s. 572.06(3), F.S., provides “this **subsection** is repealed...” The amendment creates new paragraph (3)(b) and the position of the language appears to indicate the intent was to repeal the *paragraph*, not the *subsection*. The intent of this amendment may be the same as similar language in CS/HB 709, which clearly refers to repeal of the *paragraph*.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 5, 2011, the Rulemaking & Regulation Subcommittee adopted CS/CS/HB 849 which added an exemption from the requirement of legislative ratification in s. 120.541(3), F.S., for rules adopting federal standards, the triennial update of the Florida Building Code, and the triennial update of the Florida Fire Prevention Code. CS/CS/HB 849 also added a revision of s. 527.06(3), F.S., to require affected state agencies to compel compliance only with the minimum LP gas tank separation distances contained in the 2011 edition of NFPA 58. This analysis reflects the changes in CS/CS/HB 849.