

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Final Decision of the
State Building Code Board of Appeals in
Appeal 22-04

ORDER DENYING INTERVENTION

This matter is pending before Administrative Law Judge Jim Mortenson pursuant to a Notice and Order for Hearing (Notice), dated March 14, 2023, and served and filed by the Department of Labor and Industry (Department) on March 17, 2023. The Notice listed Todd Geske, a municipal building official, and Timothy Smedberg, a homeowner, as the parties to this matter. It was Petitioner Geske who filed an appeal to the Commissioner, on February 1, 2023, of the October 24, 2022, State Building Code Board of Appeals decision on Smedberg's appeal of Geske's final determination on a building permit concerning the Smedberg home and its heating, ventilation, and air-conditioning (HVAC) system.

On March 27, 2023, the Builders Association of the Twin Cities, dba Housing First Minnesota (Housing First), filed a Petition to Intervene. On April 6, 2023, the Judge issued a Continuance Order for the prehearing conference scheduled for April 7, 2023, because Housing First's petition to intervene created a conflict of interest for Smedberg's counsel; substitute counsel was obtained and needed time to review the matter. The prehearing was moved to May 5, 2023, to hear arguments on the Petition to Intervene - the Department and Smedberg objected to Housing First's Petition - and arguments on whether Geske is an "aggrieved" party, as the term is used in Minn. Stat. § 326B.139 (2022). On May 3, 2023, the City of Otsego (the municipality in which the Smedberg home is located and for whom Geske is the local building official) filed a Petition to Intervene.

The Judge convened the prehearing on May 5, 2023, and heard arguments about the petitions to intervene and Geske's standing to appeal.

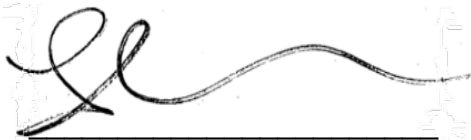
Geske is represented by Mark R. Becker and Lucas T. Clayton, Fabyanske, Westra, Hart & Thomson, P.A. Smedberg is represented by J. Scott Andresen, Bradford, Andresen, Norrie & Camarotto, LLP. The Department is represented by Kaitrin C. Vohs, Assistant Attorney General. Housing First is represented by Christopher W. Boline, Felhaber Larson. Otsego is represented by David S. Kendall, Campbell Knutson, P.A.

Pursuant to Minn. R. 1400.5500, .6200, .6500, (2021), and based on the pleadings, arguments, law, and for the reasons explained in the memorandum below,

IT IS HEREBY ORDERED:

1. Geske, a building official, lacks standing to appeal the final decision of the State Building Code Board of Appeals (Board) under Minn. Stat. § 326B.139;
2. Housing First Minnesota's petition to intervene is **DENIED**;
3. Otsego's petition to intervene is **DENIED**;
4. The Judge will entertain a motion to dismiss if filed no later than **July 14, 2023**. Pursuant to Minn. R. 1400.6600 anyone contesting the motion may file a response within 10 working days after they receive the motion;
5. If anyone filing or responding to the motion wants a hearing, they are to make the hearing request clear in their pleading. The motion hearing, if requested, will be convened at the Office of Administrative Hearings at **9:00 a.m. on Thursday, August 3, 2023**.

Dated: June 12, 2023



JIM MORTENSON
Administrative Law Judge

MEMORANDUM

The underlying question in this case is an interpretation of state building code. Geske, who is the local building official, and the Department have differing views on this question. Smedberg, the homeowner who initiated proceedings below when he appealed Geske's determination in favor of the homebuilder and its subcontractors, agrees with the Department's interpretation of the building code.

A local building official must apply the code as determined by the Commissioner because the Commissioner has the final interpretive authority over the state building code under Minn. Stat. § 326B.127, subd. 5 (2022). Therefore, and for the reasons explained below, Geske lacks standing to appeal the decision of the Board under Minn. Stat. § 326B.139, because he is not an aggrieved party. Moreover, any disagreement Geske has with the Commissioner's interpretation must be addressed through other mechanisms prescribed by the legislature.

I. Facts¹

Smedberg had a problem with his new home's heating, ventilation, and air conditioning (HVAC) system.² Rooms in the upper floor of the residence were reportedly not retaining heat properly.³ In April 2021, Smedberg filed a complaint with the Department against the home's builder, Lennar, concerning the HVAC system.⁴ Geske inspected the home on May 3, 2021.⁵ Geske created a two-page list of 12 items which needed to be corrected and re-inspected.⁶

Department staff from the Construction Codes and Licensing Division (CCLD) worked with and provided direction to Geske to enable him to enforce the state building code consistent with their interpretation of the code.⁷ In June and July 2021, discussions between CCLD, Geske, Lennar⁸, and EI Engineering⁹ (DPIS) discussed the home's design and how to ensure it met building code standards for HVAC.¹⁰ The final airflow tolerance was discussed and a query was raised whether it was +/- 10 percent. DPIS recommended +/- 20 percent and Geske was going to use that tolerance level, without objection from CCLD.¹¹

On September 14, 2021, Geske issued a permit to Elander Mechanical for repair work on Smedberg's HVAC system.¹² Geske closed the permit following inspection of the completed repairs on September 16, 2021.¹³ DPIS, however, had relied on a standard of +/- 25 CFM (cubic feet per minute) or 20 percent of the design target when it tested the HVAC system on September 16, 2021.¹⁴ DPIS concluded the HVAC installation met Air Conditioning Contractors of America (ACCA) standard 5.¹⁵ ACCA standard 5 is not a standard within the Minnesota building code.

¹ These facts are largely taken from the pleadings and are used here to determine whether Geske has standing and the questions of intervention. Geske has represented that material facts are not in dispute. Nevertheless, the facts herein are used only for this limited basis and are not deemed proved for the purposes of the interpretation of the building code.

² Smedberg's Memo In Support of Dismissal (Resp. Memo) at 2 (Apr. 28, 2023); Notice and Order for Prehearing Conference (Notice), Exhibit (Ex.) 6.

³ Resp. Memo at 2.

⁴ Notice, Geske Appeal Brief at 6, (Feb. 1, 2023).

⁵ Notice, Ex. 17.

⁶ *Id.* A 13th item concerning water odor was noted as inspected and did not require corrections and further inspection.

⁷ Geske Appeal Brief at 8; Notice, Ex. 2, Ex. 3, Ex. 4, Ex. 5, Ex. 6, Ex. 7, Ex. 8, Ex. 9, Ex. 10, Ex. 13, Ex. 14, Ex. 15, Ex. 23, Ex. 26, Ex. 30, Ex. 32.

⁸ Lennar is the builder of the home.

⁹ This is the company that designed the HVAC system for the home.

¹⁰ Notice, Ex. 15, Email from Timothy Manz (CCLC) to Geske (July 1, 2021).

¹¹ *Id.*, Ex. 17; Geske Appeal Brief at 6.

¹² Geske Appeal Brief at 16; Resp. Memo at 2.

¹³ Geske Appeal Brief at 6, Ex. 18.

¹⁴ Notice, Ex. 19, Ex. 20.

¹⁵ *Id.*, Ex. 21.

Following the repairs, Smedberg did not believe the problem was corrected. He believed the problem may have been made worse because a smaller furnace was installed.¹⁶ On November 4, 2021, CCLD staff issued a Correction Notice to Lennar for the HVAC work at the home.¹⁷ On November 22, 2021, the area manager for Lennar asked CCLD staff about the code requirement for “certain cfm numbers for each diffuser.”¹⁸ CCLD staff responded the next day with the requirements of Minn. R. 1346.0309 (2021) concerning heating system balancing.¹⁹

On December 4, 2021, DPIS provided a letter to Lennar’s area manager opining that section 309.2.1 (from Minn. R. 1346.0309) did not apply to the home because it is a residential dwelling. The rule, according to DPIS, “is targeted at commercial mechanical ventilation systems” because “all residential equipment have fan motors at one horsepower or less.”²⁰ DPIS also reasoned that the requirement for mechanical ventilation heating system balancing focuses “on fresh air ventilation systems (Chapter 4), not air distribution systems (Chapter 6).”²¹ DPIS reasoned that the rule for system balancing reports requires documentation of minimum outdoor air requirements for the ventilation system pursuant to International Mechanical Code (IMC) chapter 4.²² Therefore, according to DPIS, the balancing for the HVAC system need only be conducted for the entire building in one location – the heat recovery ventilator (HRV) – not at each diffuser.²³ DPIS stated that, to its knowledge, balancing of the “residential air distribution” system (mechanical ventilation heating system) was not required to be balanced at all.²⁴ DPIS reiterated that it believed that ACCA standard 5 applied, requiring individual room airflows within the greater of +/- 20 percent, or 25 CFM of the design requirements.²⁵ The home in question, according to DPIS, met the requirements it applied.²⁶ Lennar agreed with DPIS and so informed CCLD.²⁷

On December 7, 2021, Elander, the HVAC installer, tested the temperatures in the house.²⁸ The outdoor temperature was 15 degrees Fahrenheit.²⁹ The thermostat was set to 71 degrees, and then temperatures were taken in all rooms of the house. The temperatures ranged between 66.9 (in a bathroom) to 70.5 (in the formal dining room).³⁰

¹⁶ *Id.*, Ex. 22.

¹⁷ *Id.*, Ex. 25. (It is unclear why CCLD took this step when Geske was still Otsego’s building official.)

¹⁸ *Id.*, Ex. 26.

¹⁹ *Id.*

²⁰ *Id.*, Ex. 27.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, Ex. 28.

²⁸ *Id.*, Ex. 31.

²⁹ *Id.*

³⁰ *Id.*

On December 9, 2021, CCLD staff advised Lennar it could not rely on ACCA standard 5.³¹ CCLD provided seven reasons:

1. None of the 2015 codes in effect during the construction of the home (including mechanical, energy or residential building codes) reference ACCA Standard 5.
2. ICC codes (which are adopted in Minnesota) are not based upon ACCA Standard 5.
3. The provision for +/- 10% airflow rates in Section 309.2.1 of the MMC does not exempt residential buildings – it merely states that speed adjustment is not required for fan motors rated at one horsepower or less.
4. Section 309.2.3 of the MMC requires systems balancing reports to be submitted to the building official upon request. It does not differentiate between commercial and residential buildings.
5. Section 603.1 of the MMC requires the air distribution system to be designed and installed to supply the required distribution of air, and Section 202 of the MMC defines an “air distribution system” as any system of ducts, plenums and air-handling equipment that circulates air within a space or spaces and includes systems made up of one or more air-handling units.
6. Section R403.5 of the 2015 MMC Residential Energy Code (MREC) requires a balanced mechanical ventilation system that is +/- 10% of the system’s design capacity.
7. Section R202 of the MREC defines “mechanical ventilation” as the mechanical process of supplying conditioned or unconditioned air to, or removing it from, any space.³²

As a result, CCLD wanted the system reviewed based on the airflow rate tolerance of +/- 10 percent, not the +/- 20 percent or 25 CFM rates from ACCA standard 5.³³

On December 20, 2021, Lennar informed CCLD that Lennar, DPIS, and Elander believed CCLD’s position on the airflow rates for the home’s HVAC system is a new “interpretation” of the state building code.³⁴ According to Lennar, the CCLD’s application of the balancing requirement of +/- 10 percent of airflow design in each room required every supply and return duct to be so balanced. Further, according to Lennar:

The New Interpretation would also create both a new temperature control requirement for cooling systems and a new temperature control requirement between rooms for both heating and cooling systems.

³¹ *Id.*, Ex. 32.

³² *Id.*

³³ *Id.*

³⁴ *Id.*, Ex. 33.

However, there is no proper support in the 2015 MN codes for the New Interpretation.³⁵

Lennar pointed out that “Section 309.2.1 . . . contains no reference whatsoever to “room-level airflows” of a duct distribution system. Neither does MMC Chapter 6 Duct Systems.”³⁶ Lennar argued that because Minn. R. 1346.0309, § 309.2.1 “explicitly states that the minimum amount of outdoor air be listed in the balancing report . . . is why the statement ‘verify system performance’ relates to [only] outdoor air.”³⁷ Among other arguments, Lennar also stated that the Department had not, over the prior seven years, notified any residential builder or HVAC contractor that the requirement now being espoused must be met.³⁸ For these, and addition reasons Lennar carefully articulated, the Lennar area manager requested CCLD reconsider its position.³⁹

On December 28, 2021, CCLD informed Lennar and Elander that CCLD was not changing its position.⁴⁰ CCLD provided eight additional detailed reasons.⁴¹ CCLD summarized:

Plainly stated, the 2015 MN Mechanical Code and MN Residential Code require the air distribution system of a dwelling unit’s mechanical ventilation system to:

- A. Supply and remove heated and cooled air to and from the rooms and spaces of the dwelling unit in accordance with its design.
- B. Provide airflow rates within +/- 10 percent of the mechanical ventilation system’s (ducts, plenum and equipment) design capacities.
- C. Be balanced.
- D. Be performance tested.
- E. Be able to maintain a temperature of 68 degrees Fahrenheit 3 feet off the floor on the designated heating day for all spaces intended for human occupancy.⁴²

Lennar continued to disagree with CCLD.⁴³ CCLD provided a deadline for Lennar to respond to the mechanical code compliance issues.⁴⁴ CCLD informed Lennar it would not entertain further argument about the code requirements. CCLD advised Lennar that if it failed “to provide a complete response by the deadline,” CCLD would refer “this matter to

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*, Ex. 34.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, Ex. 35.

⁴⁴ *Id.*

CCL Licensing Enforcement Services with a recommendation that it take actions it deems appropriate.”⁴⁵

On January 5, 2022, Lennar responded to CCLD, again vociferously objecting to CCLD’s reading of the building code.⁴⁶ Lennar argued that the Department approved all aspects of the permitting for the repair of the home’s HVAC system, and Lennar relied on those approvals (express or implied).⁴⁷ Lennar argued that the Department provided no training over the prior seven years about the interpretation of the mechanical code CCLD was now employing.⁴⁸ Lennar argued that the code interpretation CCLD was employing was unnecessary to ensure homes, generally, “maintain reasonable indoor room-to-room interior temperature consistency.”⁴⁹ Lennar argued that CCLD’s “new interpretation” would “drastically increase costs” to homebuyers.⁵⁰ According to Lennar, the “new interpretation” would “result in residential HVAC systems that provide less comfort for homebuyers than under current custom and practice.”⁵¹ In Lennar’s response paperwork, it made the following statement in regards to the balancing of the ventilation system within +/- 10 percent of the system’s design capacity, which CCLD found did not comply:

The Broan HRV ventilation system’s intake and exhaust airflows were balanced to within 10% of the system’s design capacity. This system complies with the code requirements as described in [Department] approved training for over 5 years.

[The Department] is now creating a new code interpretation that it claims mandates that each supply and return duct in the forced air circulation system be balanced to within +/- 10% of the design airflow target. As we have stated previously, this is an inconsistent reading of the language of the code and inconsistent with [the Department’s] industry training and documentation for over 5 years. Nowhere in the code is there a room-level airflow target defined, other than a ventilation rate for unfinished basements in R403.5 (0.02 cfm per square foot or a minimum of 1 supply duct and 1 return duct). The code makes a clear distinction between a ventilation system and a forced air circulation system.

While we have outlined the unintended consequences of [the Department’s] new interpretation of this code provision and the difficulties/costs the industry will face in attempting to comply with this new interpretation, please see attached Exhibit 5a for a list of registers and their design airflow targets with a range of +/- 10% and the most recently measured values at this home.⁵²

⁴⁵ *Id.* (emphasis in original).

⁴⁶ *Id.*, Ex. 36.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis in original).

⁵² *Id.*

Project 17658 51st St. NE
CFM Tolerance +/- 10% of Design target from DLI's new interpretation of 2015 MN Mechanical and Energy Code

Mfg Blower Data (@0.70 in. w.g.)
Estimated Humidifier Bypass
Net Blower Output

1150 cfm
0 cfm
1150 cfm

Register Name	Heating Load (Btuh)	% of Heating Load	Heating (CFM)	Cooling Load (Btuh)	% of Cooling Load	Cooling (CFM)	Average (CFM)	Normalized (CFM)	DI New Code Interpretation Maximum Airflow (CFM)	DI New Code Interpretation Minimum Airflow (CFM)	Measured CFM	Within DI New Code Interpretation Airflow Range?
Basement (B Bath)	11,741	20.8%	239	2,413	9.1%	105	172	172	189	155	44	No
Bath (3/4 Bath - Study)	1,379	2.4%	28	405	1.5%	18	23	23	25	21	24	Yes
Bath 3 (B&J Bath)	644	1.1%	13	191	0.7%	8	11	11	12	10	35	No
Bedroom 2	2,191	3.9%	45	2,632	9.9%	114	79	79	87	72	24	No
Bedroom 3	2,990	5.3%	61	2,530	9.6%	110	85	85	94	77	36	No
Bedroom 4	4,827	8.5%	98	2,775	10.5%	121	109	109	120	98	85	No
Closet 3 (CLST - Bed 3)	1,676	3.0%	34	516	2.0%	22	28	28	31	25	15	No
Closet-A (CLST - Mud)	1,148	2.0%	23	125	0.5%	5	14	14	16	13	23	No
Dining	686	1.2%	14	408	1.5%	18	16	16	17	14	18	No
Dinette (Nook)	1,864	3.3%	38	1,483	5.6%	64	51	51	56	46	30	No
Foyer	2,205	3.9%	45	799	3.0%	35	40	40	44	36	30	No
Great Room	2,321	4.1%	47	1,391	5.3%	60	54	54	59	48	42	No
Great Room-A	2,321	4.1%	47	1,391	5.3%	60	54	54	59	48	48	No
Kitchen	3,429	6.1%	70	2,122	8.0%	92	81	81	89	73	30	No
Laundry	1,470	2.6%	30	907	3.4%	39	35	35	38	31	15	No
Mud Room	1,316	2.3%	27	233	0.9%	10	18	18	20	17	24	No
Owners's Bath	1,450	2.6%	29	425	1.6%	18	24	24	26	22	22	Yes
Owners's Closet	2,315	4.1%	47	675	2.6%	29	38	38	42	34	30	No
Owners Suite	2,712	4.8%	55	1,575	6.0%	68	62	62	68	56	32	No
Owners Suite-A	2,712	4.8%	55	1,575	6.0%	68	62	62	68	56	39	No
Pdr 2 (3/4 Bath - Bed2)	1,154	2.0%	23	188	0.7%	8	16	16	17	14	9	No
Study	3,995	7.1%	81	1,700	6.4%	74	78	78	85	70	57	No
Supply Total	56,545	100.0%	1,150	26,458	100.0%	1,150	1,150	1,150	1,265	1,035	712	No

Return Air	Htg load (Btuh)	% of Htg load	Heating (CFM)	Cooling Load (Btuh)	% of Cooling Load	Cooling (CFM)	Average (CFM)	Normalized (CFM)	ACCA Standard 5 Maximum Airflow (CFM)	ACCA Standard 5 Minimum Airflow (CFM)	Measured CFM	Within ACCA Standard 5 Airflow Range?
Basement	13,120	23.2%	267	2,818	10.7%	122	195	195	214	175	127	No
Study	5,859	10.4%	119	3,183	12.0%	138	129	129	142	116	105	No
1st Floor Hall	5,893	10.4%	120	2,480	9.4%	108	114	114	125	102	96	No
Great Room	3,007	5.3%	61	1,799	6.8%	78	70	70	77	63	66	Yes
Great Room-A	4,526	8.0%	92	2,190	8.3%	95	94	94	103	84	70	No
Laft	2,624	4.6%	53	1,095	4.1%	48	50	50	56	45	55	Yes
Bed2	2,191	3.9%	45	2,632	9.9%	114	79	79	87	72	54	No
Bed3	4,666	8.3%	95	3,046	11.5%	132	114	114	125	102	55	No
Bed4	5,471	9.7%	111	2,966	11.2%	129	120	120	132	108	89	No
Owners	5,424	9.6%	110	3,150	11.9%	137	124	124	136	111	67	No
Owners-A	3,765	6.7%	77	1,100	4.2%	48	62	62	68	56	50	No
	56,545	100.0%	1,150	26,458	100.0%	1,150	1,150	1,150	1,265	1,035	928	No

Exhibit 5a⁵³

Lennar also stated, with regard to room temperatures below 68 degrees:

Any rooms in the home that have temperatures below 68 degrees are the result of a thermostat set at too low of a temperature. This causes the system to turn off before the room is heated to be above the code minimum temperature. During a recent HVAC service call on a day with an outdoor temperature of 10 degrees F, the home[']s temperature increased from 68 degrees F to 71 degrees F while the system was set to operate continuously for testing. Room-to-room temperatures were within 2-3 degrees. The HVAC system in this home is properly designed and installed to satisfy the temperature requirement of Section 309.1 of the 2015 MN Mechanical Code.⁵⁴

On January 25, 2022, CCLD again provided Lennar with a detailed correction order.⁵⁵ This communication, like all prior communications CCLD sent to Lennar, was copied to Geske.⁵⁶ In particular, the correction order found that the total ventilation rate of 117 CFM was less than the required rate of 190 CFM for a dwelling the size of the

⁵³ *Id.*

⁵⁴ *Id.*, Ex. 37.

⁵⁵ *Id.*

⁵⁶ *Id.*

home.⁵⁷ In addition, most rooms of the home failed to meet the required air flow requirements of +/- 10 percent of the normalized design.⁵⁸ CCLD found that, when tested, the majority of rooms of the home failed to maintain the required temperature.⁵⁹ CCLD stated:

[T]he installation approvals extended previously by the City of Otsego for the air distribution system, space heating system and ventilation air system installed in the structure that is the subject of this notice are invalid in accordance with the 2015 MN Rule 1300.0210, Subpart 1.⁶⁰

CCLD responded to Lennar's critical comments on the requirement for registers with airflow targets within +/- 10 percent of design range, as follows:

This refers to the mechanical ventilation requirements in Section R403.5 of the [Minnesota Residential Energy Code] MREC which specifies the minimum outdoor air in the mechanical ventilation system, which is a combination of the HRV and furnace/AC blower duct system. Specifically, Section R403.5 requires that the air intake is within 10% of the exhaust output for the HRV system. In addition, Section 309.2.1 of the 2015 MN Mechanical Code (MMC) requires airflow rates within +/- 10 percent of the design capacities, which means each supply and return opening in the house shall be measured to confirm that they provide airflow within +/- 10 percent of the normalized Cfm design capacity in Exhibit 5a.⁶¹

CCLD further stated:

Measuring the airflow of each supply and return opening in the house to confirm that they provide airflow within +/- 10 percent of the normalized Cfm design capacity according to Section 309.2.1 of the MMC verifies that the HVAC system complies with Section 603.1 of the MMC based on the definitions of "air distribution system" and "conditioned space" in the MMC.⁶²

Lennar's plan for addressing the corrective action required by CCLD was due for review by February 11, 2022.⁶³ On that date, Lennar's attorney submitted its response.⁶⁴ The response reflected Lennar's previous statements to CCLD, and specifically alleged that the Department was engaging in unpromulgated rule-making with its "new

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Minn. R. 1300.0210, subp. 1 (2021), provides that a building official's "[a]pproval as a result of an inspection is not approval of a violation of the code or of other ordinances of the jurisdiction. Inspections presuming to give authority to violate or cancel the provisions of the code...are not valid."

⁶¹ *Id.* The second sentence of this quote was repeated at least once on another page of the document.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, Ex. 39.

interpretation” of Minn. R. 1300.0309 (2021).⁶⁵ Based on that position, Lennar refused to comply with CCLD’s correction order.⁶⁶ Lennar, through counsel, advised the Department that it, and Smedberg, wanted the HVAC permit closed – Smedberg specifically so that the home could be put on the market.⁶⁷ Included in Lennar’s counsel’s response was a response by DPIS, which concluded:

As an active participant in the homebuilding industry in Minnesota, we are unaware of any application of this asserted new code interpretation since the 2015 MN codes were adopted. We have neither seen any publication of a CCLD room-level balancing report nor been made aware of any training provided by CCLD on how to achieve room-level air balancing within the +/- 10% threshold; nor any analysis on how to comply with this new interpretation of code, nor consideration of the costs of implementation or even the need for this new interpretation, let alone any consideration of industry input on best practices in this area.⁶⁸

On March 7, 2022, the Director of CCLD, Scott McLellan, provided another detailed explanation for the Department’s position, and emphasized that it has not implemented a “new interpretation” of the building code.⁶⁹ McLellan reiterated CCLD’s position that while it welcomed further discussions with Lennar, it still expected compliance with the building code as CCLD had repeatedly set forth.⁷⁰ Specifically, the letter stated:

The fact remains that the HVAC system in this home is not performing as intended or expected by the State Building Code, and the department expects Lennar to comply with any correction orders issued by the City of Otsego’s building official to bring the system into compliance with the code.⁷¹

On April 15, 2022, Geske wrote to Smedberg, Lennar, Elander, and Engineering Systems Inc. (ESi), an engineering firm hired by Smedberg.⁷² The letter advised the recipients of the procedure Geske was going to use to make a decision on the compliance of the HVAC system in Smedberg’s home.⁷³ Geske stated that he would examine “the evidence submitted to date” to determine if it was “sufficient to demonstrate compliance or non-compliance of the System.”⁷⁴ Geske gave the letter recipients two weeks to complete any additional testing anyone wanted to have completed and considered.⁷⁵ Geske gave the letter recipients a deadline of May 6, 2022, to provide:

⁶⁵ *Id.* at 2.

⁶⁶ *Id.*

⁶⁷ *Id.* at 2-3.

⁶⁸ *Id.*, Ex. 29, DPIS Response at 6.

⁶⁹ *Id.*, Ex. 40.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, Ex. 41.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

one final comprehensive written submission containing any and all information, including code interpretations, measurements, testing, engineering reports, historical data, and other information that the parties would like me to consider.⁷⁶

Then, by May 13, 2022, “each party [was] to provide a written response to the submissions submitted by the other parties.”⁷⁷ He stated he would “consider the record closed after the receipt of the responses.”⁷⁸ Geske further stated:

Within fourteen days of the close of the record, May 27, 2022, I will render my written decision, which shall include my assessment of the data submitted and *my interpretation* of the applicable code provisions. The parties shall abide by my decision, subject to a party’s right to appeal.⁷⁹

Finally, Geske stated that the parties could appeal Geske’s decision to the State Appeals Board because Otsego did not have a municipal board of appeals.⁸⁰

ESi conducted an inspection of the HVAC system on May 12, 2023.⁸¹ The inspection consisted of: use, observations, and photographs of the HVAC equipment; measurements of temperatures, pressures, and airflow within the home; and review of the December 2021 testing data.⁸² ESi stated the December testing data showed the furnace did not function for winter-heating within the manufacturer’s specifications.⁸³ Among other issues, the December airflow was “well below the 1260 CFM” expected based on the external air-pressure.⁸⁴ Moreover, “[t]he design static pressure [did] not accurately reflect the current operating static pressure of the system,” which also “exceeded the capabilities of the furnace blower.”⁸⁵

ESi concluded that the HVAC system did “not provide the required distribution of air in violation of 2015 Minnesota Mechanical Code section 603.1.”⁸⁶ Specifically, according to ESi, and consistent with the direction of CCLD:

The system must provide air flow rates within +/- 10 percent of the design capacities for each space. There are no exceptions for residential structures.⁸⁷

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (Emphasis added.)

⁸⁰ *Id.*

⁸¹ *Id.*, Ex. 42.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

ESi stated further:

The code provision [§ 309.2.1 of the MMC] is not limited to the system capacities as a whole...and applies to the airflow rates throughout the entire system. Each supply and return outlet shall be balanced to within +/- 10% of the design capacity in order to be compliant.⁸⁸

The HVAC system in Smedberg's home, according to ESi, was inadequate, as demonstrated by some rooms being "far short of the required airflow."⁸⁹

DPIS, in a letter dated May 20, 2022, and based on its prior inspection in 2021, maintained that the HVAC system met the size and load requirements pursuant to ACCA Manual S calculations, and therefore met Minn. R. 1322.0403, subp. 2 (2021), R403.5.17(A).⁹⁰ DPIS did not modify its approach, despite CCLD's instructions, and continued to use the ACCA standard of +/- 20 percent or 25 CFM for proper air balance of air supply registers and return grills and continued to argue the system met state building code requirements.⁹¹ DPIS included a list of 20 critiques of ESi's May 12 inspection.⁹²

On May 27, 2022, Smedberg and Lennar each submitted rebuttal reports from their "engineering experts" to Geske.⁹³ Then, on June 10, 2022, Geske closed the HVAC permit, determining that the work done in September 2021 was compliant with the state building code.⁹⁴ Geske noted that the Department had agreed with the compliance of the work in September 2021, and he did not address CCLD's subsequent instructions concerning temperature control balancing.⁹⁵ In fact, Geske did not even cite to the controlling rule, Minn. R. 1346.0309.⁹⁶ Rather, Geske determined that he found Lennar's alternate method to determine compliance based on ACCA Standard 5 concerning target airflows was "satisfactory" and "is at least the equivalent" of the code standard in terms of "quality, strength, effectiveness, fire resistance, durability, and safety."⁹⁷

Otsego does not have a local board of appeals. Therefore, Smedberg appealed Geske's determination to the State Building Code Board of Appeals (Board). A hearing was held before the Board on October 4, 2022.⁹⁸ Because Smedberg was appealing Otsego's building official's determination, the Board treated the building official - Geske – as a party to the appeal.⁹⁹ The Board agreed with Smedberg and, on October 24, 2022,

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at Ex. 43.

⁹¹ *Id.* DPIS used its own interpretation of the state building code, not the interpretation used by CCLD.

⁹² *Id.*

⁹³ *Id.* at Ex. 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at Ex. 1.

⁹⁹ *Id.*

issued a written order on its decision.¹⁰⁰ Geske then made this appeal, claiming to be an “aggrieved party” under Minn. Stat. § 326B.139.

II. Geske is not an “aggrieved party” under Minn. Stat. § 326.139, and therefore lacks standing to appeal the Board’s decision.

Minn. Stat. § 326B.139 provides that “[a] person aggrieved by the final decision of any local or state level board of appeals as to the application of the code...may, within 180 days of the decision, appeal to the commissioner.”

As the facts above demonstrate, this matter is a dispute between a homeowner – Smedberg – and a homebuilder – Lennar. Smedberg had issues with the distribution of heat in his home, and Lennar’s attempts to resolve it were not satisfactory to Smedberg. Geske opened a permit for the work to correct the matter and closed the permit following the initial repair work. Moreover, Geske made this determination in consultation with Department staff. Because Smedberg remained dissatisfied, the Department took another look at the matter and asked Geske to reopen the permit so that repairs could be made to bring the HVAC system up to code. The Department gave repeated and specific instruction to the builder and its subcontractors about the code requirements. Lennar and its subs disagreed with the Department.

The Department ultimately stated it expected “Lennar to comply with any correction orders issued by the City of Otsego’s building official to bring the system into compliance with the code.”¹⁰¹ Despite the Department’s specific code interpretations, the local building official ignored them when he made the determination in the spring of 2022. This prompted Smedberg’s appeal to the Board, consistent with Minn. R. 1300.0230.

The rule of law is “that an ‘aggrieved party’ to whom the right of appeal is granted under a statute is one who is *injuriously or adversely affected by the judgment or decree when it operates on his rights of property or bears directly upon his personal interest.*”¹⁰²

Geske’s arguments that he has been “adversely affected” by the Board’s decision is not convincing because the adverse effect he claims is, at best, on his public duty, not his property rights or personal interest. As Geske correctly notes, the question below was about enforcement and administration. These are his duties as a public official. How he is instructed to apply the law is not about his property or other personal interests. The only persons whose property rights or personal interests were affected by the Board’s decision were Smedberg and the homebuilder, Lennar; neither of whom appealed the Board’s decision. Moreover, the challenges Lennar will face in complying with the building code are not Geske’s concern.¹⁰³

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at Ex. 40.

¹⁰² *In re Getsug*, 186 N.W.2d 686, 689 (Minn. 1971) (emphasis added).

¹⁰³ See Minn. R. 1300.0110, subp. 9 (2021), Building officials are not personally liable “for any damage accruing to persons or property as a result of any act or by reason of an act or omission in the discharge of official duties.”

In addition, the facts and Geske's argument runs counter to the legal analysis supplied by the Minnesota Supreme Court in *Minnesota Water Resources Bd. v. Traverse County*, 177 N.W.2d 44 (Minn. 1970). In that case, a county wanted a watershed district created by the Minnesota Water Resources Board.¹⁰⁴ The Board held hearings and multiple counties were involved, as their territory would be impacted. The Board made a decision, but two impacted counties and some property owners appealed the Board's decision to District Court.¹⁰⁵ The District Court changed the Board's decision and the Board appealed to the Minnesota Supreme Court.¹⁰⁶

A key issue the Court decided was whether the Board was "aggrieved" or otherwise a party with standing to appeal the District Court's decision.¹⁰⁷ To make this determination, the Court reasoned: "[t]he right of appeal depends largely on whether express provision is made in the particular statute involved."¹⁰⁸ When a statute is broadly referring to any "party aggrieved," the Court, with some ambivalence, said the test:

seems to be whether the agency is created to represent the interests of the public or whether it is to act only in deciding controversies between other entities of government or individual members of the public.¹⁰⁹

Based on this approach, the Court determined that the Minnesota Water Resources Board operated quasi-judicially more than administratively, and therefore was not an aggrieved party.

In this case, the local building official, rather than follow the direction of the Department staff in administering the state building code, specifically acted in a quasi-judicial manner. Geske advised the multiple parties involved that he was employing certain procedures to make a decision. He invited them to submit facts and arguments about the building code, and then made his decision. The decision favored the businesses who would have been required to continue to repair the non-compliant HVAC system (as determined by CCLD and, subsequently, the State Board) had Geske followed the Department's direction. By removing himself from a purely administrative role and taking on the role of arbiter, and making a determination in clear contradiction to direction provided by the Commissioner's staff, Geske was acting quasi-judicially and cannot, therefore, be an "aggrieved" party under Minn. Stat. § 326B.139.

Additionally, the broader regulatory framework for the Department's administration of the building codes supports the position that Geske is not a person aggrieved for purposes of this appeal. First, in the rule creating an appellate board, the local building official is an ex officio member of the board.¹¹⁰ The building official works under the authority and supervision of the Commissioner and the state building official. He may be

¹⁰⁴ *Minn. Water Res. Bd.*, 177 N.W.2d 44, 45 (Minn. 1970).

¹⁰⁵ *Id.* at 45-46.

¹⁰⁶ *Id.* at 46.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Id.*

¹¹⁰ Minn. R. 1300.0230, subp. 1 (2021).

disciplined by the Commissioner.¹¹¹ It is the Commissioner who has the final interpretive authority of the state building code, not the local building official.¹¹² In this case, the Department and the State Building Official, under the authority of the Commissioner, repeatedly articulated the Department's interpretation of the code. Geske ignored the Department's interpretation and, if he had concerns prior to April 2022, took no steps to clarify that interpretation or otherwise address his concerns with the State Building Official or under the mechanism available at Minn. Stat. § 326B.127, subd.5. Over the six-month period Lennar and its subcontractors and Department staff had been communicating about the building code standard in question, Geske could have brought any concerns about the Department's interpretation to the Construction Codes Advisory Council or to the Commissioner's Final Interpretive Committee.¹¹³ Geske did not do so.

As stated above, the Commissioner is the final authority on building code interpretation. Subordinates are expected to follow.¹¹⁴ If a municipality, through its building official, "is not properly administering and enforcing the code . . . the commissioner may have [those duties] undertaken by the state building official or by another building official certified by the state."¹¹⁵ In such cases, if the municipality disagrees with the commissioner, it is entitled to a contested case – an episode its local building official would likely be involved in.

For these reasons, it is the view of the Judge that the Geske lacks standing to challenge the Board's determination.

III. Intervention by Housing First or Otsego is not proper.

A person not named in a notice of hearing and "who desires to intervene in a contested case as a party" must serve and file a petition to intervene.¹¹⁶ A judge must "allow intervention upon a proper showing" how the petitioner:

- May have their legal rights, duties, or privileges determined or affected by the contested case;
- May be directly affected by the outcome of the case; or
- Is authorized to participate by statute, rule, or court decision.¹¹⁷

First, because Geske lacks standing to appeal, it is highly questionable whether there is a live case. Without a live controversy to intervene in, any petition to intervene is necessarily moot.

Housing First and Otsego each contend they have standing independent of Geske's, and therefore should be allowed to intervene. In looking at the factors under

¹¹¹ See Minn. Stat. §§ 326B.121, subd. 3; .127; .133, subds. 3, 5, 6 (2022).

¹¹² Minn. Stat. § 326B.127, subd. 5 (2022).

¹¹³ See Minn. Stat. §§ 326B.07. .127, subd. 5.

¹¹⁴ Minn. Stat. §§ 326B.121, subd. 3; .127, subd. 5; 133, subd. 5.

¹¹⁵ Minn. Stat. §§ 326B.121, subd. 3.

¹¹⁶ Minn. R. 1400.6200 (2021).

¹¹⁷ *Id.* at subp. 1.

Minn. R. 1400.6200 and petitions to intervene, the Judge cannot conclude that either Housing First or Otsego is a proper party with full rights.

Housing First does not seek to become a full party. The organization is concerned with the impact of the Board's decision "on training, testing, home designs," the cost of homes, and homeowners.¹¹⁸ While these policy questions are important, they are not the basis upon which a contested case under Minn. Stat. § 326B.139 could be commenced or decided. A contested case is determined based on the law as written, not the law as a party wishes it to be. The considerations Housing First wishes to address are appropriate for another forum, not as part of this case.

Otsego's Petition to Intervene is a bit more compelling, but not sufficiently so. The City argues that it is a proper aggrieved party because its personal interests will be impacted by whether the permit in this case remains open.¹¹⁹ According to the City, the open permit requires the use of additional resources for inspections, possible additional permits, and the proper enforcement of building codes.¹²⁰

Otsego stands in the same place, however, as its local building official. Geske must enforce the building code, as interpreted by the Commissioner, on behalf of the City.¹²¹ Thus, for the same reasons Geske lacks standing in this matter, the City also lacks standing, and intervention is not appropriate. Moreover, the City stated on May 5, 2023, that it did not take a position on the outcome of the case.¹²² Given the City is not arguing for a specific outcome of the case, that is further reason intervention is not appropriate. Moreover, because Geske is Otsego's agent, its building official, it is questionable whether he can legally hold a different position than the municipality in this matter.

IV. Conclusion

For the reasons explained above, the petitions to intervene are denied. Because the Judge finds Geske lacks standing to appeal the State Board's Order, and because the Judge advised the parties on May 5 that he would not dismiss this matter before fully considering all reasonable arguments pertaining to the controversy, he invites a motion to dismiss.

J. R. M.

¹¹⁸ Housing First's Petition to Intervene at 3 (Mar. 27, 2023).

¹¹⁹ City of Otsego's Petition to Intervene at 3-4 (May 3, 2023).

¹²⁰ *Id.* at 4.

¹²¹ Minn. Stat. § 326B.133.

¹²² Recording of prehearing conference (May 5, 2023) (on file with the Office of Admin. Hearings).