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**MIKE HILGERS**  
ATTORNEY GENERAL

March 15, 2024

Dominic Sims  
Chief Executive Officer  
ICC Board of Directors  
International Code Council  
200 Massachusetts Avenue, N.W.  
Suite 250  
Washington, DC 20001

Re: Appeal of 2024 International Energy Conservation Code

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

On behalf of the State of Nebraska, I write to express serious concerns about the International Code Council's 2024 International Energy Conservation Code (Code) and its potential impact in Nebraska. In addition to substantive concerns about the ways in which the Code may harm competition, impacting thousands of builders and buyers across the state, we are also concerned that the Code was adopted in violation of the procedures that the Council claims to follow. In a time in which Nebraskans are facing an unprecedented housing affordability crisis, these actions are both legally suspect and short-sighted.

The Code is of particular concern to Nebraska because it is the most widely used energy code in the United States. Previous codes have been adopted in Nebraska through legislation, Neb. Rev. Stat. § 81-1611 *et seq.*, and some of Nebraska's home rule cities have adopted variants, *see* Lincoln Municipal Code § 20.14.010. Even though the Council's codes have increasingly failed to provide realistic standards that states and municipalities are comfortable adopting,<sup>1</sup> the Council's codes still influence

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<sup>1</sup> *See, e.g.,* Ethan Duran, *Wisconsin Senate Committee Votes Down Proposal to Adopt New State Building Code*, FINANCE & COMMERCE (Aug. 23, 2023), <https://finance-commerce.com/2023/08/wisconsin-senate-committee-votes-down-proposal-to-adopt-new-state-building-code/>.

decisions made by buyers, sellers, policymakers, and administrators across Nebraska and the Nation.

Our substantive concerns are multiple. Under the Code, all residential buildings must have solar-ready provisions, electric vehicle provisions, and provisions for electric appliances. For commercial buildings, the Code requires, among other things, either onsite renewable energy systems or an off-site renewable energy contract, and additional requirements for electric vehicles. These provisions ignore market realities such as the fact that most consumers still prefer gas stovetop cooking to electric,<sup>2</sup> the well-reported drop in consumer demand for electric vehicles,<sup>3</sup> and the fact that most consumers cannot afford solar panels.<sup>4</sup>

These provisions conflict with the Code's stated scope and intent, and do not concern energy *use* or *efficiency*. It is also of great concern that the ICC revised the scope and intent of the Code in the middle of the code development process without providing notice, comment, or opportunity for appeal. If anything, these provisions appear to favor certain industries and products, such as those using or generating electricity, to the exclusion of others.

We would like additional information about how the 2024 Code changes were developed. As currently proposed, the Code is likely to have a significant adverse economic effect on products, services, and energy sources sold within our State. These changes reach well beyond standard setting and instead tread on consumer choices in a manner that increases costs and reduces competition.

### **The Code's Substantive Provisions Raise Serious Antitrust and Consumer Protection Concerns in Violation of Its Own Stated Intentions**

The Code raises serious antitrust and consumer protection concerns. Private code development organizations that become captive to, or collude with, special interests can violate state competition and consumer protection laws, which prohibit unfair and anticompetitive practices in trade or business.

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<sup>2</sup> Veronica Dagher, *If You Want to Sell a Home, Put Gas Stove in the Listing*, WALL STREET JOURNAL (Jan. 23, 2023), <https://www.wsj.com/articles/gas-stoves-sell-homes-realtors-say-11674480753>.

<sup>3</sup> Nick Carey & Joseph White, *Industry pain abounds as electric car demand hits slowdown*, REUTERS (Jan. 30, 2024), <https://www.reuters.com/business/autos-transportation/industry-pain-abounds-electric-car-demand-hits-slowdown-2024-01-30/>.

<sup>4</sup> Edmund Andrews, *Tax rebates for solar power ineffective for low-income Americans*, STANFORD NEWS (Nov. 16, 2022), <https://news.stanford.edu/2022/11/16/solar-panels-largely-confined-wealthy-americans/>.

While industry codes and standards can result in improved safety and efficiency, courts have long recognized that standard setting can serve anticompetitive ends. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309–10 (3d Cir. 2007) (acknowledging that conduct that “undermines the procompetitive benefits of private standard setting may . . . be deemed anticompetitive under antitrust law”); *see also American Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (Code developer may be liable for adverse market effects.).

The Code itself purports to recognize these concerns. The Intent Section creates a neutral and objective basis for determining Code provisions, including that the Code “must”:

- (1) Provide “market-driven, enforceable requirements for the design and construction of commercial [or residential] buildings;”
- (2) Provide “minimum efficiency requirements for buildings;” and
- (3) Consider costs and benefits “that result in the maximum level of energy efficiency that is safe, technologically feasible and life cycle costs effective considering economic feasibility, including potential costs and savings for consumers and building owners and return on investment.”<sup>5</sup>

Yet, in conflict with these requirements, the Code mandates electric vehicle power transfer infrastructure be installed for commercial applications,<sup>6</sup> that commercial buildings without heat pumps meet 1.25 times the energy credits as compared to those buildings with heat pumps,<sup>7</sup> and that commercial buildings must have either onsite renewable energy system or an off-site renewable energy contract.<sup>8</sup> Also, in conflict with these requirements the Code mandates that residential buildings be “solar ready”, “EV-ready”, and “electric ready.”<sup>9</sup> Those “ready” provisions require that the infrastructure be added to a building, increasing costs, regardless of the owner’s needs or wants. In other words, to be electric-ready, electrical wiring and outlets must be installed where there is a natural gas or propane appliance installed. To be solar-ready and electric-vehicle-ready, all of the infrastructure to eventually

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<sup>5</sup> Section C101.3 Intent of the Commercial and Residential IECC, [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).

<sup>6</sup> IECC-CE-PCD1-CAR-CED1-39 and IECC-CE-PCD1-CAR-2 CECD1-27, <https://www.iccsafe.org/wp-content/uploads/CECD1-27-22.pdf>.

<sup>7</sup> *See* IECC-CE-PCD1-CAR CECD1-18, <https://www.iccsafe.org/wp-content/uploads/CECD1-18-22.pdf>.

<sup>8</sup> *See* IECC-CE-PCD1-CAR CECP1-2, <https://www.iccsafe.org/wp-content/uploads/IECC-CE-PCD1-CAR.pdf>.

<sup>9</sup> *See* IECC Residential CAR RECPI-6/RECPI-7, IECC Residential CAR-REPI 7-21, IECC Residential CAR REPI-111, <https://www.iccsafe.org/wp-content/uploads/IECC-Residential-CAR-reduced.pdf>.

support solar power and electric vehicles must be installed. Those upgrades will be expensive. Upgrades to an electrical system to be solar-ready may cost \$2,500 to \$6,500.<sup>10</sup> Added cost for electric-vehicle charging stations could range from \$500 to \$2,500.<sup>11</sup>

Indeed, none of the electric-mandate provisions have anything to do with energy use or efficiency. And they are difficult to reconcile with standard cost and benefit considerations. Instead, these proposals raise costs with little benefit to efficiency or to consumers. In some cases, new code provisions radically increase the costs of new construction and renovation and increase owner and occupant costs during the life of the building.

The above provisions would force builders to install *electric* ready provisions. Without such inclusion, individual builders, developers, purchasers, product and service providers, and other market participants throughout Nebraska and the United States would determine a building's products, services, and energy sources. They would base these choices on their specific market demand, infrastructure, consumer trends, and other market realities.

Especially in markets where they face less demand, these provisions are a boon for the solar electric industry, the electric car industry, and other industries that generate, use, or relate to electricity. While a boon for those industries, the Code excludes their competitors from preferential mandates in construction and renovation projects throughout the Nation. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988) (noting that code development by associations requires "meaningful safeguards" to "prevent the standard-setting process from being biased by members with economic interests in stifling product competition").

In direct conflict with the Code's own professed scope and intent, these provisions ignore market realities, provide unrealistic and anticompetitive minimum standards, and drive up costs for consumers who favor alternative products. The Council should not dictate to consumers which products and energy sources they should prefer. Nor should the Council give preferential treatment in favor of one industry over another, which artificially stifles innovation in disfavored industries while increasing costs for consumers. The recent amendments threaten to inflict serious economic harm by hindering competition by interfering with consumers' rights to choose which products they buy and sell.

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<sup>10</sup> *How Much Does Solar Energy Cost?*, OPTIONONESOLAR, <https://optiononesolar.com/is-solar-energy-expensive/>.

<sup>11</sup> Dustin Hawley, *How Much Does it Cost to Install an EV Charger?*, J.D. POWER (Dec. 11, 2022), <https://www.jdpower.com/cars/shopping-guides/how-much-does-it-cost-to-install-an-ev-charger>.

## **The Adoption of the Code Appears to Violate the Council’s Own Process Rules**

The harm caused is particularly egregious where, as here, the Code is promulgated without adherence to the process principles that the Council represents as its policy. With the goal of weighing the competing interest at play in establishing an international building code, the Council represents that it has established safeguards that serve Due Process values. These include ideals such as openness, transparency, and fostering consensus.<sup>12</sup>

In particular, the Council commits to following two sets of self-imposed rules: (1) the Council’s “Code Development Principles,”<sup>13</sup> and (2) the “ANSI Essential Requirements: Due Process Requirements for American National Standards.”<sup>14</sup> These safeguards—in theory—reduce the chances that the Council would become captive to special interests, which would undermine the reliance interests placed upon the Code by builders, buyers, and local and state governments.

The Council has betrayed the Due Process principles it claims to follow.

For example, the Intent Section states that “[t]he code may include *non-mandatory* appendices incorporating additional energy efficiency and greenhouse gas reduction resources.”<sup>15</sup> Yet the Council, unilaterally—without notice, comment or appeals—dramatically broadened what may be included in the body or the Code as mandatory provisions. Specifically, on February 15, 2022, amid the Code’s development process, the Council provided *guidance* directly conflicting with the above provision: “Any content within the scope and intent of the 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>16</sup>

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<sup>12</sup> *Code Development Principles*, INTERNATIONAL CODE COUNCIL, <https://www.iccsafe.org/products-and-services/i-codes/code-development/code-development-procedures/>.

<sup>13</sup> *Id.*

<sup>14</sup> *ANSI Essential Requirements*, AMERICAN NATIONAL STANDARDS INSTITUTE (Jan. 2024), <https://www.ansi.org/american-national-standards/ans-introduction/essential-requirements>.

<sup>15</sup> Section C101.3 Intent of the Commercial IECC, [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).

<sup>16</sup> Mike Pfeiffer, *ICC Memorandum Re: Discount Rates and Code Conduct*, 2 (Feb. 15, 2022), [https://www.iccsafe.org/wp-content/uploads/IECC-Discount-Rates-and-Code-Content-Memorandum\\_02\\_15.22.pdf](https://www.iccsafe.org/wp-content/uploads/IECC-Discount-Rates-and-Code-Content-Memorandum_02_15.22.pdf).

This guidance, issued without notice, comment, or opportunity for appeal, effectively nullified the neutral and objective bases for inclusion of substantive provisions in the code. This nullification occurs because the guidance allows provisions that otherwise would be non-mandatory appendices to now become mandatory. In other words, provisions that fall outside the Code's scope and intent that should be non-mandatory can be included in the rule upon a favorable determination from a Consensus Committee. This is a surreptitious way to include provisions that do not meet the Code's scope and intent in the Code. As a result, proposals such as the electric-mandate provisions that had no relation to the Code's scope and intent, nor to energy use or efficiency, are now included in the Code.

This is a violation of the very policies and procedures that the Council represents that it adheres to. After all, the Council itself has said that “the inclusion of code provisions that are not within the stated scope and intent of the code is a violation of process and procedure.”<sup>17</sup>

This flawed code-making process has resulted in amendments hostile to the products, services and energy sources provided and consumed in the State of Nebraska, and a Council that misrepresents its policy, procedures, and purposes to consumers. Not only do these misrepresentations potentially constitute deceptive trade practices in violation of the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-302 *et seq.*, and the Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1601 *et seq.*, but they also have monopolistic tendencies and call into question protections the council may have under the *Noerr-Pennington* doctrine. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988) (“[P]rivate standard-setting by associations . . . is permitted . . . under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits” and with “meaningful safeguards” that “prevent the standard-setting process from being biased by members with economic interests in stifling product competition.”).

## Conclusion

The Council has a duty to develop building codes that meet safety, efficiency, and economic performance purposes that promote competition and are not biased for or against particular markets or market participants. Effective deterrence of anticompetitive behavior in organizations such as the Council is vital to Nebraska's economy. The decisions made by the Council affect countless businesses, including builders, developers, building occupants, consumers, as well as product and service

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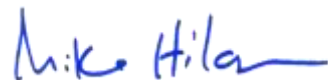
<sup>17</sup> *Report on the Code Development Process; Appeals Board Report on Scope and Intent*, INT'L CODE COUNCIL (Sept 25, 2020), [https://www.iccsafe.org/wp-content/uploads/Appels-Board-report\\_Scope\\_Intent.pdf](https://www.iccsafe.org/wp-content/uploads/Appels-Board-report_Scope_Intent.pdf).

providers of all sizes in Nebraska. Moreover, the State plays a vital role in protecting consumer choice and markets that favor options and affordability. The Council has overstepped its bounds in a manner directly opposed to those interests.

We request additional information about whether the Council contends—and if so, how—that the Council and/or committees developing the Code determined that the questioned amendments meet the neutral and objective standards outlined above. We also request information on how the subject proposed amendments were developed and agreed upon by interested market participants prior to their being introduced as an omnibus amendment without opportunity for further comment. Further, we seek information related to the Council’s February 22, 2015, guidance memorandum, including by whom it was requested, by whom within the Council it was developed and authorized, and for what purposes.

Nebraska is concerned that the Council is ignoring the importance of building costs, housing affordability, and the market realities affecting average consumers. The fact that the Code caters to products that are out-of-reach for most consumers, including most Nebraskans, is a concerning signal that the Council may be putting special interests above Nebraska consumers and its stated purpose. “Standards” should reflect averages, not special interests, and not high-income earners. “Minimum standards” should be even more inclusive. Given this and all the above, my office will consider recommending against any municipalities, businesses, developers, and other entities in Nebraska adopting the Code. Our consumers and communities deserve better.

Sincerely,



MIKE HILGERS  
Nebraska Attorney General

CC:

President Stuart D. Tom

Vice President David Spencer

Secretary-Treasurer Mike Boso

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