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# 2019 Group B – Appeals STAFF ANALYSIS MEMO

## 2019 – 4

September 9, 2020

**STAFF ANALYSIS MEMO TO APPEALS BOARD  
ON APPEALS BASED ON IMPACT OF ONLINE VOTING, COST IMPACT, VOTING  
GUIDES, VOTER ELIGIBILITY AND VALIDATION PROCESS  
ON 2019 GROUP B CODE CHANGES  
September 9, 2020**

To: The Appeals Board regarding 2019 Group B Appeals

From: Mike Pfeiffer, P.E., Senior Vice President of Technical Services

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Two entities, the National Association of Home Builders (NAHB) and the Leading Builders of America (LBA), have appealed a group of 20 code changes to the 2021 International Energy Conservation Code (IECC). These changes were approved by the final action Online Governmental Consensus Vote (OGCV) in December 2019.

The issues raised by the appeals and the requested remedial actions are set forth and discussed below. For the reasons set forth in this memorandum, we recommend that the appeals be denied.

**THE APPEALS**

I. NAHB APPEAL

NAHB has asserted the following bases for its appeal:

- Ineligible voters: Some of the governmental member voting representatives who voted in the OGCV did not meet the voter eligibility requirements set forth in the ICC by-laws.
- “Spirit and intent”: The code changes do not meet the “spirit and intent” of CP-28 which governs the ICC code development process, in that they were moved forward for, and ultimately approved by, the OGCV, despite being disapproved at both the committee action and public comment hearings.

NAHB has requested the following remedial actions:

- “Set aside the results of the OGCV and declare the final action on [the 20 proposals] to be in accordance with the results of the public comment hearing, as permitted in CP#28 Section 10.2.”
- “Modify CP#28 to prohibit proposals defeated at both the committee and public comment hearings from proceeding to the OGCV and consider such proposals disapproved.”
- “Reevaluate the credentials of each Governmental Member Voting Representative (GMVR) to ensure each GMVR actually performs a governmental function as outlined in the ICC Bylaws.”
- “Revise the bylaws to make clear that only Governmental Members and GMVRs that work with enforcement and administration of building codes can become GMVRs and institute voter validation protocols to ensure that each new Governmental Member and new Voting Representative meet the bylaw requirements.”

II. LBA APPEAL

The issues raised by LBA are set forth below:

- “Whether ICC created highly subjective bylaws that fail to provide due process to certain groups and stakeholders.”
- “Whether ICC failed to properly validate voters by failing to ensure on-line voters truly complied with eligibility criteria.”
- “Whether the Energy Efficient Code Coalition's proprietary interests in the outcome of the code change proposals have unfair access to EECC members that are on-line voters that other ICC stakeholders do not have resulting in a due process failure.”
- “Whether the 2021 IECC final outcome will result in egregious cost ineffectiveness and negatively impact home affordability.”
- LBA also contends that a “voting guide” produced by the “Energy Efficient Code Coalition” (EECC) unduly influenced the OGCV, and that the “EECC has inside, unfettered and confidential access to its members that are also online voters.”

LBA has requested the following remedial actions:

- Rescind actions taken on the IECC proposals during the OGCV or reverse the results of the OGCV vote on the 20 code changes at issue.
- “Safeguard the process so that it is open, fair, objective, and not unduly influenced by proprietary interests; and that only governmental officials who actually enforce the code and are charged with the public's safety, are permitted to vote and determine the outcome of codes. Specifically, procedural changes should be instituted to ensure voters are not members of organizations that have a proprietary and financial interest in the outcome of code(s).”

### **RELEVANT COUNCIL POLICIES**

Council Policy CP 1-03 sets forth the procedures for appeals of “any action or inaction,” including matters related to code development. For purposes of the appeals at issue, two sections of this policy are of particular relevance.

- Section 6.3.7 provides:  
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.
- Section 6.3.8 provides:  
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.

### **DISCUSSION**

#### I. ICC bylaws and voter eligibility

Both NAHB and LBA raise, in slightly different ways, the issue of who can vote in the OGCV process. The appellants’ make two contentions: (1) The by-law definition of who can vote is too broad, and (2) Even within the scope of the existing by-law definition, ICC does not vet the voters carefully enough, and people who do not meet the by-law definition of a GMVR are allowed to vote.

Definition of GMVR: The definition of a GMVR is set forth in the ICC bylaws, and as such, is not within the power of the Board of Appeals to change. The mechanism for changing the definition of GMVR is through a bylaw amendment, which either the ICC Board of Directors or ICC members themselves itself can propose, and then it would be subject to the approval of the ICC voting membership.

Vetting of GMVR's: The issue of whether individual voters were properly vetted has been thoroughly investigated by ICC in the aftermath of the Group B voting process (which included the IECC that is the subject of the present appeals). No irregularities were found.

This was documented in ICC's April 8, 2020 "Report on the Code Development Process 2019 Group B Cycle." The report was compiled in response to concerns raised by some ICC stakeholders regarding the Group B voting process and reviewed "all the issues identified by concerned participants." The purpose of the report was to make sure "that all stakeholders are provided the necessary information in order to review the specific details of the 2019 Group B cycle and be confident in its outcome."

The report documented the findings and conclusions of the "Validation Committee," a committee which is appointed by the ICC Board of Directors per section 10.1 of CP-28, and whose purpose is to "report the results [of the voting process] to the ICC Board, either confirming a valid voting process and result or citing irregularities..."

As part of its review process, the Validation Committee directed ICC staff "to investigate whether voting members participating in the OGCV were fully and correctly reviewed and vetted in accordance with written Code Council policies and bylaws."

Thereafter, ICC staff reviewed the records of 124 new 2019 applications from governmental members that participated in Group B, and "determined that all 124 met the bylaws definition" of a governmental member set forth in Section 2.1.1 of the bylaws.

ICC staff also reviewed the record of 2,026 individual governmental member voting representative applications from GMVRs who participated in Group B, and "found that all the applicants who participated in Group B met the bylaws definition" of a GMVR contained in Section 2.1.1.1 of the bylaws.

Based on the report of the Validation Committee, which was assisted in its work by ICC staff and outside auditors, the ICC Board of Directors, on March 31, 2020, unanimously certified the results of the OGCV for the 2019 Group B cycle.

## II. "Spirit and Intent" of CP-28

On this issue, the NAHB appeal states:

"This appeal does not dispute that the letter of CP#28 was followed in the Group B process, but it is clear that the spirit and intent of the process was exploited leading to the voting irregularities occurred.

"The results of these 20 proposals are clearly 'irregular' in that they ignored the input and votes of the many stakeholders, Committee Member and Governmental Voters that participated in the weeks-long Technical Committee and Public Comment Hearings; were approved despite not being fully considered or discussed, and the overturning of any twice-defeated proposal had never happened in the previous four code cycles and now 20 proposals that would have earlier been deemed defeated were overturned in one cycle.

"These irregularities highlight weaknesses in CP#28 – weaknesses that were not necessarily unexpected. When developing cdpACCESS and the OGCV and changing CP#28 to address those programs, the ICC Board saw the potential for voting irregularities within the OGCV. They had the foresight to include Section 10.2, which provides the ICC Board the latitude to address these types of problems."

The LBA appeal also notes this issue: "Curiously, an unprecedented number of proposals were overturned from disapproval to approval (requiring 2/3rds) during the online vote."

Section 10.2 of CP-28 provides:

**Voting Irregularities:** Where voting irregularities or other concerns with the Online Governmental Consensus Voting process, which are material to the outcome or the disposition of a code change proposal(s) are identified by the validation committee, such irregularities or concerns shall be immediately brought to the attention of the ICC Board. The ICC Board shall take whatever action necessary to ensure a fair and impartial Final Action vote on all code change proposals, including but not limited to:

1. Set aside the results of the Online Governmental Consensus Vote and have the vote taken again.
2. Set aside the results of the Online Governmental Consensus Vote and declare the Final Action on all code change proposals to be in accordance with the results of the Public Comment Hearing.
3. Other actions as determined by the ICC Board.

(Emphasis added.)

As NAHB notes, allowing previously disapproved proposals to move forward to the OGCV did not violate CP-28. It is specifically allowed for in CP-28.

### III. Voting Guide

On the issue of the voting guide, the LBA appeal states:

“The Energy Efficient Code Coalition (EECC) has a mix of membership interests that are both proprietary and non-proprietary. Many of its members were permitted by ICC to vote during the OGCV. This poses not just a conflict of interest, but also an undue process. EECC has inside, unfettered and confidential access to its members that are also online voters.”

“The OGCV results have a direct correlation to EECC's Voting Guide. Curiously, an unprecedented number of proposals were overturned from disapproval to approval (requiring 2/3rds) during the online vote. An unprecedented phenomenon that only occurred on IECC proposals, and only on those contained in the EECC Voting Guide.”

The previously mentioned 2020 “Report on the Code Development Process 2019 Group B Cycle” addressed this issue and found that voter guides do not violate CP-28 and have historically been part of the code development process:

“This report notes that voter guides 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. The Code Council Board of Directors has directed the Board Committee on the Long-Term Code Development Process to review the issue of voter guides as part of their effort.”

The report also noted that “the Code Council does not provide email addresses of its members to the public. Distributions are based on the email addresses known to the organization who developed the guide.”

### IV. Cost-effectiveness and affordability

On this issue, the LBA appeal states: “The considerable increased costs associated with the OGCV outcome will result in egregious cost ineffectiveness, that will significantly affect the home building industry and ultimately, will drastically impact home affordability.”

This assertion goes to the merits of the code change proposals in question, and LBA does not identify any specific “matters of process and procedure” related to this claim, as required by CP-01. As further stated in CP-01, “the Board of Appeals shall not render decisions on the relative merits of technical matters.”

## SUMMARY

The appellants' contentions and our responses are summarized below.

1. Contention: The by-laws are too broad or too subjective.

**Response: The adequacy or appropriateness of by-law language is not a matter of "process or procedure," as required by CP 1-03, and therefore is beyond the scope of the Board of Appeals' review authority.**

2. Contention: Voters were not properly vetted to make sure they met the by-law definition of governmental member voting representative.

**Response: After the Group B OGCV, ICC staff, under the direction of the Board-appointed Validation Committee, reviewed the applications of all of the Group B voters and determined that they all met the by-law definition.**

3. Contention: Allowing a final OGCV vote on proposals that were disapproved at the committee and public comment stages violates the spirit of CP-28.

**Response: Allowing previously disapproved proposals to move forward to the OGCV does not violate CP-28. It is specifically noted as a possibility.**

4. Contention: A "voting guide" distributed by a stakeholder group unduly influenced the OGCV.

**Response: Voting guides do not violate CP-28 and have historically been part of the ICC code development process. Distribution is based on email lists developed by the distributing organization; ICC does not provide email addresses of its members to such organizations. However, the ICC Board of Directors has directed the Board Committee on the Long-Term Code Development Process to review the issue of voter guides.**

5. Contention: The code changes in question will significantly affect the cost of construction and home affordability.

**Response: These are not "matters of process and procedure" as required by CP-01, but rather, involve "the relative merits of technical matters," and are therefore not a proper matter for the Board of Appeals.**

### **CONCLUSION**

For the reasons set forth in this memorandum, we recommend that the appeals by NAHB and LBA be denied and that the ICC Board consider a review of the following, by the relevant ICC committees for future code development activities:

1. Consider ending consideration on proposals defeated at both the committee and public comment hearings.
2. Examine whether the current requirements around cost impact are sufficient.
3. Examine the impact of **the definition of** Governmental Member Voting Representative (GMVR) on the mission of the organization.

As noted above, the ICC Board of Directors has already directed the Board Committee on the Long-Term Code Development Process to review the issue of voter guides.