

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS
FINAL BILL ANALYSIS**

BILL #: CS/CS/HB 447 Construction

SPONSOR(S): Commerce Committee and Business & Professions Subcommittee; Diamond and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 902

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	14 Y, 0 N	Brackett	Anstead
2) Local, Federal & Veterans Affairs Subcommittee	14 Y, 0 N	Darden	Miller
3) Commerce Committee	22 Y, 0 N	Brackett	Hamon
FINAL HOUSE FLOOR ACTION: 112 Y's 0 N's			
GOVERNOR'S ACTION: Approved			

SUMMARY ANALYSIS

CS/CS/HB 447 passed the House as amended on April 25, 2019. The bill was amended in the Senate on May 3, 2019, and returned to the House. The House concurred in the Senate amendments and subsequently passed the bill as amended on May 3, 2019.

The bill:

- Allows local governments to send written notice to an owner and a contractor that a building permit is about to expire.
- Allows local governments to close a building permit 6 years after the issuance of the permit, even in the absence of a final inspection, if the local government determines that no apparent safety hazards exist.
- Provides that the work to close an expired permit can be completed in accordance with the Building Code in effect when the building department received the permit application if the work has already been substantially completed.
- Excludes a property owner, working under the owner-builder exemption, from the requirement that the owner reside on the property for a year in order to qualify for the exemption, in certain situations.
- Clarifies that local governments may only charge a person one search fee based on costs incurred for a request to identify the building permits for each unit or sub-unit assigned to a parcel of property.
- Prohibits local governments from penalizing a purchaser of property solely because a previous owner failed to close a building permit.
- Prohibits local governments from denying a contractor a permit solely because the contractor has expired building permits.
- Prohibits local governments from carrying forward a budget balance greater than its average cost for enforcing the Building Code for the preceding four fiscal years.
- Prohibits local governments from charging surcharges or other similar fees.
- Allows the Florida Building Commission to adopt provisions to the Building Code every 3 years without individually determining that each provision is needed to accommodate the specific needs of the state.
- Provides that a contractor who takes over a job from a previous contractor is not liable for any defects in the work performed by the previous contractor.
- Provides that serving a notice of claim alleging a construction defect does not effect the time-period to file an action related to the construction defect.

The bill does not have a fiscal impact on state government. The bill may have an insignificant fiscal impact on local governments.

The bill was approved by the Governor on June 7, 2019, ch. 2019-75, L.O.F., and will become effective on July 1, 2019.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 6/11/2019

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

The Florida Building Code – Current Situation

The Florida Building Code

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

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

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

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

The Florida Building Commission

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

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

² *Id.* & DBPR, *Overview of the Florida Building Code*, <http://webcache.googleusercontent.com/search?q=cache:udGIX8b7K60J:www.floridahousing.org/docs/default-source/aboutflorida/august2017/august2017/tab4.pdf+&cd=1&hl=en&ct=clnk&gl=us> (last visited on Jan. 3, 2019).

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

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

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

⁶ Ss. 553.74, & 553.76(1), F.S.

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

Procedures for Adopting the Florida Building Code

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

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

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

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

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

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

Technical Amendments

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

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

⁸ S. 553.73(7), F.S. (2017).

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

¹⁰ S. 553.73, F.S.

¹¹ *Id.*

¹² *Id.*; Rule 61G20-2.002, F.A.C.

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

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

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

The Commission determined that provisions added to the Building Code must be adopted by technical amendment, as needed to accommodate the specific needs of this state. The Commission further determined that technical amendments needed to accommodate the specific needs of the state include amendments that:

- Establish minimum life safety construction requirements to protect buildings and their occupants from fire, wind, flood, and storm surge using the latest technical research and engineering standards for buildings and materials products.
- Provide for flood protection provisions that are consistent with the latest flood protection requirements of the National Flood Insurance Program.
- Maintain eligibility for federal funding and discounts from the National Flood Insurance Program, the Federal Emergency Management Agency, and the United States Department of Housing and Urban Development.
- Provide energy efficiency standards for buildings that meet or exceed the national energy standards as mandated by Title III of the Energy Conservation and Protection Act.
- Maintain updates to the Florida Fire Prevention Code.
- Provide for the latest industry standards and design standards.¹⁵

Division of Administrative Hearings Rule Challenge

In December of 2017, the Florida Association of American Institute of Architects, Inc. (FAAIA) filed a rule challenge to the Commission’s amendment of rule 61G20-2.002 of the F.A.C. The FAAIA challenged the rule based on their belief that the rule is an invalid exercise of the Commission’s delegated authority regarding implementation of the update process for the building code. Specifically, the FAAIA argued that the rule’s requirement that the Commission determine that any technical amendment added to the Building Code must be necessary to accommodate the specific needs of the state, placed restrictions on the updates to the Building Code beyond what is contemplated by statute.

¹³ S. 553.73(3), F.S.

¹⁴ *Id.*

¹⁵ Rule 61G20-2.002, F.A.C.

In February of 2018, the Division of Administrative Hearings (Division) ruled that the challenged provisions of the rule were a valid exercise of delegated authority. The Division based its decision on the statute, which specifically states that the Commission may adopt any portions of the I-codes or the NEC as technical amendments to accommodate the specific needs of the state, and the Division dismissed the petition.¹⁶

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

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

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

The Florida Building Code – Effect of the Bill

The bill provides that effective July 1, 2020, the Commission, upon the required review of the I-Code and the NEC, may approve provisions to the Building Code every three years without a specific individual finding that each of the provisions are needed to meet the specific needs of the state. However, the bill provides the Commission the discretion to require such finding if it so chooses.

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

Building Permits – Current Situation

Local Enforcement of the Florida Building Code

It is the intent of the Legislature that local governments have the power to inspect all buildings, structures, and facilities within their jurisdiction in protection of the public's health, safety, and welfare.¹⁸

Every local government must enforce the Building Code and issue building permits.¹⁹ It is unlawful for a person, firm, or corporation to construct, erect, alter, repair, secure, or demolish any building without first obtaining a permit from the local government enforcing agency or from such persons as may, by

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

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

¹⁸ S. 553.72, F.S.

¹⁹ Ss. 125.01(1)(bb), 125.56(1), and 553.80(1), F.S.

resolution or regulation, be directed to issue such permit, upon the payment of reasonable fees as set forth in a schedule of fees adopted by the enforcing agency.²⁰

Building Permits

A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity. A building official is a local government employee or a person contracted by a local government who supervises building code activities, including plan review, enforcement, and inspection.²¹

To obtain a permit, an applicant must complete an application for the proposed work on the form furnished by the local government. The forms may be in a format prescribed by the authority issuing the permit and may include any information required by the authority issuing the permit, but at a minimum, the application must include the following information:

- 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; and
- The number or identifying symbol assigned to the building permit by the issuing authority.²²

A building permit becomes invalid if:

- work authorized by the permit is not commenced within 6 months after issuance of the permit or
- work authorized by the permit is suspended or abandoned for a period of 6 months after the time the work commenced.²³

A permit may also become null and void, expired, or may be revoked due to a lack of progress or abandonment. If this happens, then work must be halted until a new permit has been obtained.²⁴

Any construction work that requires a building permit also requires plans and inspections by the local building official to ensure the work complies with the Building Code. The Building Code requires certain building, electrical, plumbing, mechanical, and gas inspections. The Building Code also requires a final inspection to be performed after work is complete to ensure the project complies with the Building Code. In addition to required inspections, a local building official may require other inspections to ensure the work complies with the Building Code.²⁵ Generally speaking, a permit that passes the required inspections is considered completed or closed.²⁶

Any construction work that requires a building permit must be performed in compliance with the edition of the Building Code that is in effect when the local government received the application for the permit. If the local government received the application for the permit before the Building Code took effect, then the work must comply with the minimum building code in effect when the local government received the application. If work is halted or abandoned, and the permit expires or becomes invalid or null and void, then a new permit is required to complete the work. The remaining work performed under the new

²⁰ See ss. 125.56(4)(a), 553.79(1), F.S.

²¹ S. 468.603(2), F.S.; S. 202 of the Florida Building Code (Building), Sixth Edition.

²² S. 713.135, F.S.

²³ S. 105.4, of the Florida Building Code (Building), Sixth Edition.

²⁴ *Id.*

²⁵ Ss. 107, 110.1, and 110.3 of the Florida Building Code (Building). Sixth Edition;

²⁶ Doug Wise, *Closing Inactive & Excluded Building Permits*, Palm Beach County Planning, Zoning & Building Department, Building Division, <http://discover.pbcgov.org/pzb/building/BuildingCodes/PBO-126%20%E2%80%93%20Closing%20Inactive%20and%20Excluded%20Building%20Permits.pdf> (last visited Mar. 15, 2019).

permit must be in accordance with the edition of the Building Code that is in effect when the local government received the application for the new permit.²⁷

Real Estate Disclosure Agreement Forms

Florida's real estate industry has developed standardized forms for many real property transactions that are used by owners, real estate agents, and attorneys. It is common for a seller of real property to complete a property disclosure form prior to the sale of the property to disclose all known facts that materially affect the value of the property being sold and that are not readily observable or known by the buyer. A recent addition to the seller's property disclosure form includes questions pertaining to active or open permits on the property that have not been closed by a final inspection.²⁸

Created jointly by the Florida Bar and Florida Realtors, the FAR/BAR Standard Contract and the FAR/BAR 'AS IS' Contract are accepted forms used for transactions of varied configurations and complexities. The forms outline responsibilities and obligations of parties in real estate transaction closings related to inspection periods, seller disclosures, and building permits. Under paragraph 12 of the Standard Contract, if the buyer gives notice of building permit issues, the seller is obligated to resolve open or expired permits and obtain permits for any unpermitted improvements up to a certain dollar amount.²⁹ Under paragraph 12 of the "As Is" Contract, the seller must assist the buyer with closing building permits but is not obligated to spend money for this purpose.³⁰

In response to the disclosure requirements pertaining to open or expired building permits on the seller's disclosure form and the FAR/BAR forms, title companies, closing agents, and real estate attorneys research properties to determine if open or expired permits exist. Without resolution of such permits, closings may be delayed or canceled.

Complications From Expired Permits

News reports indicate that homeowners are experiencing problems with obtaining new building permits and selling their homes based on the existence of expired permits. Some homeowners have discovered expired permits that are 20 or 30 years old. Many times the permits expire because the required inspections have not been completed even though the work is completed. These expired permits can prevent the homeowner from selling their homes and obtaining new permits to do additional construction, and also may subject the owner to possible fines.³¹

At least one county has addressed the problem. Orange County instituted a policy of giving notice to all contractors and homeowners that their permit was about to expire. According to news reports, the number of Orange County building permits that expired dropped from nearly 2,500 in 2017 to 229 in the

²⁷ S. 105 of the Florida Building Code (Building), Sixth Edition; The City of Fort Myers, *Building, Permitting, & Inspections Division*, <https://www.cityftmyers.com/174/Building-Permitting-Inspections-Division> (last visited on Apr. 11, 2019).

²⁸ Northeast Florida Association of Realtors, Inc., *Seller's Property Disclosure*, https://www.nefar.com/filebin/pdbdb/11/728_11.pdf (last visited Mar. 13, 2019).

²⁹ Florida Realtors, *Residential Contract For Sale And Purchase*, https://www.floridarealtors.org/LegalCenter/HotTopics/upload/FloridaRealtors-FloridaBar-5_032217_Watermarked-3.pdf (last visited Mar. 13, 2019);

³⁰ Florida Realtors, "AS IS" Residential Contract For Sale And Purchase, <https://www.needtosellmyhousefast.com/wp-content/uploads/2014/08/Florida-FAR-BAR-AS-IS-Residential-Contract-For-Sale-and-Purchase.pdf> (last visited Mar. 13, 2019).

³¹ Antony Clark, *Expired permits cause complications*, Gainesville Sun (Oct. 25, 2015) <https://www.gainesville.com/news/20151025/expired-permits-cause-complications> (last visited on Apr. 12, 2019); Mike DeForest, *Work done on your home may have failed inspection without you knowing it*, (November 7, 2018) <https://www.clickorlando.com/news/investigators/homeowners-hindered-by-failed-inspections-expired-permits> (last visited Mar. 15, 2019).

first nine months of 2018. County officials attribute the drop in expired permits to the notices given to owners and contractors.³²

Building Permits – Effect of the Bill

The bill provides that local governments may:

- Provide written notice that a building permit is about to expire the owner of the property listed on the permit and the contractor who has been issued the permit by e-mail or United States Postal Service no less than 30 days before the permit will expire.
 - If the local government decides to send, the notice it must identify the permit that is about to expire and the date the permit will expire.

The bill also allows a local government to close a building permit without doing a final inspection if:

- The local enforcement agency issued the permit 6 years ago, and
- The local enforcement agency determines there are no apparent safety hazards.

Thus, a permit that has been expired for 6 years or more may be closed without a final inspection if the local enforcement agency determines that there are no apparent safety hazards. The phrase “no apparent safety hazards” is not defined. The bill does define the term “close” to mean that the requirements of the permit have been satisfied.

The bill provides that local governments may not:

- Penalize an arms-length purchaser of property solely because a previous owner failed to close a building permit for the property.
 - The local government still has all rights and remedies against the owner and contractor listed on the permit.

The bill allows remaining work required to close an expired building permit to be done in accordance with the Building Code in effect when the local enforcement agency received the application for the permit if the local enforcement agency determines the work related to the permit has already been substantially completed.

Local Government Fees – Current Situation

Each local government may provide a schedule of reasonable inspection fees in order to cover the costs of inspection and enforcement of the Building Code.³³ 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.³⁴

Local governments are authorized to levy fees to cover the cost of enforcing the provisions of the Building Code.³⁵ The fees, including any fines or investment earnings related to the fees, may only be used for the costs associated with carrying out the local government’s building code enforcement responsibilities. These costs include:³⁶

- The review of building plans, building inspections, re-inspections, and building permit processing;

³² Mike DeForest *supra* note 21.

³³ Ss. 125.56(2), 166.222, and 553.80(7), F.S. *See e.g.*, Broward County website on Impact and Concurrency Fees, available at <http://www.broward.org/Planning/Development/FAQs/Pages/Impact-and-Concurrency-Fees.aspx> (last visited Mar. 15, 2019).

³⁴ *See* s. 553.80(7), F.S.

³⁵ Ss. 553.80(7), 125.56(2), and 166.222, F.S.

³⁶ S. 553.80(7)(a), F.S.

- Building Code enforcement;
- Fire inspections associated with new construction;
- Training costs associated with enforcement of the Building Code; and
- Enforcement action pertaining to unlicensed contractor activity, to the extent not funded by other user fees.

Local governments are prohibited, however, from requiring additional fees for:

- Providing proof of licensure pursuant to ch. 489, F.S.;
- Recording or filing a license; or
- Providing, recording, or filing evidence of workers' compensation insurance coverage required by ch. 440, F.S.³⁷

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.³⁸ 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.³⁹

Local governments may not use code enforcement fees to cover:⁴⁰

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

Local Government Fees – Effect of the Bill

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

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

The bill clarifies that local governments may only charge a person one search fee for identifying the building permits for each unit or sub-unit assigned to a parcel of property. Such fee shall be commensurate with the research and the time costs incurred by the local government.

³⁷ S. 553.80(7)(d), F.S.

³⁸ S. 553.80(7), F.S.

³⁹ S. 553.80(7)(c), F.S.

⁴⁰ S. 553.80(7)(b), F.S.

The bill also prohibits local governments from charging surcharge fees or other similar fees not directly related to enforcing the Building Code.

Contractors – Current Situation

The Legislature has determined that it is “necessary in the interest of the public health, safety, and welfare” to regulate the construction, electrical, and alarm system industry.⁴¹ Construction contracting essentially means building or altering a structure for compensation. Electrical contracting essentially means performing any electrical work such as working on electrical wiring, fixtures, appliances, apparatus, and conduits for compensation. Alarm system contracting essentially means working on alarm systems such as installing, repairing, replacing, or servicing alarm systems for compensation.

Construction contractors are either certified by or registered with the CILB. The CILB is housed in DBPR and consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB is responsible for licensing, regulating, and disciplining certified construction contractors. Electrical contractors and alarm system contractors are certified by or registered with the ECLB. The ECLB is also housed in DBPR consists of 11 members who are appointed by the Governor and confirmed by the Senate. The ECLB is responsible for licensing, regulating, and disciplining certified electrical and alarm system contractors.⁴²

"Certified contractors" are individuals who pass the state competency examination and obtain a certificate of competency issued by DBPR. Certified contractors are permitted to practice in any jurisdiction in the state.⁴³

“Registered contractors” are individuals that have taken and passed a local competency examination and can practice contracting only in the local jurisdiction for which the license is issued.⁴⁴ Local jurisdictions may approve or deny applications for licensure as a registered contractor, review disciplinary cases, and conduct informal hearings relating to discipline of registered contractors licensed in their jurisdiction. Registered contractors must register with DBPR after obtaining a local license from the jurisdiction and comply with local and state statutory obligations.⁴⁵

The CILB and the ECLB may take action⁴⁶ against a certified contractor if they find the contractor is guilty of violating the law. Violations include:

- Abandoning a construction project. There is a presumption a contractor abandoned a project after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, or the contractor fails to perform work without just cause for 90 consecutive days; or
- Proceeding on a job without obtaining applicable local building department permits and inspections.⁴⁷

Additionally, the CILB may take action against a certified construction contractor if they find the contractor is guilty of receiving money totaling more than 10 percent of a contract price for repair, restoration, improvement, or construction to residential real property and fails to:

⁴¹ s. 489.101, F.S.

⁴² See generally Ch. 489, F.S.

⁴³ Ss. 489.105, & 489.505, F.S.

⁴⁴ Ss. 489.103, & 489.505, F.S.

⁴⁵ Ss. 489.117, 489.131, 489.513, & 489.537, F.S.

⁴⁶ The CILB and the ECLB may place a contractor on probation, reprimand him or her, revoke or suspend the contractor’s certificate or registration, or deny the issuance of a renewal certificate or registration. The CILB and the ECLB may also require financial restitution to a consumer for financial harm directly related to a violation, require continuing education, or assess costs associated with investigation and prosecution. Ss. 489.129(1), 489.533(1), F.S.

⁴⁷ Ss. 489.129(1)(o), & 489.533(1), F.S.

- Apply for any necessary permits within 30 days after the payment is made; or
- Start the work within 90 days after the date all necessary permits are issued.⁴⁸

Local governments may deny, suspend, or revoke the ability of a certified contractor to obtain a building permit if the local government determines:

- The contractor is guilty of fraud or a willful Building Code violation within the jurisdiction of the local government; or
- The contractor is guilty of fraud or a willful Building Code violation in another jurisdiction within the past 12 months and such fraud or violation would have also been fraud or violation within the local government's jurisdiction.⁴⁹

A local government may also deny issuance of, or may suspend an outstanding building permit if the contractor fails to provide proof of public liability and property damage insurance and workers' compensation insurance.⁵⁰

Contractors – Effect of the Bill

The bill provides that local governments may not deny a contractor a permit solely because the contractor has permits that have not been closed.

Owner-Builder Exemption From Licensing Requirements – Current Situation

In order to perform construction, electrical, or alarm system contracting a person must be licensed as a contractor, be an employee of such contractor, or fall under one of the exemptions to licensure.⁵¹ One of the exemptions is the owner-builder exemption. The owner-builder exemption allows an owner of a property to act as a contractor for.⁵²

- Building or improving farm outbuildings, one or two-family residences, and improving commercial buildings at a cost that does not exceed \$75,000. The building or residence must be for the owner's use and may not be sold or leased within 1 year of the owner completing the construction.
- Repairing or replacing shingles on one-family, two-family, or three-family residences when the property has been damaged by a natural disaster for which the Governor has declared a national emergency. The residence must be for the use of the of the owner or the owner's tenant and may not be sold within 1 year of the construction; and
- Installing, uninstalling, or replacing solar panels on one-family, two-family, or three-family residences, when the local enforcement agency is participating in a "United States Department of Energy SunShot Initiative: Rooftop Solar Challenge."⁵³

The owner-builder exemption does not exempt any person who is employed by or has a contract with the owner from the licensure requirements to perform construction, electrical contracting, or alarm system contracting.⁵⁴

⁴⁸ S. 489.126(2)-(3), F.S.

⁴⁹ Ss. 489.113(4), 489.131(3), 489.516(3), & 489.537(3), F.S.

⁵⁰ *Id.*

⁵¹ Ss. 489.113(2) & 489.103, F.S.

⁵² Ss. 489.103(7), & 489.503(7), F.S.

⁵³ The U.S. Department of Energy (DOE) SunShot Initiative is a program designed to reduce the costs of solar energy by 75%. The program is a collaboration of private companies, universities, state and local governments, nonprofits, and national laboratories. DOE, *DOE Pursues Sunshot Initiative to Achieve Cost Competitive Solar Energy by 2020*, Feb. 4, 2011, <https://www.energy.gov/eere/solar/articles/doe-pursues-sunshot-initiative-achieve-cost-competitive-solar-energy-2020> (last visited Apr. 8, 2019).

⁵⁴ Ss. 489.103(7), & 489.503(7), F.S.

To obtain an owner-builder permit, an owner must personally appear at the local enforcement agency, sign the building permit application for the work, and satisfy all local enforcement agency requirements proving that the owner has a complete understanding of the owner's obligations under the law. The local enforcement agency is also required to provide the owner with a disclosure statement providing the owner's obligations under the law.⁵⁵

If an owner violates any of the provisions of the owner-builder exemption, the local enforcement agency must:

- Withhold final approval of the permit for the work;
- Revoke the permit; or
- Pursue an action against the owner for performing unlicensed activity.⁵⁶

Owner-Builder Exemption From Licensing Requirements – Effect of the Bill

The bill excludes a property owner, who is performing construction contracting on a residential property under the owner-builder exemption, from the requirement to reside on the property for at least a year, if:

- The owner is closing a permit where the contractor substantially completed the work related to the permit;
- The residential property is a one-family or two-family dwelling, townhome, accessory structure⁵⁷ of a one-family or two-family dwelling or townhome, individual condominium unit, or individual residential cooperative unit; or
- The property owner obtains the local enforcement agency's approval prior to qualifying under the owner-builder exemption.

The bill also restates current law allowing an owner-builder to close building permits.

Contractor Liability – Current Situation

When a contractor contracts for a project they are liable for any of the work they perform. During the progress of the work the contractor has a duty to exercise due care, and while the contractor is in control of the project site, the contractor is liable for harm resulting from defects, hidden or otherwise.⁵⁸

When a contractor completes the work and the owner of the property accepts the work, the contractor is no longer liable for any patent defects. A patent defect is a defect that would have been obvious to the owner had the owner exercised reasonable care. The rationale being that when the owner accepts the contractor's work the owner takes possession of the work and deprives the contractor of all opportunity to correct a patent defect. However, a contractor continues to remain liable for latent defects after the owner accepts the contractor's work.⁵⁹ A latent defect is a hidden flaw or imperfection that cannot be discovered by reasonable inspection.⁶⁰

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ According to FEMA, an "accessory structure" is a structure which is on the same parcel of property as a principal structure and the use of which is incidental to the use of the principal structure. Examples of accessory structures include gazebos, picnic pavilions, boathouses, small pole barns, storage sheds, and similar buildings. FEMA, *Accessory Structures* <https://www.fema.gov/accessory-structures> (last visited Mar. 14, 2019).

⁵⁸ *Slavin v. Kay*, 108 So. 2d 462, 467 (Fla. 1958).

⁵⁹ *Id.*; *McIntosh v. Progressive Design and Engineering, Inc.*, 166 So. 3d 823, 828-29 (Fla. 4th DCA 2015); *Florida Dept. of Transp. v. Capeletti Bros., Inc.*, 743 So. 2d 150, 152 (Fla. 3rd DCA 1999); *Brady v. State Paving Corp.*, 693 SO. 2d 612, 613 (Fla. 4th DCA 1997).

⁶⁰ Cornell Law School, *Latent Defect*, https://www.law.cornell.edu/wex/latent_defect (last visited on Apr. 11, 2019).

A contractor who takes over a project from a previous contractor is liable for his or her work and the previous contractor's work. According to DBPR, this is because a substitute contractor is expected to be competent to assess, contract for, and repair the situation that was left behind by the previous contractor so the project can be completed in accordance with the Building Code.⁶¹ The new contractor takes over and is responsible for the project.

Since a contractor who takes over a project from a previous contractor assumes liability for the previous contractor's work, members of the construction industry advise caution when taking over jobs where the previous contractor completed a significant portion of the contract that may not be visible or readily identifiable. This is especially true if the new contractor believes portions of the previous contractor's work may be deficient. Members of the industry recommend a contractor take steps to protect themselves from liability for a previous contractor's work such as:

- Ensuring that the contract for the work includes any specific repairs that are required because of deficient work performed by the previous contractor;
- Hiring a design professional to inspect and certify the previous contractor's work;
- Including language in the contract that allow mandatory time extensions for delays caused by repairs required to correct deficient work; and
- Including language in the contract that limits the contractor's liability for work that he or she performs and not the work performed by the previous contractor.⁶²

Contractor Liability – Effect of the Bill

The bill provides that if a property owner hires a new contractor to close a permit, the new contractor that takes over the job from a previous contractor is not liable for any defects in the work performed by the previous contractor and is only liable for the work the new contractor performs.

Notice of Claim of a Construction Defect – Current Situation

Notice of Claim

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

A notice of claim alleging a construction defect must be provided to the contractor, subcontractor, supplier, or design professional at least 60 days prior to the filing of an action, or at least 120 days before filing an action involving a community association representing more than 20 parcels. The notice of claim must describe in reasonable detail the nature of each construction defect and, if known, the damage or loss resulting from the defect. This requires the claimant, based upon at least a visual inspection, to identify the location of each defect in the notice.⁶³ If the construction defect claim arises

⁶¹ Florida Department of Business and Professional Regulation, Agency Analysis of 2019 House Bill 447, p. 7 (Feb. 12, 2019).

⁶² National Roofing Legal Resource Center, *What to do if you are asked to take over a job that was started by another roofing contractor*, http://www.nrlrc.net/content/membersonly/sidebar/1109_sidebar_assume_job.pdf (last visited on Apr. 11, 2019); Amy Florence, *Replacement Contractors*, *Electrical Construction & Maintenance* magazine (Mar. 1, 2005) <https://www.ecmweb.com/content/replacement-contractors> (last visited on Apr. 11, 2019).

⁶³ S. 558.004(1)(b), F.S.

from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted.⁶⁴

If a claimant files an action alleging a construction defect without first sending a timely notice of claim, the court must stay the action, without prejudice, and the action cannot proceed until the claimant has complied with the requirements to send a notice of claim.⁶⁵

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

- the date of actual possession,
- the date of the issuance of a certificate of occupancy,
- the date of abandonment of construction, if not completed, or
- the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever is later.⁶⁶

Similar methods for pre-suit notice with an opportunity for resolution are required in many other types of civil litigation, including medical negligence, claims against nursing homes, and eminent domain.⁶⁷

Gindel v. Centex Homes

Courts have found that pre-suit notices constitute the commencement of various types of civil actions,⁶⁸ but until *Gindel v. Centex Homes*, Florida courts had not contemplated whether providing a notice of claim constituted the commencement of a construction defect action.⁶⁹ “Action” is defined as a “civil action or proceeding.”⁷⁰

The claimants in *Gindel* took possession of their properties on March 31, 2004, and later discovered construction defects in their homes. They sent a pre-suit notice of claim to Centex Homes on February 6, 2014, before the statutory timeframe for filing suit, or the statute of repose, had expired.⁷¹ After the completion of the mandatory notice of claim procedures, Centex Homes notified the claimants that it would not repair the alleged defects. The claimants filed suit on May 2, 2014, after the statute of repose expired. The trial court held that their suit was untimely and barred because the notice of claim was not an action under the statute of repose. The appellate court reversed the trial court’s order, finding that pre-suit notice qualifies as a “proceeding,” and hence an “action,” and therefore the claimants complied with the requirements of the statute of repose, and the action could continue.⁷²

The holding in *Gindel* appears to allow claimants wishing to preserve their construction defect claim the option of sending a notice of claim, simply to satisfy the required time-period to file an action, and then potentially waiting an extended period before filing their actual claim in court. However, the *Gindel* court determined that the confusion created by the statute’s silence as to whether the pre-suit notice of claim

⁶⁴ S. 558.004(1)(c), F.S.

⁶⁵ S. 558.003, F.S.

⁶⁶ S. 95.11(3)(c), F.S.

⁶⁷ See s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), F.S., related to nursing homes; and, s. 73.015, F.S., related to eminent domain.

⁶⁸ *Musculoskeletal Institute Chartered v. Parham*, 745 So. 2d 946 (Fla. 1999); *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273 (Fla. 2017).

⁶⁹ *Gindel, et al. v. Centex Homes*, No. 4D17-2149, 2018 WL 4362058 (Fla. 4th DCA Sept. 12, 2018).

⁷⁰ S. 95.011, F.S.

⁷¹ Black’s Law Dictionary (10th ed. 2014) (Statutes of Repose are legislative enactments that place limitations on certain legal rights and, if such legal rights are not acted upon within the prescribed periods, the legal rights are cut off.)

⁷² *Id.*; Westlaw, *Homeowners’ “Action” Against Contractor Begins to Run for Purposes of Florida’s Statute of Repose Upon Owners’ Filing of the Mandatory Pre-Suit Notice Under Right to Repair Act*, 40 Construction Litigation Reporter (April 2019).

constitutes commencing an action and the fact that many other pre-suit notices do constitute such commencement were persuasive. The court found that the pre-suit notice constituted commencement of an action for purposes of the statute of repose because to “rule otherwise would result in an unconstitutional impediment to access to the courts.”⁷³

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

The bill provides that serving a pre-suit notice of claim alleging a construction defect does not effect the time-period during which a claimant must formally file an action related to a construction defect in court. Section 558.004 (1), F.S., was amended to read:

“A notice of claim served pursuant to this chapter shall not toll any statute of repose period under chapter 95.”

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:

Indeterminate. There may be a negative, but likely insignificant, fiscal impact from reduced permit fees.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive impact on the private sector from a reduction in expired building permits.

The bill may have a positive economic impact on contractors as a result of the removal of liability for a previous contractor’s work when taking over a construction project. However, the bill could make it difficult for property owners, and regulatory entities, to resolve contractual disputes with contractors for faulty construction when there is more than one contractor who worked on the project.

⁷³ *Musculoskeletal Institute Chartered v. Parham*, 745 So. 2d 946 (Fla. 1999); *Gindel*, *supra* note 35.

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

D. FISCAL COMMENTS:

None.