

Dominic Sims,  
Chief Executive Officer  
ICC Board of Directors  
International Code Council  
500 New Jersey Avenue, N.W.  
6<sup>th</sup> Floor  
Washington, D.C. 20001

January 2, 2024

Re: Appeal of 2024 International Energy Conservation Code

Mr Sims, ICC Board President Stuart, and ICC Board of Directors:

Due process is the lodestar of all voluntary code and standard making bodies in the United States, and the basis for the success of voluntary code and standard making bodies across the United States. Due process is achieved, inter alia through a code development process that requires a balance of interests, openness, transparency, and an appeals procedure that permits appellants the opportunity to challenge matters of process and procedure prior to the implementation of a code. The ICC has committed to these principles via the *ICC Code Development Principles*.<sup>1</sup>

The American Gas Association (AGA) appeals the following provisions addressing electric vehicle readiness, electric readiness and photovoltaic readiness, and greenhouse gas emissions (GHG) which were improperly promulgated and incorporated into the International Energy Conservation Code (IECC) 2024 edition (IECC 2024), commercial and residential versions, as the result of material and significant due process irregularities in the code development process and the procedures employed.

The AGA appeals are on provisions that require or promote “electric ready” provisions, all-electric homes and buildings, require or promote electric vehicle

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<sup>1</sup> *ICC Code Development Principles*. <https://www.iccsafe.org/products-and-services/i-codes/code-development/code-development-procedures/>).

power transfer infrastructure, or penalize the installation of natural gas applications with increased requirements that are not economically justified.

As discussed below, the following provisions are inconsistent with the scope and intent of the IECC, and were not promulgated consistent with the ICC's established policies and procedures, and are in violation of due process principles and procedures to which the ICC has committed:

### **Commercial Code**

- **IECC-CE-PCD1-CAR-CED1-39 and IECC-CE-PCD1-CAR-2 CECD1-27:** Relating to electric vehicle power transfer infrastructure be installed for commercial applications.
- **IECC-CE-PCD1-CAR-4 CED1-15:** An adoptable appendix by the Authority Having Jurisdiction (city, county, state) for an all-electric building.
- **IECC-CE-PCD1-CAR-3 CECD1-28:** An adoptable electric-ready building appendix.
- **IECC-CE-PCD1-CAR CECD1-18:** Requires that commercial buildings without heat pumps meet 1.25 times the energy credits as compared to those buildings with heat pumps.
- **IECC-CE-PCD1-CAR CECP1-2:** Requires commercial buildings to have either onsite renewable energy system or an off-site renewable energy contract.

### **Residential Code:**

- **IECC Residential CAR-REPI 7-21 Solar-ready:** Requires residential buildings to have solar-ready provisions in the body of the code.

- **IECC Residential CAR RECPI-6/RECPI-7 EV-ready** (subsequently included in the Omnibus proposal approved 9/26/22): Requires residential buildings to have EV-ready provisions in the body of the code.
- **IECC Residential CAR REPI-111 Electric-ready** (subsequently included in the Omnibus proposal approved 9/26/22): Requires residential buildings to have electric-ready provisions in the body of the code.
- **IECC Residential CAR REPI-155-21 All-Electric Appendix**: Requires the installation of all-electric equipment and appliances in new construction.

The appealed provisions of the IECC 2024 commercial and residential editions are in direct conflict with the scope and intent of the IECC. Further, the method by which the ICC provided guidance midway through the IECC 2024 code development process conflicts with the ICC’s stated processes and procedures for issuing guidance and its due process principles. That errant guidance led to the development of a “Consensus Building Forum” that operated without the due process procedural safeguards of the ICC, which in turn led directly to the improper approval of the appealed provisions.

AGA requests that the IECC 2024 development process be stayed until this appeal is resolved and that the provisions listed above not be included in the 2024 edition of the IECC.

### **Interest of Appellant**

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 78 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent—more than 74 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and

industry associates. Today, natural gas meets one-third of the United States' energy needs.<sup>2</sup>

AGA's members are directly and materially affected by the significant procedural irregularities and due process violations that occurred during the IECC 2024 code development process and would be materially affected by federal, state, or local adoption of the requirements of these proposals which are inconsistent with the scope and intent of the IECC, disadvantage the competitiveness of natural gas use and end-use applications, and harm consumers, especially low-income consumers and commercial and residential end-users.

### **The Appealed Provisions of the IECC 2024 Edition are in Direct Conflict with the Scope and Intent of the IECC**

The ICC's publication *Leading the Way to Energy Efficiency: A Path Forward on Energy and Sustainability to Confront a Changing Climate*, (*Leading the Way to Energy Efficiency*) distinguishes the scope of the IECC, increased energy efficiency, from the larger societal goal and public policy issue of reducing greenhouse gas (GHG) emissions. By improperly issuing guidance allowing the appealed provisions in the body of the code, the ICC violated the scope and intent of the IECC as well as due process principles it committed to in *Leading the Way to Energy Efficiency* and its *ICC Code Development Principles*.

Further, in *Leading the Way to Energy Efficiency*, after distinguishing the separate goals of efficiency and reducing GHG, the ICC commits to following the ICC's "standards development procedures," including due process procedural safeguards, in order to allow for more in-depth scientific and economic deliberations."<sup>3</sup>

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<sup>2</sup> For more information, please visit [www.aga.org](http://www.aga.org).

<sup>3</sup> International Code Council, *Leading the Way to Energy Efficiency: A Path Forward on Sustainability to Confront a Changing Climate*, p. 3 (2021). ([https://www.iccsafe.org/wp-content/uploads/ICC\\_Leading\\_Way\\_to\\_Energy\\_Efficiency.pdf](https://www.iccsafe.org/wp-content/uploads/ICC_Leading_Way_to_Energy_Efficiency.pdf)). *ICC Consensus Procedures*, ANSI approved on August 2, 2023. ([https://www.iccsafe.org/wp-content/uploads/Revision-of-ICC-Consensus-Procedures\\_2-of-2\\_revised-12.6.18B.pdf](https://www.iccsafe.org/wp-content/uploads/Revision-of-ICC-Consensus-Procedures_2-of-2_revised-12.6.18B.pdf)).

To clarify and reinforce that the IECC’s purpose is “energy efficiency,” *Leading the Way*, quotes the IECC’s Commercial and Residential Scope and Intent provisions:

#### COMMERCIAL ENERGY PROVISIONS

##### C.101.2 Scope

This code applies to the design and construction of commercial buildings.

##### C101.3 Intent

The International Energy Conservation Code-Commercial provides market-driven, **enforceable** requirements for the design and construction of commercial buildings, providing minimum efficiency requirements for buildings that result in the maximum level of energy efficiency that is safe, technologically feasible, and life cycle cost effective considering economic feasibility, including potential costs and saving for consumers and building owners, and return on investment. . . . Requirements contained in the Code will include, but not be limited to, **prescriptive** and performance based pathways. The code **may** include **non-mandatory** appendices incorporating additional energy efficiency and greenhouse gas reduction resources . . .

#### RESIDENTIAL ENERGY PROVISIONS

##### R101.2 Scope

This code applies to the design and construction of residential buildings.

##### R101.3 Intent

The International Energy Conservation Code-Residential provides market-driven, **enforceable** requirements for the design and construction of residential buildings, providing minimum efficiency requirements for building that result in the maximum level of energy efficiency that is safe, technologically feasible, and life cycle cost effective, considering economic feasibility, including potential costs and saving for consumers and building owners, and return on investment. . . . The code **may** include **non-mandatory** appendices incorporating additional energy efficiency and greenhouse gas reduction resources.

(emphasis added)

The scope and intent could not be clearer, “greenhouse reductions resources” may only be included in the non-mandatory appendices.

In *Leading the Way to Energy Efficiency*, the ICC also affirms that only the “Code Council Board may set the intent/scope of the IECC procedures for the IECC development committees based on the relevant content outlined in” *Leading the Way to Energy Efficiency*.<sup>4</sup>

However, on February 15, 2022, in the midst of the IECC 2024 Code development process, in clear conflict with both the scop and intent of the IECC and the ICC Board’s primacy with regard to the development of the IECC’s scope and intent, ICC staff wrote a public memorandum stating:

Any content within the scope and intent of the [IECC] code may be included in either the body of the code as minimum requirements or as adoptable appendix based on the determination of the responsible Consensus Committee.<sup>5</sup>

This memorandum (ICC Memorandum) expanding what may be in the body of the IECC is in direct conflict with the plain language of C101.3 and R101.3 as well as the ICC’s previous actions and documents interpreting these provisions.

The plain language itself says the code “may include non-mandatory appendices incorporating additional energy efficiency and greenhouse gas reduction resources”. This provision explicitly provides the exclusive means for incorporating greenhouse gas emissions reduction resources.

It is also in conflict with the Code’s intent which is the development of “market-driven” (not policy-driven) “enforceable” “minimum efficiency requirements” for the “maximum level of energy efficiency.” Furthermore, greenhouse gas emission reduction resources are not necessarily market-driven and may not have any effect on improving energy efficiency.

EV charging infrastructure, electrification, and using social cost of carbon in cost effectiveness metrics, do not further the intent of the IECC’s “enforceable requirements” to provide for “minimum efficiency requirements for buildings”. In fact, “greenhouse gas reduction” is not one of the listed factors for determining energy efficiency. Greenhouse gas emissions reduction is a meaningful public

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<sup>4</sup> *Id.*, *Leading the Way to Energy Efficiency*, p. 3.

<sup>5</sup> Mike Pfeiffer, *ICC Memorandum Re: Discount Rates and Code Conduct*, 2 (Feb. 15, 2022).

policy goal, one that AGA supports, but it is not applicable to the stated scope or intent of the IECC.

The ICC originally interpreted the IECC’s scope and intent as consistent with its stated scope and intent. In a September 2021 ICC presentation to the Commercial Code Consensus Committee, the ICC slide titled “What We Can *Decide* to Accomplish” (emphasis in original) lists greenhouse gas reduction measures such as “Electrification”, “EV Charging”, and “Renewables” under “Appendix Chapters for elements outside base scope.”<sup>6</sup>

This interpretation is consistent with the scope and intent of the IECC as none of these measures have any effect on reducing the rate of energy use in residential and consumer buildings. It is also consistent with the Board’s statements in *Leading the Way to Energy Efficiency*, which, with reference to greenhouse gas emissions, states that “[t]he resources are intended to be useable independently and adopted alongside the baseline code to support the policies of a community in specific areas.”

In *Leading the Way to Energy Efficiency*, the ICC committed to deferring public policy making decisions to the states and municipalities that may adopt its codes. As a result of this significant irregularity of issuing the ICC Memorandum guidance in direct conflict with the IECC’s scope and intent, the appealed code provisions premised on GHG reductions were approved for inclusion in the body of the code in error. Further, this error was predicated on the assumption that they would reduce GHG emissions when there was no factual basis offered that any of the appealed provisions would actually reduce GHG emissions.

Allowing ICC staff’s February 15, 2022, ICC Memorandum to determine the scope and intent of the IECC, in conflict with the IECC’s stated scope and intent, is a violation of ICC processes and procedures but the means by which it was issued is also a violation of due process principles.<sup>7</sup>

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<sup>6</sup> International Code Council, E4C Commercial Code Consensus Committee, 6 (Sept 9, 2021).

<sup>7</sup> “[T]he inclusion of code provisions that are not within the stated scope and intent of the code is a violation of process and procedure.” Int’l Code Council, *Report on the Code Development Process; Appeals Board Report on Scope and Intent 2* (Sept 25, 2020). ([https://www.iccsafe.org/wp-content/uploads/Appeals-Board-report\\_Scope\\_Intent.pdf](https://www.iccsafe.org/wp-content/uploads/Appeals-Board-report_Scope_Intent.pdf)).

## **The Issuance of the February 15, 2022, ICC Memorandum Was Itself a Violation of the IECC’s Processes and Procedures and Due Process Principles**

The February 15, 2022, ICC Memorandum noted above, reinforces that the Commercial and Residential Consensus Committees are to be developed under a “standards development process.” Notwithstanding this affirmation, the ICC Memorandum itself was counter to widely accepted standards development processes as well as being in conflict with the IECC’s scope and intent. The ICC Memo, unilaterally, without prior notice, nor inviting comment or appeals, dramatically changed the scope of the IECC by expanding the breadth of what may be included as “code content.”

Rather than allowing the development process to proceed to resolution, as the ICC Memorandum concedes has been the historic practice, the following guidance was provided:

### **The Code Council provides the following direction:**

*Any content within the scope and intent of the code may be included in the body of the code as minimum requirements or as an adoptable appendix based on the determination of the responsible Consensus Committee. Where content is to be included in an adoptable appendix, the appendix must include mandatory enforceable language.*

(Bold and italics in the original).

AGA, the American Public Gas Association, the National Propane Gas Association, and others noted their objections to this change to the clearly stated scope and intent in the middle of the development process of the IECC 2024 edition, without notice, comment, deliberation, or process for appeal and thus in violation of the *ICC Code Development Principles*.<sup>8</sup>

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<sup>8</sup> American Gas Association, American Public Gas Association, National Propane Gas Association, Letter to ICC Board of Directors (December 12, 2022). *See also* Sustainability,

Though alerted to the departure from the IECC’s explicit scope and intent, and the due process principles necessary for amending the scope and intent, the IECC Board responded in each instance that “The Board does not provide updates or clarification to the scope and intent of codes or standards during an active development process, allowing the development process to proceed to resolution.”<sup>9</sup>

As though admitting its own departure from its process and procedures, the ICC Board let stand the ICC Memorandum, which announced a departure from the IECC’s scope and intent in the midst of the code development process by stating that it would not do the same since it was in violation of IECC procedures.

This departure from the IECC’s scope and intent, via the ICC Memorandum, issued in conflict with the stated scope and intent and without due process procedural safeguards, planted the seeds for further violations of the IECC’s processes and procedures.

### **The Appealed Provisions of the IECC 2024 Were Promulgated with Disregard to Due Process Procedural Safeguards**

The ICC Board and other code and standard developers put in place procedures to prevent the code development process from being biased by members with economic or policy interests that may stifle product competition, including energy source.

The *ICC Code Development Principles* require due process safeguards including, openness, transparency, balance of interests, due process, an appeals process, and

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Energy and High-Performance Code Action Committee, Letter to ICC Board of Directors (October 3, 2022).

<sup>9</sup> Michael Wich, President, ICC Board of Directors, Letter responding to American Gas Association, American Public Gas Association, National Propane Gas Association, Letter to ICC Board of Directors e’s concerns over ICC Memo from Mike Pfeiffer, *ICC Memorandum Re: Discount Rates and Code Conduct* (February 23, 2023). Michael Wich, President, ICC Board of Directors, Letter responding to Sustainability, Energy and High-Performance Code Action Committee’s concerns over ICC Memo from Mike Pfeiffer, *ICC Memorandum Re: Discount Rates and Code Conduct* (November 21, 2022).

**Michael L. Murray** *General Counsel*

consensus deliberations, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections.<sup>10</sup> These core procedural safeguards apply to all codes body activities, whether by the full committee, subgroup, or task group.

Additionally, openness and transparency, i.e., open proceedings, must be pervasive and is another hallmark to “mitigate the substantial anticompetitive potential inherent” to these governing bodies.<sup>11</sup>

The February 15, 2022, ICC Memorandum facilitated extra-procedural conduct in direct conflict with the ICC’s procedural safeguards. On information and belief, an ICC unauthorized “Consensus Building Forum” was developed outside of but parallel to the IECC 2024 code development process and violated the core tenets of that process, openness, transparency, balance of interests, due process, an appeals process, and consensus.<sup>12</sup>

On information and belief, this “Consensus Building Forum” was initiated to “discuss REPIs in an informal setting”<sup>13</sup> wherein a shadow committee was created, and an “omnibus” of proposals was drafted and negotiated outside the IECC code development process and later submitted to the IECC as a whole. This thwarted individual submission of proposals that would be subject to review and comment through ICC processes and procedures for the development of the IECC 2024.

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<sup>10</sup> See ICC Code Development Principles: <https://www.iccsafe.org/products-and-services/i-codes/code-development/code-development-procedures/>). See also, ICC Consensus Procedures (ANSI Approved August 2, 2021); and ANSI Essential Requirements: Due process requirements for American National Standards (Edition: January 2022).

<sup>11</sup> Letter dated June 22, 1982, from Ronald G. Carr, Acting Asst. Atty. Gen. Antitrust Div., U.S. Department of Justice, to Donald E. Sowle, Admin for Federal Procurement Policy, OMB (reproduced at 47 Fed. Reg. 49,496).

<sup>12</sup> See ICC Consensus Procedures (ANSI Approved August 2, 2021) which requires that all subcommittees, working groups, technical committees, project teams, writing groups, etc., require approval of a majority of the committee and appropriate public notice.

<sup>13</sup> Email dated July 27, 2022, from Gayathri Vijayakumar, regarding Consensus Building Forum #3.

On information and belief, the unauthorized, extra-procedural “Consensus Building Forum” was initiated by IECC members who should have been aware of ICC due process procedural safeguards to intentionally bypass those safeguards. On information and belief, ICC staff were aware of the “Consensus Building Forum” activities and that the resulting “omnibus” proposal from individual members of the ‘Consensus Building Forum’ was defective due to the disregard of ICC procedural due process safeguards.<sup>14</sup>

This implicit approval of the extra-procedural “Consensus Building Forum” is supported by the ICC accepting the “omnibus proposal” as a whole, and the process used to develop it.

Prior commenters on the constituent parts of the omnibus were not provided notice through the ICC of the opportunity to participate in the “Consensus Building Forum” discussions nor to comment on the omnibus submitted, as a whole, to the IECC. Rather, submission of the omnibus to the IECC was used as a false basis to claim all comments on the constituent parts of the omnibus were addressed.

In addition to lacking ICC due process procedural safeguards, the rejection of proposals on the omnibus’ constituent parts without providing a proper technical rationale is a clear violation of the *ICC Code Development Principles*, ICC’s due process, notice, and comment procedures and is contrary to procedures used by other code and standards developing organizations. In short, the “Consensus Building Forum” constitutes a material and significant irregularity of ICC process and procedure that undermines the entire IECC 2024 code development process.

Rather than follow the transparent and open IECC code development process, the “Consensus Building Forum,” participants pursued individual stakeholder

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<sup>14</sup> Even though a code or standard developer itself and its leadership are not aware of an incorrect interpretation of their process, did not approve of it, and did not benefit from it, the code or standard developer may still be held liable if the interpretation had adverse market effects. *See, American Soc’y of Mechanical Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

economic priorities to pursue “billions of dollars” available under the “Inflation Reduction Act.”<sup>15</sup>

There is a distinction between a group’s proposals for amendment and the antecedent conduct that generated those recommendations – i.e., the omnibus agreement. The way you get something into the IECC Code is by a multistep, transparent, and open process following the procedures set forth by the ICC.

The February 15, 2022, ICC Memorandum was a misinterpretation of the IECC’s scope and intent by a person acting under the authority of the ICC. The misinterpretation resulted in coordinated conduct through the extra-procedural “Consensus Building Forum” to pursue the improperly expanded scope of the IECC.

The “omnibus” proposal was developed via a flawed process and was designed to achieve a code that does not—and indeed could not—account for the interests of underrepresented stakeholders. The resulting code unduly influences federal and state legislation and municipal ordinances by dictating market behavior with respect to specific fuel sources commonly available and used.

Codes and standards developers that fail to follow due process principles, promulgate policy-driven guidance inconsistent with the stated intent and scope of the code or standard, or become captive to specific groups of stakeholders, results in an unbalanced voting process or processes for deliberation that cannot ensure transparency and openness. They also result in market restraints and economic burdens on underrepresented market participants and consumers.

Codes, while only advisory, have a powerful economic influence, many of them being incorporated by reference in federal regulations, and state and local laws. They have immense power to do good but also have the power to frustrate competition in the marketplace.

The IECC may be adopted as legislation as published, unedited or unamended, line by line, by states of the United States, and by municipalities. Adoption may

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<sup>15</sup> Email dated August 18, 2022, from Gayathri Vijayakumar, regarding Consensus Building Forum #4.

also be automatic, e.g., incorporated by reference as amended. All parties know that influencing the contents or exclusions from the IECC leads directly, certainly, and predictably to market effects.

The effect of the inclusion of the appealed IECC 2024 provisions would force all builders to include electric-ready provisions. Without such inclusion, individual builders, utilities, and other stakeholders throughout the United States would make independent market-driven decisions to determine a building's energy source.

This compelled choice of energy source for specific end-use applications would necessarily exclude alternate sources of energy to reduce builder and purchaser costs. In the alternative, the compelled redundancy would impose new costs on builders and commercial and residential consumers.

In other words, in all jurisdictions where natural gas may otherwise be sold, unless excluded by law, natural gas market participants, including natural gas utilities, and commercial and residential consumers, will suffer independent marketplace injury.

Codes and standards making activities can facilitate commerce and increase efficiency by increasing consumer information. However, those activities also can deprive consumers of the opportunity to make independent market decisions, and inflict serious injury on competitors, dangers which are heightened by conflicts of interest which often are present in code making bodies and, on information and belief, almost certainly the basis for developing an extra-procedural body to pursue those interests.

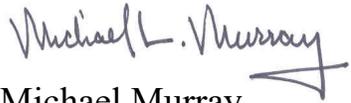
## **Conclusion**

AGA requests that the IECC 2024 development process be stayed until this appeal is resolved and that the appealed provisions not be included in the 2024 edition of the IECC because ICC staff improperly processed these proposals which were both outside the scope and intent of the IECC and developed through unauthorized, extra-procedural processes.

AGA is ready to present additional support for this appeal and requests for remedial action to the ICC Appeals Board.

Dated: January 2, 2024, at Washington, District of Columbia.

Respectfully submitted,

A handwritten signature in blue ink that reads "Michael L. Murray". The signature is written in a cursive style with a prominent flourish at the end.

Michael Murray  
General Counsel  
American Gas Association