OAH 8-9001-38469

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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 August 23, 2022. The public hearing was held by way of an interactive internet and telephone connection on the WebEx platform.

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

The agency panel at the public hearing included the following staff from the Department: Scott D. McLellan, the Director of the Department's Construction Codes and Licensing Division; Chad Payment, Construction Code Representative; Brittany M. Wysokinski, Counsel; Amanda J. Spuckler, Rules Specialist and Outreach; and Lyndy Logan, Management Analyst.[2]

Fifty-three 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 Monday, September 12, 2022 – 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 to permit interested persons and the Department an opportunity to submit replies to any earlier-submitted comments.[4] Thirteen stakeholders submitted initial comments on the matter. Seven stakeholders submitted comments in rebuttal to earlier filings.

The hearing record closed on September 19, 2022, at the conclusion of the rebuttal comment period.

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[1] *See* 42 U.S.C. § 6833 (a)(2) (2022).
[2] Public Hearing Transcript (Tr.) at 6 (Lipman).
[3] Hearing Roster; Tr. at 2 (Index).
[4] *See* Minn. Stat. § 14.15, subd. 1 (2022).

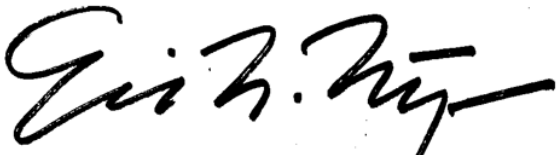
SUMMARY OF CONCLUSIONS

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 *2021 International Energy Conservation Code (IECC* or *2021 Model Energy Code*) or, alternatively, to postpone rulemaking on this subject until the next IECC revision.

Both choices are authorized by law and find adequate support in the hearing record. Yet, between these two alternatives, the Administrative Law Judge recommends initiation of rulemaking proceedings as the better choice.

Dated: October 20, 2022



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 July 28, 2021, the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy published its *Final Determination Regarding Energy Efficiency*

[5] 42 U.S.C. § 6833 (a)(5)(A) (2022).
[6] 42 U.S.C. § 6833 (a)(5)(B) (2020); *see also* Minn. Stat. § 326B.106, subd. 1(d) (2022).
[7] *See* 42 U.S.C. § 6833 (a)(5)(B) (2022).

Improvements in the 2021 International Energy Conservation Code. The determination stated:

> The U.S. Department of Energy (DOE) has reviewed the 2021 International Energy Conservation Code (IECC) and determined the updated edition would improve energy efficiency in buildings subject to the code. DOE analysis indicates that buildings meeting the 2021 IECC, as compared with buildings meeting the 2018 IECC, would result in national site energy savings of 9.38 percent, source energy savings of 8.79 percent, and energy cost savings of approximately 8.66 percent of residential building energy consumption. Upon publication of this affirmative determination, each State must certify that it has reviewed the energy efficiency provisions of its residential building code and made a determination whether it is appropriate to revise the code to meet or exceed the updated edition of the IECC. Additionally, this notice provides guidance on State code review processes and associated certifications.[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. The Administrative Law Judge received comments from interested persons, made those comments available for public inspection, assembled the hearing record for later review, and provides this summary and recommendation.[9]

Specifically, 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 *2021 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

The public comments received in this matter reprise, and update, many of the key arguments that were presented to the Commissioner in 2020.

Six key policy debates emerged from the public comment process and are summarized below. To facilitate the Commissioner's review of the hearing record, examples of how each of these key policy disputes relate to the arguments for and against rulemaking are presented. Samples of comments that support a prompt resort to rulemaking are noted in the second column and comments that support a delay in the start of rulemaking appear in the third column.

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[8] 86 Fed. Reg. 40529 (July 28, 2021).
[9] *Compare* 86 Fed. Reg. 40529, 40530 ("States have discretion with regard to the hearing procedures they use, subject to providing an adequate opportunity for members of the public to be heard and to present relevant information"); *see also* Tr. at 20 (McLellan).
[10] *See* Tr. at 14; 42 U.S.C. § 6833 (a)(1) (2022).
[11] *See* 47 State Register 37 (July 18, 2022); Tr. at 18-20 (McLellan).

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

Policy Issue	Support for a Prompt Rulemaking to Adopt Rule Revisions	Support for a Delay in Revisions Until a Future Cycle
The timing of the adoption of the 2021 *Model Energy Code*	"Minnesota is supposed to be on a mandatory six-year code adoption cycle that was supposed to begin with the 2018 IECC. And then the previous decision delayed that adoption, and now the 2018 is almost five years old. In order to get the state back on track, Minnesota needs to open this rulemaking for the 2021 and secure its adoption within two years of its publication date, which is February of 2021. So the 2021 IECC became available February 2021. The intention of that six-year cycle statute was not to have a 12-year cycle. So we really need to update this right away."[12]	"Since the 2018 code cycle, all residential building codes operating under the delegated authority of the Minnesota Department of Labor and Industry's Commissioner run on a six-year code cycle …. The previous code cycle took effect March 2020, using the 2018 series of model codes. The next residential building code cycle occurs in 2026 with the review of the 2024 editions of the model building codes. [T]he appropriate window for any potential energy code revision would be the 2026 code cycle."[13]
Payback on newer, energy-efficient building features	"So Minnesota has two different climate zones … Climate Zone 6 and Climate Zone 7. I will just give you the average. The simple payback in years for both of those climate zones is 3.6 years. And the average increase in cost that we calculate is only 543 additional dollars, not 5,000."[14] "[A]n annual increase in mortgage payments of $324, less $220 in energy savings, for a net cost to the homeowner of $104 per year. This amounts to about $8.66 a month or .28 cents per day."[15] The U.S. Department of Energy found "a 9.1 percent savings. But I'll note that the DOE analysis compared the 2021 IECC to an unamended 2015 IECC. If you figure that Minnesota adopted the 2012 IECC with some weakening amendments, the savings are actually larger than that."[16]	"In both instances for climate zones 6 and 7, the true payback far exceeds the median length of homeownership of 13.1 years, meaning that most homebuyers will likely never realize the payback…. The true payback at today's interest rates far exceeds the life of a mortgage. Even when using historic low interest rates, the payback period nears a 30-year mortgage in climate zone 6, where the majority of Minnesotans live."[17] "The prescriptive wall requirements are not cost effective to the consumer. The additional cost for this is estimated at $1,819 for 1,016 square feet of wall in Climate Zone 6. This makes the simple payback [in] 55 years. This also will create a negative cash flow for the consumer in all cases."[18]

[12] Tr. 30-31 (Lindburg).
[13] Rebuttal Comments of Housing First at 3.
[14] Tr. 31 (Lindburg).
[15] Rebuttal Comments of Michael Morehead at 9.
[16] Tr. 38 (Lacey).
[17] Initial Comments of Housing First at 4.
[18] Initial Comments of Builders Association of Minnesota at 3.

Policy Issue	Support for a Prompt Rulemaking to Adopt Rule Revisions	Support for a Delay in Revisions Until a Future Cycle
Supporting the affordability of home ownership	"Minnesota, Wisconsin, and Iowa each share the same Residential Energy Code Efficiency category classified at the 2009 IECC for residential buildings, so it is a fallacy to argue that energy code would be a reason for a large disparity in home construction costs compared to neighboring states."[19] "Minnesota residents faced shocking heating bills in the winters of 20/21 and 21/22 and are facing the same increasingly-precedented high gas costs again this winter. Homebuilders, naturally, are most concerned with housing costs during the construction process. But in order to protect consumers from volatile global markets for fossil fuels, we must ensure our homes are built to the highest standards so that once builders hand the keys over, residents can continue to afford to live there over the life of the building."[20]	"By nearly every measure, it costs more to build a new home in Minnesota than in nearby Midwest states. The state's Residential Energy Code is a contributing factor."[21] "[T]he state's housing affordability and inventory challenges have only worsened since the Department [last] considered changes to Minnesota's Energy Code.... [A]doption of a new, costlier energy code will impede housing affordability and supply, leaving an adverse impact on an already troubled housing market."[22] "[W]e do not have a crisis of housing energy efficiency in Minnesota; we have a crisis of housing affordability and availability. Adopting the 2021 Residential IECC only makes matters worse."[23]
The meaning of the Residential Energy Services Network's assessment of homes in Minnesota	The 7,287 sample of [Home Energy Rating System - HERS] 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."[24] "The RESNET website listed the top ten states with the best HERS ratings…. Minnesota was listed as #6 with 45% of new homes tested.... Minnesota builders cannot claim to be # 1 as less than half of new homes in the state are actually tested."[25]	"According to RESNET (Residential Energy Services Network), the average HERS index in Minnesota for 2021 is 50. This average is from 9,623 homes, primarily in the metro area as part of the Xcel/Centerpoint energy efficient home program."[26] "Minnesota's homebuilders and code officials have an unmatched mastery of the residential energy code. This is reflected in the performance of new construction in terms of energy efficiency…. For many years, Minnesota has been the most energy efficient high activity state in terms of new home production."[27]

[19] Rebuttal Comments of American Chemistry Council at 2-3 (footnote omitted).
[20] Rebuttal Comments of AIA Minnesota and Others at 2 (footnotes omitted).
[21] Initial Comments of Central Minnesota Builders Association, at 1.
[22] Rebuttal Comments of Housing First at 2.
[23] Rebuttal Comments of Central Minnesota Builders Association, at 1.
[24] Midwest Energy Efficiency Alliance Comments at 3.
[25] Rebuttal Comments of Michael Morehead at 2.
[26] Initial Comments of Builders Association of Minnesota at 1.
[27] Initial Comments of Housing First at 2.

Policy Issue	Support for a Prompt Rulemaking to Adopt Rule Revisions	Support for a Delay in Revisions Until a Future Cycle
The appropriate regulatory priority for the agency	A "9.1 percent energy savings ... [will result in] almost 10 million metric tons of carbon emission savings over a 30-year period. Updating the energy code will also help Minnesota meet its goal to reduce carbon emissions by 80 percent by 2050."[28] "But if we're running into this issue of, like, where to decide to make things more affordable, I would start with the square footage.... Habitat for Humanity is building homes way beyond the code … [but] are not 3,000 square feet."[29]	"Minnesota already has one of the most energy efficient stocks of housing and we build the most energy efficient houses in the country right now. When we are dealing with people who are looking for homes – and that's the real crisis in Minnesota. It's not energy efficiency but the affordability of housing."[30]
Minnesota's standing among the states on energy efficiency	"We are, in fact, a little bit delayed behind the six-year code adoption cycle that is set forth in statute.… [A]dopting the 2021 residential provisions of the IECC will help us catch up with other states who are advancing their standards in line with best practice across the country."[31] "We're seen as a leader in the energy code and now we've fallen behind a number of our Midwestern neighbors, including ... Michigan, Illinois, Indiana who have all adopted more advanced energy codes, residential energy codes because we decided to forego the 2018 residential provisions."[32]	"Michigan had 5,329 HERS Rated homes in 2021, representing 22% of all new homes with an average HERS Index Score 57, 14% worse than Minnesota's average HERS Index Score of 50.... These facts demonstrate that having a more recent code adoption date does not correlate to improved on-site energy performance and that building practices and technologies employed by Minnesota home builders continues to outperform other Midwest states.[33] "I've been all over the country talking to different contractors, building officials around. And by far and away, this energy code is the most controversial, and states around us are struggling the same way. How much is enough?"[34]

III. Nonbinding Recommendation

As with any policy choice that is reflected in administrative rules, the "appropriateness determination" in this case turns upon the weight that the

[28] Tr. 25 (Rabe); *see also* Initial Comments of the New Buildings Institute at 1.
[29] Tr. 54-55 (Lindburg).
[30] Tr. 40 (Gottwalt).
[31] Tr. 27-28 (Fowler).
[32] Tr. 25 (Rabe).
[33] Rebuttal Comments of Central Minnesota Builders Association, at 2.
[34] Tr. 45-46 (Karow).

Commissioner assigns to particular policy concerns. On this record, the Commissioner has a number of reasonable choices.

When this same question was presented to the Commissioner in 2020, the undersigned recommended a delay in a move to rulemaking. The 2020 recommendation reflected concerns as to whether revised code provisions would be confusing to the regulated public so close after the publication of the most recent set of code manuals.[35] While the question of whether to proceed to rulemaking today remains a close one, in the view of the Administrative Law Judge, the calculus has since shifted in favor of initiating rulemaking proceedings.

As noted above, Minnesota's current Energy Code is based upon the 2012 version of the IECC. Three additional model code updates have been issued since publication of the 2012 IECC – revisions in 2015, 2018 and 2021.[36] Likewise important, the IECC drafters are preparing for still yet another revision in 2024.[37]

The stakeholders who oppose a resort to rulemaking in the near term note that during the 2015 legislative session, the Minnesota Legislature amended state law to provide for a regular schedule of updates to the building code.[38] These commentators maintain that, following the 2015 amendments, any revisions to Minnesota's Energy Code would be inappropriate before 2026.[39]

In the view of the Administrative Law Judge, that reading of state law is overstated. The 2015 amendments provide an exception to the six-year review cycle, if, in the Commissioner's judgment, the revisions would advance construction methods or improve the efficiency of buildings. The statutory provisions read:

> 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**.[40]

In this way, the statute operates as a proverbial "floor," but not a "ceiling," to the Commissioner's review of model building codes. The Commissioner must review and adopt portions of the model codes at least every six years but can propose regulatory

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[35] *See* Report of the Administrative Law Judge, OAH 8-9001-36776, slip op. at 7 (Minn. Off. Admin. Hrgs 2020); *accord* Hearing Transcript, OAH 8-9001-36776 (Minn. Off. Admin. Hrgs 2020), at 55-58 (Kerby).
[36] Tr. 21 (McLellan); *see also* Minn. R. 1322.0010, subd. 1 (2021).
[37] Midwest Energy Efficiency Alliance Comments at 4.
[38] *See* 2015 Minn. Laws. ch. 54, art. 1, § 6.
[39] *See e.g.,* Central Minnesota Builders Association at 1; Rebuttal Comments of Central Minnesota Builders Association at 2; Housing First Initial Comments at 2; Housing First Rebuttal Comments at 2.
[40] *See* Minn. Stat. § 326B.106, subd. 1(c) (2022) (emphasis added).

changes at more frequent intervals if those changes advance construction methods, improve the efficiency of buildings, or improve the use of buildings.[41]

In the view of the Administrative Law Judge, the listed exceptions permit the Commissioner to consider and adopt IECC model code provisions that are promulgated between 2012 and 2026.

Accordingly, between the two alternatives presented to the Commissioner today, the Administrative Law Judge recommends a resort to rulemaking. A rulemaking proceeding would permit the Commissioner to develop a detailed record on the questions that are raised by the legislature's statutory direction to the Commissioner, but which are not precisely answered by this hearing record. Specifically, are there particular innovations in the 2015, 2018 and 2021 versions of the IECC that are: (1) genuine advancements to construction methods, improvements in the efficiency of buildings or improvements in the use of buildings; and (2) qualify as "modern methods, devices, materials, [or] techniques . . . [which are achievable] at the least possible cost"?[42] The hearing record suggests, but does not establish, that there are such innovations.

With all of that said, the hearing record would support either the choice to move forward with rulemaking or wait until promulgation of the 2024 version of the IECC.

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[41] Minn. Stat. § 326B.106, subd. 1(c) (emphasis added).
[42] Minn. Stat. § 326B.101 (2022).