

September 30, 2020

VIA EMAIL ONLY

Jeffrey F. Lebowski
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Re: *In the Matter of Possible Amendments to the Minnesota Residential Energy Code, Part 1322*
OAH 8-9001-36776
Revisor R-4512

Dear Counsel:

Enclosed and served upon you please find the **REPORT OF THE ADMINISTRATIVE LAW JUDGE ON THE APPROPRIATENESS DETERMINATION** in the above-entitled matter.

If you have any questions, please contact me at (651) 361-7881, Anne.Laska@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



ANNE LASKA
Legal Assistant

Enclosure

cc: Docket Coordinator

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Possible Amendments to the
Minnesota Residential Energy Code, Part 1322

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE
ON THE APPROPRIATENESS
DETERMINATION**

This matter came before Administrative Law Judge Eric L. Lipman for a public hearing on Monday, August 3, 2020. The public hearing was held by way of an interactive internet and telephone connection on the WebEx platform.

The public hearing was conducted so as to permit the Commissioner of the Minnesota Department of Labor and Industry (Department) to develop a record for decision-making on whether to undertake rulemaking to revise the Minnesota Residential Energy Code. Federal law obliges the Commissioner to make such a decision upon a written record, after the receiving comment from interested persons at a public hearing.¹

The agency panel at the public hearing included then-Commissioner of the Minnesota Department of Labor and Industry, Nancy J. Leppink, and Scott McClellan, the Director of the Department's Construction Codes and Licensing Division.²

Forty-nine people attended the public hearing. Seven members of the public made statements or asked questions during the hearing.³

After the close of the hearing, the Administrative Law Judge kept the hearing record open for another 20 calendar days – until August 24, 2020 – to permit interested persons and the Department to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested persons and the Department an opportunity to submit replies to any earlier-submitted comments.⁴ Sixteen stakeholders submitted initial comments on the matter. Five stakeholders submitted comments in rebuttal to other, earlier filings.

The hearing record closed on August 31, 2020, at the conclusion of the rebuttal comment period.

¹ See 42 U.S.C. § 6833 (a)(2) (2020).

² Public Hearing Transcript (Tr.) at 12 – 22 (August 4, 2020).

³ Hearing Roster; Tr. at 2.

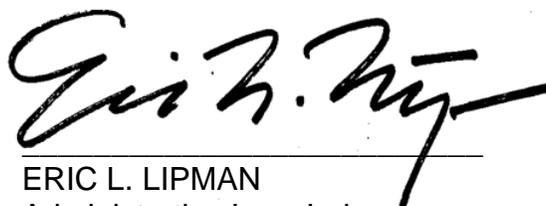
⁴ See Minn. Stat. § 14.15, subd. 1 (2020).

SUMMARY OF CONCLUSIONS

The Commissioner of Labor and Industry requested a summary of the public comments and a recommendation from the Administrative Law Judge.

The Administrative Law Judge concludes that the hearing record could support either appropriateness determination by the Commissioner – a decision to promptly begin revising the building code to incorporate provisions of *2018 International Energy Conservation Code (IECC or 2018 Model Energy Code)* or, alternatively, to postpone rulemaking on this subject until the next code revision cycle. Both choices are authorized by law and find adequate support in the hearing record. Yet, between these two alternatives, the Administrative Law Judge recommends postponement of the rulemaking as the better choice.

Dated: September 30, 2020



ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

I. Regulatory Background to Updates of the Residential Energy Code

Federal law requires that the Secretary of Energy review revisions made by the International Code Council to the *Model Energy Code*. The Secretary undertakes this review to “determine whether any revisions would improve energy efficiency in residential buildings.” The determination must be published in the *Federal Register* within a year of any revisions to the *Model Energy Code*.⁵

If the Secretary concludes that the latest revisions would improve energy efficiency, this determination triggers a series of state-level reviews of the updated *Model Energy Code*. Within two years of the Secretary’s determination, each state must make its own determination; namely “whether it is appropriate for such State to revise such residential building code provisions to meet or exceed the revised code”⁶ As noted above, the state’s “appropriateness determination” must be made following the notice, comment, and hearing procedures specified in the federal statute.⁷

On December 10, 2019, the U.S. Department of Energy’s Office of Energy Efficiency and Renewable Energy published its *Final Determination Regarding Energy*

⁵ 42 U.S.C. § 6833 (a)(5)(A) (2020).

⁶ 42 U.S.C. § 6833 (a)(5)(B) (2020); see also Minn. Stat. § 326B.106, subd. 1(d) (2020).

⁷ See 42 U.S.C. § 6833 (a)(5)(B) (2020).

Efficiency Improvements in the 2018 International Energy Conservation Code. The determination stated:

The U.S. Department of Energy (DOE) has reviewed the 2018 edition of the International Energy Conservation Code (IECC) and determined the updated edition would improve energy efficiency in buildings subject to the code compared to the 2015 edition. DOE analysis indicates that buildings meeting the 2018 IECC (as compared with buildings meeting the 2015 IECC) would result in national site energy savings of 1.68 percent, national source energy savings of 1.91 percent, and national energy cost savings of approximately 1.97 percent of residential building energy consumption.⁸

While it was not a requirement of federal law, the Commissioner used her contracting powers to hire an independent Administrative Law Judge to preside over the public hearing, receive comments from interested persons, make those comments available for public inspection, assemble the hearing record for later review, and provide a summary of the public comments.⁹

Additionally, the Commissioner requested that the Administrative Law Judge render a non-binding recommendation as to whether it is “appropriate” for Minnesota to revise the residential building code to meet or exceed the *2018 Model Energy Code*.¹⁰ If the Commissioner determines that such revisions are appropriate, the Department will undertake state rulemaking (under Minnesota Statutes Chapter 14) to develop, consider and promulgate a series of code revisions.¹¹

II. Summary of Public Comments

Nine key policy debates emerged from the public comment process and are summarized below. For each issue, two examples of the comments in the record are provided. Examples of comments that support a prompt rulemaking are noted in the second column and comments that support a delay in the start of rulemaking appear in the third column.

Alongside these examples, the complete hearing record is available for review by the Commissioner, Department staff and the public.

⁸ 84 Fed. Reg. 67435 (December 10, 2019).

⁹ Compare 44 State Register 1548 - 1550 (June 10, 2020) with 42 U.S.C. § 6833 (a)(2) (2020); see also Tr. at 14-15.

¹⁰ See Tr. at 14; 42 U.S.C. § 6833 (a)(1) (2020).

¹¹ See 44 State Register 1548, 1550; Tr. at 14-15; Department’s Post-Hearing Comments, at 2 (August 24, 2020).

Policy Issue	Support for a Prompt Rulemaking to Adopt Changes	Support for a Delay in Revisions Until the Next Cycle
The timing of the adoption of the 2018 Commercial Energy Code	Having the commercial and residential amendments of the 2018 International Energy Conservation Code (2018 IECC) adopted close in time, and “synced” to similar renewal cycles, would simplify education and code compliance. ¹²	The Minnesota Legislature recently adopted a six-year code renewal cycle. The purpose of the statute was to regularize the timetable for code updates and changes. Adoption of updates outside of that schedule frustrates that clear legislative purpose. ¹³
Payback on newer, energy-efficient building features	A 3- or 4-year payback period on energy efficiency features is reasonable. Moreover, the reductions in energy costs will continue to produce savings after the payback period – presumably for the many decades that the house is in use. ¹⁴	Payback calculations that suggest a 3- or 4-year recoupment of investments are under-inclusive. They do not account for “associated costs” of compliance with the 2018 IECC, overhead, margin, or commissions. ¹⁵
Supporting the affordability of home ownership	Adoption of the 2018 IECC provisions will reduce annual energy costs and lower costs for <u>operating</u> a home. After mortgage costs and taxes, energy costs are the largest costs faced by homeowners. ¹⁶	The \$1,500 in added, upfront costs to install continuous exterior insulation, will make homeownership for lower-income people more difficult to achieve. Ongoing costs of operating a home are not significant price considerations to those who cannot afford to <u>obtain</u> a home in the first instance. ¹⁷
Availability of an Energy Rating Index (ERI) compliance alternative for homebuilders	The 2018 IECC has multiple, flexible methods of achieving compliance with code standards – including an alternative ERI compliance method. ¹⁸	Access to utility program supports for energy ratings, particularly in Greater Minnesota, is limited. It is difficult for many builders to obtain cost effective ERI ratings as an alternative path to meeting the energy code requirements. ¹⁹

¹² Tr. at 33 (Lacey); Comments of the Responsible Energy Codes Alliance (July 27, 2020); Rebuttal Comments of the American Chemistry Council (August 31, 2020); Rebuttal Comments of the Midwest Energy Efficiency Alliance (August 31, 2020).

¹³ Comments of Housing First (August 24, 2020); *see generally* Minn. Stat. § 326B.106, subd. 1(c) (2020).

¹⁴ Tr. at 31 (Lindburg); Tr. at 37 (Lacey); Rebuttal Comments of the Midwest Energy Efficiency Alliance (August 31, 2020); Rebuttal Comments of the Responsible Energy Codes Alliance (August 31, 2020).

¹⁵ Comments of Housing First (August 24, 2020).

¹⁶ Comments of Fresh Energy (August 24, 2020) (emphasis added).

¹⁷ Rebuttal Comments of Housing First (August 31, 2020) (emphasis added).

¹⁸ Tr. at 35 (Lacey); Rebuttal Comments of the American Chemistry Council (August 31, 2020); Rebuttal Comments of the Responsible Energy Codes Alliance (August 31, 2020); Rebuttal Comments of the Midwest Energy Efficiency Alliance (August 31, 2020); Rebuttal Comments of Fresh Energy (August 31, 2020).

¹⁹ Comments of the Builders Association of Minnesota (July 30, 2020); Tr. 49-50 (Vonthoma).

Policy Issue	Support for a Prompt Rulemaking to Adopt Changes	Support for a Delay in Revisions Until the Next Cycle
The meaning of the Residential Energy Services Network's assessment of 7,287 homes	Home Energy Rating (HERS) ratings are often required as part of voluntary above-code programs or tax credits and do not provide the most complete picture of the state of housing efficiency. The statewide minimums included in the energy code are not reflected by average HERS ratings. ²⁰	The 7,287 sample of homes reflects approximately 50 percent of all of the housing construction permits issued in Minnesota in 2019, and 97% of these (7,287) homes had HERS index scores of 61 or less. Such ratings meet the standards of the 2018 IECC. ²¹
The appropriate regulatory priority for the agency	The adoption of the residential provisions of the 2018 IECC is an effective way to meet established climate goals. ²²	The homes in Minnesota that lack energy efficiency are not the newly built homes. Rather, the less energy efficient homes are found in older, existing housing stock. ²³
Minnesota's standing among the states on energy efficiency	Minnesota should not lose its leadership position in conservation efforts and achieving energy efficiency by foregoing rulemaking. "Failure to update now would set the state Residential Energy Code back over a decade, putting Minnesota well behind other states in the Midwest before the next update in 2026." ²⁴	Minnesota has achieved lower average HERS Index ratings than the other states with similarly harsh winter climates – states that include both Climate Zones 6 and 7. None of these states has adopted the 2018 IECC standards. ²⁵ Of the seven states that have adopted the 2018 IECC residential code standards, none have Minnesota's harsh winter climate. ²⁶
Achieving the needed standard U-Values in windows	"[T]he Department of Energy identified two key changes that comprised most of the 1.6 percent energy savings associated with the 2018 code. And those two big areas were in reducing the standard for window U values from .32 to .30." ²⁷	The "two highest contributors to the 2018 [Code's] energy efficiency, which is the U value of windows and the efficacy of lighting, which most Minnesota builders already exceed." ²⁸

²⁰ Rebuttal Comments of the Responsible Energy Codes Alliance (August 31, 2020); Rebuttal Comments of Fresh Energy (August 31, 2020); see also Comments of Michael Morehead (August 21, 2020).

²¹ Comments of the Builders Association of Minnesota (August 24, 2020); see also Tr. 47 (Vonthoma).

²² Comments of the Midwest Energy Efficiency Alliance (July 31, 2020); Comments of the City of St. Louis Park (August 18, 2020); Comments of the City of Eden Prairie (August 19, 2020).

²³ Rebuttal Comments of Housing First (August 31, 2020).

²⁴ Comments of the Midwest Energy Efficiency Alliance (July 31, 2020).

²⁵ Comments of the Builders Association of Minnesota (July 30, 2020); Rebuttal Comments of Housing First (August 31, 2020).

²⁶ Rebuttal Comments of Housing First (August 31, 2020).

²⁷ Tr. 20 (McClellan).

²⁸ Tr. 51 (Vonthoma).

Policy Issue	Support for a Prompt Rulemaking to Adopt Changes	Support for a Delay in Revisions Until the Next Cycle
Our ability to communicate “consensus” positions on needed practices	“However, without adoption by the state, there is no guarantee that all new homes are being built to achieve the consensus understanding of the minimum requirements and building techniques necessary for efficient buildings The regulatory minimum should be updated to reflect the best available consensus knowledge as embodied in the model code.” ²⁹	“As a function of the code cycle we have just gone through, we now have out in the field 2020 Minnesota IRC books. And as a function of those Minnesota books, included in them is the current Residential Energy Code, which is the 2012 IECC amended, as Minnesota amended it, into the 2015 Minnesota energy code. So the books that are in the field right now are 2020 IRC books with the 2015 Minnesota residential energy [code] in them. Logistically that is a nightmare for outstate Minnesota, to have code books that don’t have the correct codes in them.” ³⁰

III. Nonbinding Recommendation

As it is with any policy choice that is reflected in administrative rules, the “appropriateness determination” in this case turns upon the weight and priority that the Commissioner assigns to particular policy concerns in the hearing record. On this record, the Commissioner has a number of options. Thus, how the Commissioner assigns weight and priority to the issues detailed above sets the speed at which the minimum standards in the energy code will change.

As noted during the public comment process, Minnesota is, generally, on a six-year cycle of building code revision. During its 2015 Session, the Minnesota Legislature amended state law to provide for a regular schedule of updating most building codes.³¹ The 2015 amendment states:

Beginning with the 2018 edition of the model building codes and every six years thereafter, the commissioner shall review the new model building codes and adopt the model codes as amended for use in Minnesota, within two years of the published edition date. The commissioner may adopt amendments to the building codes prior to the adoption of the new building codes to advance construction methods, technology, or materials, or, where necessary to protect the health, safety, and welfare of the public, or to improve the efficiency or the use of a building.³²

²⁹ Rebuttal Comments of the American Chemistry Council (August 31, 2020); see also Rebuttal Comments of the Midwest Energy Efficiency Alliance (August 31, 2020); Rebuttal Comments of Fresh Energy (August 31, 2020).

³⁰ Tr. 55-56 (Kerby).

³¹ See 2015 Minn. Laws. ch. 54, art. 1, § 6.

³² See Minn. Stat. § 326B.106, subd. 1(c).

In the view of the Administrative Law Judge, the general policy preference for a routine schedule of code revision should guide the Commissioner's choice between reasonable alternatives in this matter. Because of the impact that a "mid-cycle" code revision could have on compliance, particularly in those communities where there is no local code enforcement system,³³ near-term changes to the *Model Energy Code* are not recommended.

Moreover, any practice that is reflected in the *2018 Model Energy Code* is available now to purchasers who are willing pay for the superior performance and longer-term cost savings that more advanced windows, lighting and construction methods provide. The market for new home construction can, will, and should, usher in some of the innovations of the 2018 code.

With that said, and as detailed above, the hearing record would support either the choice to move forward with rulemaking or wait until the next cycle arrives.

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³³ See Minn. Stat. § 326B.121, subd. 2 (2020); Tr. 55-56 (Kerby) ("[The thing] the last and third thing, which is the most impactful for me as a building official, as the boots on ground people in rural Minnesota, we work on an "island of code" in Bemidji, Minnesota. The state building code is the code throughout the state, but we enforce it in the city of Bemidji, as do many other municipalities, but there's a vast, vast large area in Minnesota that does not see enforcement. And so where we don't have enforcement, we're strictly relying on education, implementation, getting people to understand the need for the code. And we've been working very, very diligently – DOLI has been working very diligently on that, through their education processes, to get the outstate contractors that aren't under the jurisdiction of a code enforcement agency to understand it's important to implement these codes").