

August 31, 2020

2019 Group B Appeals Board
c/o Mike Pfeiffer, SVP of Technical Services
International Code Council
500 New Jersey Avenue, NW 6th Floor
Washington, DC 20001

[via email]

**RE: Combined Appeal Hearing
Impact of online voting (CP28), Cost impact, Voting guides; Multiple Proposals
Voter Eligibility and Validation; Multiple Proposals**

Members of the Group B Appeals Board:

On behalf of New Buildings Institute (NBI), I submit the following comments for consideration in the Appeal Hearing on Impact of online voting (CP28), Cost impact, Voting guides, and Voter Eligibility and Validation, and request to participate in the hearing on September 14, 2020. NBI was an active participant in the Group B development cycle, through the submission of proposals, attendance, and testimony during both hearings, and directly supporting jurisdictions with technical questions and education on proposals, as well as the processes. NBI appreciates the open and transparent process that the International Code Council (ICC) has maintained throughout this Group B Development Cycle.

Overview

These comments will address the issues of the impact of online voting, voting guides, cost, and voter validation and eligibility related to multiple proposals with appeals from the following parties:

1. Leading Builders of America
2. National Association of Home Builders (NAHB)

The appellants raise the following complaints: 1) the proposals that were disapproved at the CAH and in person at the PCH should not have been allowed to go to the online vote; 2) the online vote was representative of a specific voting guide; 3) the cost increase of the 2021 code; 4) that some voters should have been ineligible to vote.

Concerns on the Online Governmental Consensus Vote

The rules that established voting procedures were set before this development cycle began, and even the appellants state that no rules have been violated. Disagreeing with the outcome of the voting does

not justify retroactively change the rules. The appellants even state themselves: “... does not dispute that the letter of CP#28 was followed in the Group B process.”

This issue was first raised in the form of a challenge to the voting results by Thomas Zaremba, Partner at Roetzel & Andress; Leading Builders of America; National Association of Home Builders; and Home Builders Association of Michigan

Challenges were placed before the ICC Validation Committee, which is charged with certifying the results of the tabulation of in person votes from the PCH and online votes, as stated in Council Policy 28 – Code Development Section 10.1. The validation committee is additionally responsible for identifying potential voting irregularities, as stated under Section 10.2. The validation committee completed both tasks, and in the Report on the Code Development Process 2019 Group B Cycle published on April 8, 2020, reported the following on page 7:

“A staff review of the OGCV since its inception in 2014 has confirmed that the pattern of voting identified in the letter as an irregularity — disapproved at the CAH, disapproved at the PCH, then passed during the OGCV — has not occurred previous to this current cycle. However, this pattern of voting is not prohibited in CP 28, and this specific scenario is provided for in Section 8.1.

Section 8.1 notes that where the action is disapproval at both the CAH and PCH, a two-thirds majority is required to achieve a final action of as submitted. This is what occurred for the 20 code changes identified in the Zaremba letter.”

Most directly, the report states: “Staff found that no voting irregularities occurred during the 2019 Group B cycle.”

Council Policy 28 lays out the process by which votes are cast, counted, and proposals are passed under Sections 7.0 Public Comment Hearing, 8.0 Online Governmental Consensus Vote, and 10.0 Tabulation and Validation. Again, according to the Report on the Code Development Process 2019 Group B Cycle, all these processes were followed.

1. Regarding Section 7.0: *“The 2019 Group B Public Comment Hearings (PCH) were conducted in accordance with Section 7.0 of CP 28”*
2. Regarding Section 8.0: *“Section 8.1 notes that where the action is disapproval at both the CAH and PCH, a two-thirds majority is required to achieve a final action of as submitted. This is what occurred for the 20 code changes identified”*
3. Regarding Section 10.0: *“On March 31, 2020, by a unanimous vote, the Code Council Board of Directors certified the results of the OGCV for the 2019 Group B cycle.”*

When ICC introduced online voting in November 2013, CEO Dominic Sims said, “The ultimate goal is to provide a superior way to develop codes and increase participation in code development.” While the CAH and the PCH meetings are important to allow many perspectives to be brought up and considered, they are not representative of all ICC members. Over 2,000 ICC members, who were not at the hearings, voted for the IECC online. And these numbers far exceeded the in-person counts at the Las Vegas

hearings, where the maximum number of votes cast for any one proposal was 64. The lowest number? Three. Mr. Sims' stated objectives for the ICC were clearly facilitated by online voting,

Concerns on Voting Guides

Voting guides are not new to the ICC Code Development process. Nor was the voting guide called out by the appellants from the Energy Efficient Codes Coalition (EECC) the only guide shared at the 2021 IECC Development Hearings (see Attachment– NAHB 2019 ICC Group B Online Governmental Consensus Vote Voting Guide). There Appeals Board should consider the following facts around voting guides:

1. The voting guide in question was not the sole source of votes for most of the Governmental Member Voting Representatives.

According to the document “Additional Documentation on Energy Votes” released by ICC on August 19, 2020, there were a total of 1,248 voters active in the IECC voting, casting a total of 125,227 votes. There were 117, 99 or 45 proposals recommended by the EECC (depending on which guide one would follow). The number of voters whose number of votes exactly matched the recommended numbers of votes in the three versions of the EECC Guides were 29, five, and two, respectively.

To favor the appellants, if we assumed all 36 of these voters were using the EECC guides (and there was no other way to total 117, 99 or 45 total votes), 2.88% of voters cast their votes solely by using the advice presented by the EECC. This totals 3,978 votes, or 3.18% of all votes cast.

The claim in the appeal that the EECC voting guide was the only source of voter information is not supported by the voting information that has been shared by ICC.

2. The impact of the voting guides from previous cycles is ignored.

The EECC voting guide in this cycle appears to have been successful for 104 proposals, or 89% of the time. In the 2018 IECC development cycle, there were voting guides as well (as mentioned above, these guides are not new to the process). The voting guide from NAHB (see Attachment – NAHB 2016 ICC cdpACCESS Online Voting Guide ADMIN, IECC, IRC, IFC, STRUCTURAL) in the previous development cycle was successfully implemented for 39 of its 50 recommended votes in the IECC, or 78% of the time. The appeal on alleged fairness of voting guides in this cycle does not seem to be an issue with “voting guides” themselves. It is rather an issue with one particular guide and the group that developed it.

Concerns on the Cost of Code Changes

Cost impact statements in the IECC development process are required to be included for each proposal CP 28, Section 3.3.5.6:

“The proponent shall indicate one of the following regarding the cost impact of the code change proposal:

- 1) The code change proposal will increase the cost of construction;*
- 2) The code change proposal will decrease the cost of construction; or*
- 3) The code change proposal will not increase or decrease the cost of construction.*

The proponent shall submit information which substantiates such assertion.”

Cost effectiveness, or a requirement for a specific pay-back period, as cited by the appellants is not a requirement of Section 3.3.5.6. Cost impact is a matter that is frequently discussed and debated at both the Committee Action and Public Comment Hearings. Voters, along with all of the other information presented to them, have access to weigh the cost impact statement, along with the relative merit of each statement, and their own expertise, to assist in determining if they will or will not vote in favor of a proposal.

Concerns on Voter Eligibility and the Validation Process

This appeal was previously presented as a challenge and rejected by the Validation Committee. Challenges were filed by Leading Builders of America; National Association of Home Builders; and Home Builders Association of Michigan.

These challenges were placed before the ICC Validation Committee, as it is charged with certifying the results of the tabulation of in person votes from the PCH and online votes, as stated in Council Policy 28 – Code Development Section 10.1. The validation committee is additionally responsible for identifying potential voting irregularities, as stated under Section 10.2. The validation committee completed both tasks, and in the Report on the Code Development Process 2019 Group B Cycle published on April 8, 2020, reported the following on page 3:

“Code Council staff performed a comprehensive review of all GMs and GMVRs who participated in the 2019 Group B cycle and determined all GM and GMVR applications met the Code Council bylaws definitions, and that the overwhelming majority of applications and GMVR designations were submitted on time. Of note, during the voter validation process, individuals put forth by the GM that did not meet the bylaws definition were rejected. Of the 124 new GM applications for the 2019 Group B cycle, Code Council staff identified two GM applications that did not meet application deadlines. Staff determined that votes cast by these two were not material to the outcomes.”

The emphasis for rebuttal centers on the rules– that have been in place for many years. The oldest digitally available copy of the ICC Annual Report is from 2005, and includes bylaws that read:

“each of the designated voting representatives shall be an employee or a public official actively engaged either full or part time, in the administration, formulation or enforcement of laws, ordinances, rules or regulations relating to the public health, safety and welfare.”

The bylaws currently published on ICC’s website today read:

“each of the designated voting representatives shall be an employee or a public official actively engaged either full or part time, in the administration, formulation, implementation or enforcement of laws, ordinances, rules or regulations relating to the public health, safety and welfare.”

For 15 years, the only change has been the addition of the word “implementation.” If the appellants were concerned about the membership definition, why wait until now to challenge it? The appeal on the

definition of eligible voters in this cycle appears to be an issue with the way these voters cast their votes, and not a concern with this long-standing rule.

ICC defines a Governmental Member Voting Representatives (GMVRs) under Article II – Membership, Section 2.1.1.1 of the ICC Bylaws as “an employee or a public official actively engaged either full or part time in the administration, formulation, implementation of enforcement of laws, ordinances, rules or regulations relating the public health, safety and welfare”. When signing up as a GMVR, there are two questions they must respond to which ensure they satisfy the conditions for meeting the bylaws:

Question 1 (Q1): The applicant must:

1. Administer the laws, ordinances, rules, or regulations of this governmental member.
2. Formulate the laws, ordinances, rules, or regulations of this governmental member.
3. Implement the laws, ordinances, rules, or regulations of this governmental member.
4. Enforce the laws, ordinances, rules, or regulations of this governmental member.

Question 2 (Q2): The applicant must be a:

1. Paid employee of the governmental member.
2. Third-party contractor of the governmental member.
3. Elected official of the governmental member.

A voter does not have to meet all these criteria, but they do need to meet at least one in each category, which is the threshold defined by ICC. Three examples:

A building inspector: Q1) an inspector *enforces* the laws but does always formulate or administer the laws; Q2) inspectors are either a paid employee or a contractor but are never elected.

A chief sustainability officer (CSO): Q1) a chief sustainability officer *administers* and *formulates* laws, but most often not a direct enforcer of the laws; Q2) a CSO is most likely a paid employee.

A mayor: Q1) a mayor *administers* and *formulates* laws, but really does not enforce; Q2) a mayor is typically elected.

These three positions all meet the rules set out by the ICC. For the future of the energy code as a tool used by jurisdictions, the fact that this range of GMVRs might participate is critical. As an increasing number of cities and states set climate goals, addressing building energy use is a large factor in achieving carbon emissions reductions, that more people participated this cycle in voting for the energy code should not be surprising. Building energy use accounted for 39% of total U.S. energy consumption in 2019, making energy codes a critical part of any climate or sustainability plan. Employees engaged in local climate and sustainability planning often include those responsible for: protecting their citizens from the costly and devastating impacts of climate change; the viability of businesses in their local economies; and housing affordability.

This type of appeal also questions the qualifications of the GMVRs but does not outline how it would define “qualified” going forward. The ICC’s GMVR definition has built into it the qualification to vote. The inference that the voters were unqualified to participate is at best, misguided. At worst, its completely fabricated, and its circulation as truth is dangerous to the ICC process.

Proposing Changes Out of Scope and Overturning the Governmental Process

These appeals attempt to change both the Council Policies and Bylaws via the Appeals process, as well as retroactively change the rules to the code development process that was clearly laid out before this Group B cycle began.

Any attempt to change CP 28 through a challenge is out of scope for the Appeals Board. Council Policy 46 governs the review and changing of other Council Policies through a committee established by the Board of Directors. As stated in section 5.2, Amendments to Existing Council Policies, "Substantive amendments to existing Council Policies that are proposed to the Board of Directors shall be reviewed by the Committee."

The bylaws themselves state in Article XVIII – Amendments to Bylaws, that proposals to amend bylaws must be considered at an Annual Business Meeting. Given that the Annual Business Meeting for 2020 has been cancelled, no action should be taken on this request in 2020 without being in clear direct violation of the rules laid out by ICC. Using an appeal to amend the bylaws is out of the scope of the Appeals Board.

The appellants omitted any concerns about overturning the results of the Group B process, which has now been underway for over a year. The governmental consensus process is the cornerstone of I-Code development. Most importantly, striking down the proposals now would set a dangerous precedent for future code development cycles by creating a path for opponents of a successful proposal to present their side again and again, to ever smaller groups of decision makers, who may not have jurisdiction to overturn the OGCV, and only after the voting representatives have made clear their intentions.

In conclusion, NBI urges the committee to uphold the results of the online vote, and to await the results of discussion, debate, and reconsideration for future development cycles underway at the Long Term Code Development Process Committee. Thank you for your thoughtful consideration of these appeals.



Kimberly Cheslak
Associate Director of Codes and Policy

Attachments:

NAHB 2019 ICC Group B Online Governmental Consensus Vote Voting Guide
NAHB 2016 ICC cdpACCESS Online Voting Guide ADMIN, IECC, IRC, IFC, STRUCTURAL

cc: Greg Wheeler, CBO President, International Code Council *[via email]*
Dominic Sims, CEO, International Code Council *[via email]*
Michael Wich, CBO, Chair of Long Term Code Development Process Committee *[via email]*