



Mike Pfeiffer  
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August 26, 2020

*[via email]*

**RE: Comments to the International Code Council Appeals Board 2019 Regarding the Group B Code Changes – Issues related to ICC Bylaws and Polices**

Dear Mr. Pfeiffer,

On behalf of NRDC (Natural Resources Defense Council) and its more than 2 million members and online activists, we submit the following comments for consideration by the Code Council Appeals Board. We also request to participate in and present information at the Appeals Board hearings to be held on August 31, September 3, September 10, and September 14, 2020. We appreciate the opportunity to comment.

### Overview

In these comments, NRDC will discuss appeals related to ICC bylaws and policies. NRDC submitted an initial set of comments on August 17, 2020 that responded to the proposal-specific appeals filed on RE126, RE147, and CE217 Parts I and II.

As we noted in our comments filed on August 17, 2020, the arguments of the appellants are largely without merit and do not meet the requirements laid out by the ICC to be considered in the appeals process. The ICC follows bylaws and policies to develop its codes, and these procedures were properly followed to develop the 2021 IECC. The code development process is laid out in [Council Policy \(CP\) #28-05](#). The appeals process follows [CP #1-03](#).

In recent years, the ICC has taken important and productive steps to expand participation in the code development process, most notably with the addition of online voting for governmental members, first

put into place for the IECC in the 2015 code development cycle. Participation by local and state officials in the development of the 2021 IECC was unprecedented: many proposals received more than 1,000 votes in the online voting period. In contrast, proposals received a maximum of around 70 votes during the in-person public comment hearings. The online voting turnout was also significantly higher in the 2021 code development cycle than in previous years; proposals in the 2018 code development cycle received a maximum of around 450 total votes, with most proposals receiving far fewer.<sup>1</sup>

This increased voter engagement is a very positive development. Local government officials understand the importance of a strong energy code better than ever before. Building energy use has become a key component of city and state climate action plans, and a strong building energy code is a critical policy tool to achieve such goals. Online voting allows government officials to participate equitably: the development of the code is not simply left up to jurisdictions who can afford the time and resources to send the most members to vote in person. Per Article II of the ICC Bylaws, Governmental Members are entitled to 4, 8, or 12 voting members, depending on the population of the jurisdiction.<sup>2</sup> Online voting ensures that each of those voters can have their fair say.

Of course, the success of an online voting process depends on the integrity of the system. Voters must be properly validated to ensure they meet all of the requirements put in place by the ICC, and the process of voting must be secure. The ICC has done a thorough and excellent job to ensure that all eligible voting members can participate in code development in a way that is equitable, secure, and valid. The ICC's April 2020 Report on the Code Development Process – 2019 Group B Cycle details an extensive validation process, including review by third-party independent auditors, review by the ICC Board-appointed Validation Committee, and ICC Board review and action.<sup>3</sup> Many of the issues presented as appeals were already brought to the attention of the Validation Committee, which decisively determined there were no voting irregularities. Quoting the April 2020 Report (emphasis added):

“On March 20, 2020, the Validation Committee again met and passed the following motion: 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

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<sup>1</sup> CE105-18 received 445 total votes; RE58-18 received 449 total votes. <https://www.iccsafe.org/wp-content/uploads/2016-GroupB-Final-Action-Results-OGCV.pdf>

<sup>2</sup> <https://www.iccsafe.org/wp-content/uploads/bylaws.pdf>

<sup>3</sup> [https://www.iccsafe.org/wp-content/uploads/ICC\\_Report\\_Code\\_Dev\\_Process\\_2019\\_Group\\_B\\_Cycle.pdf](https://www.iccsafe.org/wp-content/uploads/ICC_Report_Code_Dev_Process_2019_Group_B_Cycle.pdf)

consensus vote, conducted November 18 – December 6, 2019. **Having found no irregularities or concerns material to the 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.** The motion was approved unanimously.”

The ICC Board subsequently certified the results of the 2019 Group B code cycle.

As we discuss in more detail below, the vast majority of the topics being appealed do not meet the requirements outlined in CP #1-03, section 6, for review by the Appeals Board (excerpted below), and should warrant no further discussion. We request the Appeals Board limit the discussion at the forthcoming hearings to issues that are limited to matters of process and procedure, and reject any appeals that do not meet the requirements of CP #1-03.

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.

### Appeals Related to ICC Bylaws and Policies

The National Association of Home Builders (NAHB) and the Leading Builders of America (LBA) raised a number of issues related to the ICC’s Bylaws and policies, including the impact of online voting, cost impact, the use of voting guides, voter eligibility, and the voter validation process. These issues are not appealable, and in fact, many of them have already been decided. None of these arguments raise an issue of process or procedure as is required by CP #1-03, and therefore should warrant no further discussion. However, in the event the Appeals Board chooses to discuss these issues further, we offer the following responses.

#### Impact of Online Voting (CP #28)

##### *Appeals Claim*

LBA claims that the ICC has highly subjective bylaws that fail to provide due process to certain groups and stakeholders, saying “The final results of the 2021 IECC were achieved through deliberate and calculated manipulations through the leveraging of these overly subjective bylaws. These manipulations were orchestrated by proprietary interests which have a direct vested economic stake in the IECC being developed in their favor.”

NAHB does not dispute that the letter of CP #28 was followed in the code development process, but claims that the “spirit and intent” of the process was “exploited.” They say that the fact that the ICC bylaws allow proposals to be overturned in the Online Governmental Consensus Vote (OGCV) is a “vestige of an earlier process” and an “oversight.”

### *Response*

There is no legitimate matter of process and procedure raised here, and therefore there is no irregularity of process or procedure. As NAHB says, CP #28 was followed to the letter during the development of the 2021 IECC.

This is further supported by the April 2020 ICC Report on the Code Development Process – 2019 Group B Cycle.<sup>4</sup> There were similar claims made during the code validation process, broadly categorized as “voting irregularities.” Specifically, appellants are referring to the fact that 20 proposals which were recommended for disapproval by the technical committee and also voted down during the public comment hearings received enough votes during the OGCV to ultimately be passed into the code. Since this has never happened before, the appellants seem to believe it can only happen as the result of nefarious manipulation. The April 2020 ICC Report addresses this head-on:

“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. Staff found that no voting irregularities occurred during the 2019 Group B cycle.”

Although it is true that proposals have not been overturned during the OGCV in previous code cycles, the fact that this happened does not mean that the process is broken. In fact, it means the voting process is working exactly as designed. Online voting was designed to make voting more accessible to more governmental voting members, and we saw that happen this code cycle. More governmental officials than ever before took the time to educate themselves about proposals they care deeply about and vote, for reasons that may have to do with the broader policy goals of their jurisdiction. The fact that local governments’ policy goals may differ from the positions of the technical committee members

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<sup>4</sup> [https://www.iccsafe.org/wp-content/uploads/ICC\\_Report\\_Code\\_Dev\\_Process\\_2019\\_Group\\_B\\_Cycle.pdf](https://www.iccsafe.org/wp-content/uploads/ICC_Report_Code_Dev_Process_2019_Group_B_Cycle.pdf)

or the small number of voters in the room during the public comment hearings, does not make the online vote any less valid. If anything, this result shows that the committee process may not meet the needs of the voting body, not the other way around.

The “remedial actions” proposed by NAHB and LBA, to overturn the will of the governmental voting body on these 20 proposals, are completely inappropriate. The vote on each proposal was decisive, passing with at least a 2/3 majority. The 20 proposals in question received an average of 57 votes during the in person public comment hearings (ranging from 26 and 70). In the online vote, these same 20 proposals received an average of 1,080 votes (ranging from 926 and 1220). The ICC Board has already found that there were no voting inconsistencies and the voters have been independently validated, and therefore the Appeals Board has no authority to reject or overturn the proposals that were voted on by such a wide majority of voters. Doing so would completely undermine the ICC’s process, discard the will of more than 1,000 voters, and discredit the governmental members’ faith in the code.

#### Cost Impact

##### *Appeals Claim*

LBA and NAHB claim that the final outcome of the 2021 IECC will result in cost ineffectiveness and negatively impact home affordability.

##### *Response*

This is not an issue of process and procedure, and therefore should not be provided further consideration by the Appeals Board.

There is no stated requirement for the model energy code to stand alone as cost-effective – and indeed, there is no consensus on how “cost-effectiveness” is even defined for new homes and commercial buildings. Some stakeholders, including NRDC, believe it wise to consider cost-effectiveness over the useful life of the building. Others look only at whether a measure will increase the cost to construct a building, or consider only the costs and benefits in the first few years of occupancy while not accounting for future savings.

There are, however, a multitude of reasons to increase the efficiency of new homes and buildings at the time of construction. Investing in efficiency during construction is unquestionably cheaper than having to undertake a costly and intrusive energy retrofit in the future. Furthermore, while increased energy efficiency may initially increase the cost of construction, the benefits accrue over the lifetime of the building. This is particularly important for lower-income consumers, who are less likely to be the first purchasers of a new home. A home with better insulation, for example, will mean that the first owners will have lower energy bills – but it also means that whoever owns the home in 10 or 20 years once it is

an “existing” home will continue to reap those savings. The same is true for measures like electrification readiness and electric vehicle readiness: a small additional cost today will prevent a much larger cost ten or twenty years in the future. A home is not constructed only for its first occupant, and the code must account for that.

There are real, long-term costs of not moving to energy efficient, low-carbon buildings as soon as possible, both in terms of utility bill costs to consumers and societal costs to the community and the planet. The cost of doing nothing, is not nothing: it is a debt imposed on future owners and renters, especially burdensome on lower-income occupants. In order to avoid the worst impacts of climate change, the status quo is not enough. Our new buildings must improve, and must improve quickly.<sup>5</sup>

The governmental voting body overwhelmingly recognized this fact and used their votes to make much-needed improvements in the efficiency of the code. This is a technical decision and the voting body is the only proper decision-making authority.

## Voting Guides

### *Appeals Claim*

The appellants seem to claim that the use of voter guides has put them at a disadvantage.

### *Response*

Voter guides have been used since before the creation of the ICC, and for every code cycle since then. Guides are produced by many entities including local ICC chapters and NAHB. The ICC’s April 2020 report clearly states that the use of voter guides is not a violation of CP 28. Voters are free to reference and use voter guides however they choose. In fact, having access to more than one voter guide provides voters with a valuable look at the perspective of different stakeholders, which helps to further inform their decision making. Many voters reached out to NRDC to request a voting guide, so the presence of such a guide is clearly valuable to voters.

The voting data shows that very few voters voted completely in line with any one voting guide, including the guide produced by the Energy Efficient Codes Coalition. We defer to the EECC for additional comment on this issue.

This issue was referred to and has been discussed as part of the Board Committee on the Long Term Code Development Process. In initial discussions, there has been no consensus on the issue. Numerous stakeholders raised the important issue of First Amendment freedom of speech rights, which would

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<sup>5</sup> <https://www.nrdc.org/sites/default/files/americas-clean-energy-frontier-report.pdf>

come into play with any attempt to limit access to voter guides. There may, however, be ways to make voter guides more easily accessible to voters, or to ensure that all voters have access to all voter guides. These are issues that are most appropriate for the LTCD committee to address. There have been no violations of process or procedure in the use of voter guides to inform the 2021 IECC development, and therefore this issue should not be given further consideration by the Appeals Board.

## Voter Eligibility and Voter Validation

### *Appeals Claim*

The appellants claim that ICC failed to do its due diligence when validating voters, and therefore a subset of voters should have been ruled ineligible.

### *Response*

There is absolutely no evidence to back up this claim. NAHB states that “The eligibility of many of the Governmental Member Voting Representatives (GMVR) is suspect and NAHB believes the status of a subset of GMVRs should be reevaluated because it appears they do not meet the ICC Bylaws’ definition.” NAHB does not provide any additional information about why they believe there is reason to suspect such a subset of voters, nor does it provide any supporting information about how it may have arrived at this claim. Similarly, LBA claims that there was not adequate or appropriate oversight from ICC to validate and ensure eligibility of voters, without providing any evidence to substantiate this claim.

These are significant allegations. As we noted in the Overview section of these comments, the successful development of the code rests on the integrity of the underlying code development process, which includes ensuring that only eligible voters may cast ballots. We find no reason to believe that the ICC process to determine voter eligibility and voter validation was handled improperly, or that ineligible voters had an impact on the final action results, and neither NAHB or LBA presented any such reason.

This issue was thoroughly addressed in the ICC’s April 2020 report. ICC staff detail a comprehensive process to determine voter eligibility in line with the ICC bylaws and to validate eligible voters. ICC staff conducts independent research to fully evaluate any applications they feel may be unclear. Furthermore, the ICC’s third-party independent external auditors confirmed that only eligible voters had voting privileges via cdpACCESS. The ICC Validation Committee – which includes a member from NAHB – unanimously certified the results of the voting process. The motion to certify states, “Having found no irregularities or concerns material to the 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.” Unless NAHB and LBA have access to some kind

of information that ICC staff and the independent auditor did not – which we believe is highly unlikely – this matter has already been settled and should not be subject to further consideration by the Appeals Board.

### Conclusion

The issues raised by the appellants regarding the ICC's Bylaws and policies, including the impact of online voting, cost impact, the use of voting guides, voter eligibility, and the voter validation process, do not meet the requirements laid out by ICC to be considered in the appeals process. Many of these issues have already been addressed in the ICC's April 2020 report, and/or through the Long Term Code Development committee process. The arguments are without merit. The Appeals Board must adhere to the will of the governmental voters and dismiss these appeals.

Sincerely,

A handwritten signature in black ink, appearing to read "Lauren Urbanek". The signature is written in a cursive, flowing style.

Lauren Urbanek  
Senior Energy Policy Advocate