

[via e-mail]

August 26, 2020

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Dear Mr. Pfeiffer,

On behalf of the Energy Efficient Codes Coalition (EECC), we once again thank you for the opportunity to submit a response to the appeals raised regarding the 2019 Group B Code Changes as they related to the International Energy Conservation Code. Below you will find our Statement of Interest as well as our response to the appeals submitted by NAHB and LBA, organized in accordance with the individual hearing dates as laid out in the Notice of Appeal Hearings dated July 30, 2020.

Energy Efficient Codes Coalition (EECC) Statement of Interest in Matter Being Appealed

Because the appeals submitted by the National Association of Homebuilders (NAHB Appeal) and the Leading Builders of America (LBA Appeal) urge the Appeals Board to overturn several EECC-authored proposals that were approved by ICC Governmental Member Voting Representatives, EECC has “direct and materially affected interests in the matter being appealed,” per Council Procedure 1 (CP1) Section 6.1. Furthermore, both appeals propose extreme remedial measures of invalidating voters and reversing their votes on those EECC-authored proposals.

Accordingly, we request permission to participate in both the NAHB & LBA Appeal Hearings, scheduled on September 10th and 14th, respectively.

No Need for the Appeals Board to Act on Either Appeal

Sections 6.3.7 and 6.3.8 of CP1 Appeals establish a clear scope for decisions of the Appeals Board:

6.3.7 Review by the Appeals Board shall be limited to matters of process and procedure. The Board of Appeals shall not render decisions on the relative merits of technical matters.

6.3.8 In order to sustain the appeal, or any part thereof, the Appeals Board must find that there was a material and significant irregularity of process or procedure.

Both the NAHB and LBA appeals should be rejected because neither presents an appealable issue that meets the criteria set out in CP1 Section 6.3.7, nor does either appeal make a case for “material and significant irregularities” of ICC process or procedure, as required under CPI Section 6.3.8. In fact, the ICC staff, an independent audit, the Validation Committee and the Board have already thoroughly

examined and unanimously rejected many of the appellants' claims in the April 8, 2020 *Report on the Code Development Process, 2019 Group B Cycle* (ICC Report), which was published by ICC in connection with certification of the final results of Group B voting. There is no need for the Appeals Board to give weight to either of these appeals.

Summary of EECC's Position

The NAHB and LBA appeals sharply criticize ICC's staff and the code development process, both as written and as administered by the ICC. Moreover, the Appellants supplement their rejection of the voting outcomes with an unjustified attack on local and state policymakers, administrators, and code officials who comprise the ICC voting membership and who participated in the process in good faith.

Among the Appellants' allegations is that the votes of local and state government members were controlled by outside interests that "subverted" the code development process. The appellants claim that the voters' eligibility to participate in ICC voting is "suspect...because it appears they do not meet the ICC Bylaws' definition" and "it appears...that numerous GMVRs are not actively engaged in the administration, formulation, implementation, or enforcement of laws, ordinances, rules or regulations related to public health, safety and welfare". Additionally, it is claimed that "there is little assurance that voters fully understand the impact or consequences of proposals or their votes". These accusations are leveled without evidence and are contrary to the findings of an independent audit that confirmed the validity of all GMVRs.

These allegations are serious, for which the Appellants should face a high burden of proof; however, not only are these accusations made without presenting evidence of any specific violations of the ICC Bylaws or Council Procedures, they reiterate claims have already been considered and rejected by the Validation Committee, ICC staff, an independent audit, and the Board of Directors' report.

The Appeals Board should also be aware of the precedent that when Governmental Member voting has not gone a certain way in the past, aggrieved parties have filed appeals based on strikingly similar claims. These prior claims were unanimously rejected by both the Appeals Board and the ICC Board of Directors:

- During the 2007-2008 code cycle an appeal with similar charges was filed by NAHB on IRC fire sprinkler code proposals (RB64-07/08 and RB66-07/08). In its appeal document, using words similar to those currently used by these Appellants, NAHB claimed that "ICC's governmental consensus process was manipulated and subverted to advance the interests of a single stakeholder." NAHB went on to claim that "the fire service was able to stack the ballot box..." Finally, NAHB criticized the "failure to prevent unfair influence of third-party funding on the voting process."
- During the 2009-2010 code cycle, the voting results of the 2012 IECC results were appealed, once again using similar charges to those leveled in these appeals. Specifically, the appellants attacked both ICC's Governmental Members and its staff, stating that the GMVRs participating in-person at the 2010 Final Action Hearings had "proprietary or pecuniary interests" that undermined "ICC's commitment to an unbiased, fair and open code development process," and that inadequate safeguards were "either not employed or were not uniformly applied during the 2010 IECC Final Action Hearings to ensure that voting was limited to designated Governmental Member Voting Representatives meeting the requirements established in ICC's Bylaws."

Maximizing governmental voting participation and placing trust in ICC's Governmental Members is a fundamental tenet of the International Code Council. Rather than identifying appealable issues of process or procedure, these appeals criticize ICC's governmental consensus process and the qualifications of the voters who participated in it. An unprecedented number of new Governmental Members invested their time and resources in the Code Development Process for the first time and cast their votes in the public interest. The participation of Governmental Members is a core strength of the ICC Code Development Process; overturning results is an extreme remedy and should be reserved for only significant procedural deficiencies.

EECC urges the Appeals Board to strongly and unequivocally reject these appeals and to make it affirmatively clear that the ICC code development process worked as intended and that the allegations regarding ICC's staff and Governmental Members is without merit.

Based on the points discussed, the Appeals Board should conclude that there are no legitimate appealable issues presented by the Appellants. If, however, the Appeals Board does decide to consider and hear specific issues raised in the NAHB and LBA appeals, all should be rejected for the reasons outlined below.

Appeals Hearing, September 10, 2020: Impact of online voting (CP28), Cost impact, and Voting guides - LBA and NAHB

(Response to NAHB Item 3): The Appeals Board should not ignore ICC's published rules and overturn hundreds of GMVR votes just because NAHB believes specific proposals do not meet the "spirit and intent" of CP28.

NAHB does not identify an irregularity of process or procedure; in fact, NAHB admits that "the letter of CP28 (process) was followed (procedure)."¹ In essence, NAHB is asking the Appeals Board to ignore ICC's published rules and procedures and to overturn GMVRs' votes because the outcome of these votes did not comply with an unwritten "spirit and intent" of CP28. We strongly discourage the Appeals Board to embrace a "spirit and intent" that directly conflicts with ICC's published rules.

NAHB claims that "CP28 does not allow proposed modifications to proposals that have been defeated twice to be discussed because the assumption is that the proposal is no longer viable."² To the contrary, CP28 envisions precisely this voting scenario – Section 8.1 indicates that where a proposal does not receive an affirmative recommendation at the Committee Action Hearing, a 2/3 approval is required among all GMVRs in order for the proposal to be approved. Furthermore, a proposal is not "defeated" at the Public Comment Hearing; votes cast in-person are not only able to be changed until the Online Governmental Consensus Voting window is closed (more than a month after the PCH ends), but the in-person GMVRs are actually a subset of all eligible ICC GMVRs. As such, ICC adds the votes of those who attended the hearing to the votes cast online to determine the final voting tallies on each code update proposal. As stated by AIA Executive Vice President & CEO Robert Ivy in his letter to the ICC Validation Committee, "I disagree with the premise that the Public Comment Hearing voters are a body separate from the online voters, when the online vote is in fact an extension of the vote taken at the hearings.

¹ NAHB Appeal at Point #3.

² Ibid.

This is especially clear, since the electronic votes of those attending the hearings automatically becomes included in the online votes.”³

Not only are proposals not “deemed defeated” by CP28, this provision is neither an “oversight” nor a “vestige of the earlier process” as described by NAHB. It has been in CP28 for as long as online voting has been available. Whether this outcome happened in a previous code development cycle is irrelevant; this specific outcome is clearly anticipated by CP28.

NAHB claims that allowing a “twice-defeated proposal” to be approved by 2/3 of the GMVRs results in proposals not being “fully vetted.” This claim is also wrong, for three reasons:

- First, as noted earlier, in-person voting at the Public Comment Hearing is not a result in itself – it is only the first opportunity for GMVRs to cast votes on proposals. These votes (which may later be changed by GMVRs) will be added to votes cast during the OGCV and tallied as a single result. These proposals are not “approved” or “defeated” at the PCH. NAHB’s comparison to the pre-2013 Final Action Hearing process is irrelevant to whether the current rules were executed properly.
- Second, the 20 proposals challenged by NAHB were fully vetted according to CP28. GMVRs are only able to vote on proposals and public comments that were actually debated at either the Committee Development Hearing and/or the Public Comment Hearing. Whether the proposals received a majority of in-person votes at the PCH does not impact whether the proposals are “vetted.”
- Third, to support their proposed remedy of overturning the results of the OGCB, the NAHB appeal references CP28 Section 10.2 as a potential vehicle for the ICC Board to address “unexpected weaknesses” in CP28. However, Section 10.2 outlines the process for the Validation Committee to bring evidence of voting irregularities to the ICC Board; it does not establish independent grounds for the appeal of proposals under CP1. Under Section 10.2, where the Validation Committee identifies “voting irregularities or other concerns with the Online Governmental Consensus Voting process that are material to the outcome or disposition of a code change proposal(s) ... such irregularities or concerns shall be immediately brought to the attention of the ICC Board.” The Board only takes action under Section 10.2 where such irregularities have been identified by the Validation Committee.

In this case, the Validation Committee carried out its responsibility and investigated several claims of voting irregularities as part of its regular process, which included a third-party independent audit of the online governmental consensus vote by external auditors. The Validation Committee passed the following motion unanimously:

“In accordance with Section 10.1 of Council Policy (CP) 28 and the ICC Bylaws, the Validation Committee reviewed the 2019 Group B Validation Committee Packet during their January 15, 2020, conference call followed by the review of the staff report entitled “ICC Report to the Validation Committee” on their March 20, 2020, conference call. These two calls and review documents related to the 2019 Group B Code development cycle online governmental consensus vote, conducted November 18 – December 6, 2019. Having found no irregularities or concerns material to the

³ Robert Ivy,

outcome of the voting process, the Validation Committee hereby certifies the results of the online governmental consensus vote and confirms a valid voting process for the 2019 Group B code development cycle.”⁴

Under Section 10.2 Irregularities of process and procedure (if any) should be identified by the Validation Committee, whose role it is to investigate these claims, and then brought to the Board. This Committee found none, and NAHB’s claim should be rejected. Finally, we note that one of NAHB’s requested remedial actions is to “modify CP28 to prohibit proposals defeated at both the Committee Action Hearings and Public Comment Hearing from proceeding to the OGCV and consider such proposals Disapproved.” NAHB Appeal at 5. Council Procedures cannot be modified through a CP1 Appeal.

(Response to LBA Item 2) LBA’s charge that ICC failed to ensure that on-line voters truly complied with eligibility criteria has already been refuted by a thorough ICC staff review, an independent audit, and unanimous votes by both the ICC Validation Committee and the ICC Board of Directors.

Under the aegis of the Validation Committee, ICC staff, assisted by third-party auditors, reviewed 124 new applications of Governmental Members and determined that all 124 met the definition of Governmental Member in Section 2.1.1 of the ICC Bylaws.⁵ In addition, they re-examined the qualifications of 2,026 Governmental Member Voting Representatives and found “that all the applicants who participated in Group B met the bylaws definition.”⁶ The results of the ICC Report were reviewed and approved unanimously by the Validation Committee.

(Response to LBA Item 3) Energy Efficient Code Coalition’s access to online voters is the same as any other participant in ICC’s Code Development Process. Collecting input from, collaborating with, and informing such a broad range of pro-efficiency stakeholders is not a “due process failure,” as asserted by LBA.

Since its creation in 2007, EECC has attempted to assist jurisdictions achieve their goal of ensuring that buildings, the largest energy consuming sector in the nation, do their share to reduce wasted energy, stabilize power grids and prices and, recently, reduce carbon emissions. We take pride in assembling a broad and diverse coalition of interested stakeholders currently participating in the Code Development Process. Our supporters (we are a coalition, not a membership entity) include affordable housing advocates, environmental groups, business, utilities, labor, and nonprofit energy efficiency groups, among others, and we operate under a set of public Guiding Principles which includes opposition to “product-specific special exemptions or provisions” in the IECC.

Although LBA’s appeal references EECC’s Voting Guide, the appeal does not identify any ICC rule that was broken. As the ICC Report correctly notes: “Voter guides: This report notes that voter guides

⁴ ICC Report at 6.

⁵ ICC Report at 6.

⁶ Ibid.

developed by participants/stakeholders have been in existence since the creation of the Code Council and prior with the legacy organizations. They are not a violation of CP 28.”⁷

Many coalitions, ICC Chapters, and other participants produce voting guides and organize voting campaigns (such as NAHB’s most recent “One and Done” code official outreach campaign). Informing voters through voting guides, webinars, and other means – in addition to direct participation in code hearings – is an important part of code development. In fact, as ICC has expanded its reach to include hundreds of new voters who otherwise would not have been able to attend the hearings in-person, these voter- education efforts are more important than ever before.

(Response to LBA Item 4) While cost-effectiveness and affordability are routinely discussed at the Committee Action and Public Comment Hearings, neither is a subject that falls within the scope of this Appeals Board.

These issues are not a matter of “process or procedure,” but rather a dispute about the merits of six proposals. Cost-effectiveness is routinely discussed at the Committee Action Hearing and at the Public Comment Hearing, as it should be. As the ICC Staff correctly noted in its report to the Board:

“Ultimately, the decision rests with the eligible voting members on the cost effectiveness of the code change.”⁸

The substantive, technical content of proposals, including the cost statements, are outside the scope of appeals under CP1.

That said, the 2021 IECC includes “shelf-ready,” cost-effective measures that are already employed in homes and commercial buildings across the country. The improvements are neither egregious, nor will they negatively impact home affordability. In fact, permanent improvements will reduce energy use and flatten energy peak demands for each building’s 100-year life, while shorter-lived improvements will be likely to be replaced with equivalent or better improvements in the future.

Appeals Hearing, September 14, 2020: Voter eligibility and Validation process – LBA and NAHB

(Response to NAHB Item 4) ICC’s staff fairly, thoroughly, and properly vetted Governmental Members or Voting Representatives to ensure compliance with ICC governmental consensus requirements.

The work of validating Governmental Members and their Voting Representatives has already been completed by Staff - assisted by third-party auditors - and these results were approved by the Validation Committee and the ICC Board. According to the ICC Report, ICC Staff reviewed 124 new applications of Governmental Members and determined that all 124 met the definition of Governmental Member in Section 2.1.1 of the ICC Bylaws. ICC Report, at 6. In addition, ICC Staff reviewed the qualifications of 2,026 Governmental Member Voting Representatives and found “that all the applicants who participated in Group B met the bylaws definition.” *Id.* at 7. The results of this review were unanimously approved by the Validation Committee.

⁷ ICC Report at 3.

⁸ ICC Report, at 3.

One of NAHB's requested remedial actions is to revise the ICC Bylaws to change the definition of Governmental Member. Article XVIII of the Bylaws outlines the process for amendments, which must be properly noticed and approved through a defined process at the Annual Business Meeting, among other requirements. Such a remedy is outside the scope of the Appeals Board. Retroactively changing voter eligibility after the completion of a multi-year consensus process would not only be unfair to those who participated in the process; it could affect proposals in other Group B International Codes on which these voters cast ballots. That 124 new Governmental Members from across the country joined ICC to help promulgate national model codes is a positive sign for ICC's future and a reason to celebrate and not an invitation to narrow the range of potential participants in the Code Development Process.

(Response to LBA Item 1) Changes to ICC Bylaws should not be retroactive and are not within the scope of the Appeals Board.

The main thrust of LBA's appeal seems to be that ICC – either through its written rules or in its execution of those rules – failed to ensure a fair, consensus-driven process. LBA proposes the extreme remedy of reversing votes taken by hundreds of voters on the IECC – votes that were cast by properly credentialed GMVRs who followed ICC's published rules. As noted above, ICC should be encouraged by the growing national interest in the promulgation of the national model codes evidenced by the steadily-increasing number of new Governmental Members.

LBA does not identify an irregularity of process or procedure, but rather, claims that ICC's Bylaws are "overly subjective." The content of ICC's Bylaws is beyond the scope of an appeal under CP1. Further, in its requested Remedial Actions, LBA suggests retroactively changing the Bylaws to limit voting to "governmental officials who actually enforce the code and are charged with the public's safety."⁹ Article XVIII of the Bylaws outlines the process for amendments, which must be properly noticed and approved through a defined process at the Annual Business Meeting, among other requirements. As noted in our response to NAHB's similar request above, altering definitions of membership and/or voting privileges after the conclusion of a multi-year code development process would raise serious fairness concerns.

Thank you very much for your consideration of our response in this matter, and we look forward to presenting our position at the hearings starting September 10th.

Sincerely,

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⁹ LBA Appeal at 4