

Appeal of RB64-07/08 and RB66-07/08

DATE: October 30, 2008

APPELLANT:

National Association of Home Builders
1201 15th Street, NW
Washington, DC 20005-2800
Phone: 202-266-8564
E-mail: esutton@nahb.com

ACTION BEING APPEALED:

Approval at the Final Action Hearings for the 2007/2008 ICC Code Development Cycle of code changes RB64-07/08 (Approved as Modified by Public Comment #2) and RB66-07/08 (Approved as Modified by Public Comment)

REASON FOR APPEAL:

Failure to Provide for Balance of Interest in Voting

ICC states that its *International Codes* are developed using the governmental consensus process. Further, it claims that the ICC governmental consensus process meets the principles defined in OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.

Regrettably, voting on code changes RB64 and RB66 demonstrated an unequivocal failure of the ICC code development process to achieve real consensus on these code changes by not preventing a single interest group, specifically the fire service, from unfairly dominating the voting on these two proposals at the Final Action Hearings. The voting on these code changes clearly violated the principle of "balance of interest" specified in OMB Circular A-119 for a voluntary consensus body (see Attachment A.)

Balance of interest is generally accepted to mean that no more than one-third of the eligible voters on a consensus body should be allocated to a single interest group. This is the gold standard universally used by the developers of consensus standards and accepted by the industry to which those standards would apply throughout the U.S. In fact, ICC applies this same limitation in the selection of its code development committees.

It was clear from the voting on RB64 and RB66 that representatives of the fire service grossly exceeded the accepted balance-of-interest criterion and its one-third limit and thereby were allowed to unfairly dominate the outcome of the voting. This is witnessed by the spike in voter registration that occurred on Saturday, September 20, prior to the start of the International Residential Code (IRC) portion of the Final Action Hearings. The number of registered voters nearly doubled the total voters who had registered in the three prior days of hearings. Further, it is witnessed by the vote counts on these two proposals.

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The total votes cast for RB64 and RB66 on Sunday morning were, respectively, 1,752 and 1685. This was nearly twice the number of votes cast for any proposal where a count was taken that morning and more than 6 times the maximum number of votes being cast by 2:00 p.m. that afternoon. In fact, the vote count on RB68, the proposal heard immediately following these proposals dropped to a total of 1,083 votes – and this proposal dealt with another life safety issue strongly supported by the fire service. Clearly, members of this interest group were systematically recruited to show up and vote on these two code change proposals, thereby indisputably violating the principle of balance of interests.

Failure to Provide a Fair and Open Process

ICC maintains that its code development process is fair and open – a cornerstone of any consensus process. However, it is NAHB's opinion that ICC's governmental consensus process was manipulated and subverted to advance the interests of a single stakeholder. This belief is shared by many other industry groups, as well as numerous code official members of ICC, who have voiced their concerns to NAHB since the hearings in Minneapolis.

The ICC governmental consensus process, as understood by NAHB and other industry groups that voluntarily participate in the development and support the adoption of model building codes promulgated by ICC, is intended to provide fair and balanced representation to the citizens of a given jurisdiction. The ICC Governmental Members are supposed to represent the overall best interests of the citizens of the jurisdictions where they administer and enforce building laws and regulations, much like the U.S. Congress.

The ICC Bylaws provide that each Governmental Member is allotted and designates voting representatives based on the population of the jurisdiction it represents. The Bylaws further specify that each voting representative be "an employee or a public official actively engaged either full or part time, in the administration, formulation or enforcement of laws, ordinances, rules or regulations relating to the public health, safety and welfare."

However, based on what occurred at the recent Final Action Hearings on the voting for RB64 and RB66, the ICC governmental consensus process broke down and failed to function as intended. Indeed, the credibility of the ICC codes as representing the culmination of the thoughtful and considered opinions of the Governmental Members is in danger of losing the respect of its own membership, the design and construction industry, state and local governments, and other regulatory bodies across the country.

Because ICC has set these very general requirements for voting representatives and leaves the decision whether an individual qualifies to the Governmental Members, a large number of new voting representatives were recruited to attend and vote in favor of RB64 and RB66. They were not code officials, or even fire officials. They were primarily fire fighters of a single mind and interest – fire safety, including their own protection when fighting residential fires.

Additionally, the ability of a single jurisdiction to have multiple Governmental Members was used, in NAHB's opinion, to undermine the voting process and the credibility of the ICC governmental consensus process. The voting that resulted on these two proposals was not

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the product of a fair and open process. Instead, the fire service was able to stack the ballot box by simply joining as a separate Governmental Member, or even multiple Governmental Members, and thereby equaling or exceeding the representation afforded to the code officials who have traditionally participated in the ICC code development process.

What is fundamentally wrong with having multiple Governmental Members from a single jurisdiction is that it provides representation far in excess of what rightfully should be allowed based on population. Further, it provides the opportunity to violate the principle of balance of interests. Fire officials represent the public on essentially one issue – fire safety. As such, they should not have voting representation exceeding one-third of Governmental Member Voting Representatives from any jurisdiction. Code officials represent a jurisdiction's citizens on a much wider array of public health, safety and welfare issues.

By manipulating the ICC governmental consensus process, the fire service and their well-heeled sponsors were able to "recruit" a large number of new Governmental Members and voting representatives from a single stakeholder group. Their success was ensured with the heavy financial backing of the IRC Fire Sprinkler Coalition and its team of highly paid consultants, which speaks to NAHB's final concern regarding this failure of the ICC governmental consensus process.

Failure to Prevent Unfair Influence of Third-Party Funding on Voting Process

NAHB strongly believes ICC must take immediate and strong action to eliminate the growing influence of third-party funding to secure votes at the ICC Final Action Hearings. While proponents of code changes have in the past used the opportunities afforded by hospitality suites and receptions to pitch their position on various code change proposals, what was witnessed leading up to and during this year's hearings should be of grave concern to the ICC leadership.

From the multimillion dollar effort successfully executed by the IRC Fire Sprinkler Coalition, to buses transporting supporters of the fire sprinkler proposals to the local casinos immediately following the vote, to reports of envelopes with \$500 given to voting representatives to stay on to vote for specific energy proposals, the growth of third-party funding to secure votes is a threat to the credibility and viability of ICC's code development process and its model codes.

While the source of the IRC Fire Sprinkler Coalition's funding has yet to be fully disclosed, it is almost certain that a significant portion came from fire sprinkler manufacturers, since one of them is known to have hired the team of consultants orchestrating this coalition's efforts. Given that this industry has already reported the potential for the residential fire sprinkler market to exceed \$3 billion annually, it is hard to believe that their efforts were purely for fire safety purposes.

The manner in which this success was achieved undermines ICC's stated general purpose as "a nonprofit public benefit corporation...not organized for the private gain of any person." One cynical remark heard after this year's hearings suggested the following instead: "ICC, the best codes money can buy."

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DESCRIPTION OF ADVERSE IMPACT ON APPELLANT:

The National Association of Home Builders is a Washington, D.C.-based trade association representing more than 235,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members will construct 80 percent of the more than 1.08 million new housing units projected for 2008.

The addition of the mandated fire sprinklers requirements to the 2009 IRC will adversely impact the ability of NAHB members to construct new housing that is affordable to many home buyers, particularly first-time buyers and others in lower-income brackets. NAHB's housing economists estimate that approximately 217,000 U.S. households are priced out of the market for a median-priced new home when the price of the home is increased by \$1,000. A recent cost assessment performed by Newport Partners for NFPA's Fire Protection Research Foundation found the average cost for fire sprinklers to be \$1.61 per sprinkler sf (square foot), or over \$3,500 for a typical 2,200 sf home. This cost will more than double if the home is not on a public water system.

Adding mandates for fire sprinklers to the IRC will adversely impact the demand for new housing and further damage the home building industry already experiencing a downturn of historical proportions. It will drive many potential new home buyers from the market or further delay their return. It will force many to remain in or purchase existing housing that does not provide many of the safety features in new housing.

REMEDIAL ACTION REQUESTED:

The following actions are requested of the ICC Board of Directors:

1. Set aside the results of the ICC Final Action on RB64 and RB66 and call for reconsideration during the 2009/2010 ICC Code Development Cycle.
2. Take immediate action to eliminate the influence of third-party funding in the voting process.
3. Undertake corrective action(s) to ensure that the ICC governmental consensus process is a fair and balanced process by restoring the principle of balance of interest in the selection of Governmental Member Voting Representatives.

ATTACHMENT A
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(Extraction)

Office of Management and Budget

CIRCULAR NO. A-119
Revised

February 10, 1998

4. What Are Voluntary, Consensus Standards?

a. For purposes of this policy, "voluntary consensus standards" are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, "technical standards that are developed or adopted by voluntary consensus standard bodies" is an equivalent term.

(1) "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, voluntary, private sector, consensus standards bodies," as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:

(i) Openness.

(ii) Balance of interest.

(iii) Due process.

(vi) An appeals process.

(v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments.