

May 8, 2020

Dominic Sims, CEO
International Code Council
500 New Jersey Avenue, NW
6th Floor
Washington, DC 20001

RE: NAHB Appeal of the ICC 2019 Group B Code Cycle Final Action Results

Dear Mr. Sims:

The National Association of Home Builders (NAHB) hereby submits an appeal of the International Code Council (ICC) 2019 Group B Code Cycle Final Action Results.

I. The Issues

The issues raised by this appeal are:

- 1) Whether RE147 and CE217 meet the Intent of the International Energy Conservation Code (IECC).
- 2) Whether RE126 violates the Federal preemption statutes of NAECA.
- 3) Whether 20 proposals do not meet the spirit and intent of ICC Council Policy #28 (CP#28).
- 4) Whether ICC fairly, thoroughly and properly vetted Governmental Members or Voting Representatives to ensure compliance with ICC governmental consensus requirements.

II. Description of Issues Being Appealed

The underlying reason for this appeal is that certain proposals that were ultimately adopted exceed the scope of the IECC or fail to adhere to statutory limits. Equally troubling, the ICC's Governmental Consensus Voting Process appears to have resulted in voting irregularities, including voting by questionable Governmental Voters. Ultimately, these issues raise the question of whether the ICC Governmental Consensus Voting Process is fair and transparent and whether the resultant code is truly consensus based.

Each of the four identified issues has its own unique problems identified below.

1) Intent of the IECC

Proposals RE147 and CE217 Parts I and II are both outside the scope and intent of the IECC (section R101.3 and C101.3). These proposals require the addition of electric vehicle charging outlets (CE217 Parts I and II) and the installation of electric outlets where gas appliances are installed that can be used for future electric appliance replacement (RE147). Neither proposal impacts the *"effective use and conservation of energy"* outlined in the IECC.

Section R101.3 Intent of the IECC states, “ This code shall regulate the design and construction of buildings for the **effective use and conservation of energy** over the useful life of each building. This code is intended to provide flexibility to permit the use of innovative approaches and techniques to achieve this objective.”

Contrary to the IECC’s directive, these proposals are requirements for electric wiring and they do not contribute to effective use or conservation of energy. These types of requirements are more appropriate for Part VIII of the International Residential Code or the National Electric Code (NFPA 70) and should have been grouped with and considered concurrent with discussions and deliberations on those codes, not the IECC.

Both proposals RE147 and CE217 Part II were rejected by both the Code Development Committee and the Governmental Member Voting Representatives present at the Public Comment Hearings yet overturned during the OGCV.

2) Federal Preemption

RE126, “Water Heating Equipment,” carries significant legal vulnerabilities for adopting jurisdictions. NAHB believes a court is highly likely to find that RE126 is preempted by the Energy Policy and Conservation Act (EPCA) as amended by the National Appliance Energy Conservation Act (NAECA) and the Energy Policy Act of 1992 (hereinafter EPCA). EPCA section 6297(b) provides that a state law “concerning the energy efficiency, energy use, or water use of the covered product” is preempted by federal promulgated energy conservation standards. In other words, a state cannot require certain products to meet energy conservation standards that are more stringent than those established by the federal government. While there are exemptions to this express preemption, those conditions are not satisfied here.

Each water heater standard in RE126, except for tankless water heaters, is either set above the federal standard or requires additional modifications if the heater meets (but does not exceed) the federal standard. Thus, RE126 fails to satisfy the very purpose of the statute. State and local governments that choose to adopt the provisions contained within RE126 may find themselves the subject of litigation on the grounds that the requirements are prohibited by EPCA.

RE126 was rejected by both the Code Development Committee and by the Governmental Member Voting Representatives present at the Public Comment Hearings yet overturned during the OGCV.

3) Spirit and Intent of ICC Council Policy #28 (CP#28)

ICC’s Council Policy #28 establishes the policies and protocols ICC follows during the code development process. Prior to the Online Governmental Consensus Vote (OGCV) process, which was added in 2013, there were only two voting steps in the ICC code development process – the committee hearing and the final action hearing. Proposals that were disapproved at the

committee hearing would begin with an initial motion supporting the committee action of disapproval at the second hearing. If the vote at the second hearing did not overturn the committee action, no public comments would be heard, and the proposal would be disapproved as a final action.

With the new online process, a proposal that is disapproved at both the committee and second hearing is allowed to move to the online vote. However, the current CP#28 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. The current ICC process allows these partially vetted proposals to advance to the OGCV ballot and be approved with a 2/3 vote.

This makes little sense given prior precedent and all parties' interest in ensuring all viable proposals are fully evaluated. It is apparent that allowing a twice-defeated proposal to move to the OGCV without being fully vetted was a vestige of the earlier process and an oversight when CP#28 was modified to add the OGCV. In the four previous code cycles since the OGCV has been in place, not a single twice-defeated proposal has garnered a 2/3 online vote to pass, so the intent and spirit of CP#28 were never challenged.

That all changed in the 2019 Group B OGCV, as 20 twice-defeated proposals achieved the 2/3 vote necessary to overturn both the committee and public comment hearing results (RE 21, RE 29, RE 32, RE 33, RE 36, RE 37, RE 126, RE 145, RE 147, RE 151, RE 182, RE 184, RE 192, RE 204, RE 209, CE 12, CE 49, CE 56, CE 217 Part II, and CE 262). Of these 20 proposals, only RE 209 and CE 262 had an opportunity to be fully vetted. The other 18 proposals passed without full consideration given to their need, effectiveness, or potential resolution to known flaws.

This oversight was exploited in the 2019 Group B online vote and, if not corrected, will have a significant impact on future code development and the resultant codes.

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 stakeholder, 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. It reads,

***“10.2 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.”*

4) Voter Validation

The eligibility of many of the Governmental Members 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.

The ICC Bylaws state, “[A] Governmental Member [Voting Representative] ...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.”

Presumably, ICC established certain parameters for GMVRs to ensure voters have the knowledge and experience to consider the installation and inspection practicalities associated with codes proposals and make educated decisions via their votes. It appears, however, 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. Absent this baseline knowledge or experience, there is little assurance that voters fully understand the impacts or consequences of proposals or their votes.

It is critical that the Governmental Members and Voting Representatives are both qualified and engaged in the process to ensure the resulting codes are reasonable and enforceable.

IV. Adverse Effect on Appellants

NAHB is directly, materially and adversely affected by the process, procedures and outcome of the ICC's 2019 Group B results.

NAHB represents more than 140,000 members who are involved in construction of single-family and multifamily housing, remodeling, and other aspects of residential and light commercial construction. NAHB's members construct approximately 80 percent of all new housing built in the United States each year.

Construction costs of new homes will increase significantly if the proposals in question are incorporated into the IECC. NAHB estimates that the cost impact for complying with these 20 proposals can be in excess of \$10,000 per house in some climate zones. As a result of these increased costs, fewer consumers will be able to qualify to purchase new homes and will remain in less safe, less energy efficient homes. This will reduce the number of homes being constructed by NAHB members and decrease the housing supply, thereby increasing the cost of housing. NAHB has a "priced-out" methodology which estimates the number of households that will be priced-out of the market for each additional \$1,000 of construction cost. Based on the 2020 estimates, over 158,000 households would be priced out of the market for every \$1,000 increase in cost.

NAHB relies on the ICC codes to be cost-effective and reasonable so that every citizen has access to safe, decent, and affordable housing.

VI. Requested Remedial Actions:

Item 1: Reject Proposals RE147 and CE217 Part 1 and Part 2.

Item 2: Reject Proposal RE 126.

Item 3: Set aside the results of the 2019 IECC Online Governmental Consensus Vote and declare the Final Action on proposals RE21, RE29, RE32, RE33, RE36, RE37, RE126, RE145, RE147, RE151, RE182, RE184, RE192, RE204, RE209, CE12, CE49, CE56, CE217 Part II, and CE262 to be in accordance with the results of the Public Comment Hearing, as permitted in CP#28 Section 10.2. Also, modify CP#28 to prohibit proposals defeated at both the Committee Action Hearings and Public Comment Hearing from proceeding to the OGCV and consider such proposals Disapproved.

Item 4: Reevaluate the credentials of each Governmental Member Voting Representative to ensure each GMVR actually performs a governmental function as outlined in the ICC Bylaws. Also, 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.

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V. Interested Parties

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NAHB appreciates ICC's consideration of our appeal regarding the Group B Final Results and looks forward to providing further evidence related to the issues raised. Please do not hesitate to contact Craig Drumheller if you have any questions or would like to discuss any issues concerning this matter.

Sincerely,



Gerald M. Howard
Chief Executive Officer
National Association of Home Builders