

ERNEST LOGAN WELDE
I.D. No. 315012

ALEXANDER G. BOMSTEIN
I.D. No. 206983

JOSEPH O. MINOTT
I.D. No. 36463

Clean Air Council
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
Telephone: (215) 567-4004

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CLEAN AIR COUNCIL
135 S. 19th St., Suite 300
Philadelphia, PA 19103

Petitioner,

Docket No. _____

v.

DEPARTMENT OF LABOR AND
INDUSTRY OF THE COMMONWEALTH
OF PENNSYLVANIA,

UNIFORM CONSTRUCTION CODE
REVIEW AND ADVISORY COUNCIL OF
THE COMMONWEALTH OF
PENNSYLVANIA,

Respondents.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S APPELLATE JURISDICTION

I. INTRODUCTION

1. Petitioner Clean Air Council (the "Council") respectfully petitions this Court under Chapter 15 of the Pennsylvania Rules of Appellate Procedure to reverse the May 20, 2015 determination of the Uniform Construction Code Review and Advisory Council (the "RAC")

rejecting the 2015 triennial building code revisions issued by the International Code Council (“ICC”), and undo the damage done over the last few years to the building code review process.

2. The Council brings this lawsuit on behalf of itself and its members, who have an interest in protecting the right of all to breathe clean air.

3. The RAC’s failure to adopt the most recent triennial changes will cause all buildings in Pennsylvania that are constructed or reconstructed starting on December 31, 2015, to be built using the 2009 building codes instead of the 2015 building codes.

4. The 2015 building codes would have required, among other things, more stringent energy efficiency standards than the 2009 building codes require.

5. These modern efficiency standards would have lessened the onsite energy demands and offsite power generation needs for buildings throughout the state, lowering air pollution levels for all Pennsylvania, including Clean Air Council’s members.

6. The RAC’s failure to adopt these provisions resulted in large part from legislation designed as if intended to make the RAC review process unworkable, and a statutory interpretation by the Department of Labor and Industry preventing the RAC from reviewing any but the latest building code provisions.

7. The result was a disorderly process contrary to any concept of proper governance, which violated the Council’s statutory and constitutional rights.

8. The Council respectfully asks for relief from these illegal acts and, in particular, the May 20, 2015 RAC determination.

II. JURISDICTION

9. This Court has appellate jurisdiction over this Petition for Review pursuant to 42 Pa. C.S. § 763(a)(1), as this is a direct appeal from a final decision of a government agency.

10. The decision in question is the rejection of the 2015 building codes by the RAC on May 20, 2015. *See* Exhibit 1 at 306.

11. The RAC is not termed a Commonwealth agency, and was originally established as a subordinate body to the Department of Labor and Industry (the “Department”).

12. However, Pennsylvania Act 1 of 2011 stripped the Department of the power to reject or accept the recommendations of the RAC. 35 Pa. C.S.A. § 7210.304.

13. The RAC’s decision regarding updating Pennsylvania’s construction codes is final. The Department now *must* promulgate the RAC’s decision *without change*. The RAC’s decision is also exempt from the Commonwealth Documents Law and the Commonwealth Attorneys Act. *Id.*

14. As such the RAC’s decision is a final order appealable to the Commonwealth Court. *See* 42 Pa. C.S. § 763(a)(1).

15. Moreover, the RAC provides the Council no administrative remedy for the relief they seek herein, as the RAC was never designed to have a process whereby someone could object to a decision of the RAC and be heard with due process.

16. The Council cannot seek relief from the Department because the Department is powerless to effect the reversal of the RAC determination, as explained above. Any such efforts would be futile. *See Success Against All Odds v. Dep’t of Pub. Welfare of Com.*, 700 A.2d 1340, 1349 (Pa. Commw. Ct. 1997) (overruling preliminary objections as to failure to exhaust administrative remedies upon determination that the available remedies were “clearly inadequate”).

17. Therefore, jurisdiction lies with this Court as the appropriate body to hear the Council’s Petition to Review the RAC determination.

III. PARTIES

18. Clean Air Council is a Pennsylvania non-profit corporation started in 1967, with a mission to protect everyone's right to breathe clean air.

19. The Council has its principal office and place of business located at 135 S. 19th St., Suite 300, Philadelphia, PA 19103.

20. The Council has over 16,000 members and supporters throughout Pennsylvania.

21. The Department of Labor and Industry of the Commonwealth of Pennsylvania is an administrative agency of the Commonwealth.

22. The Department is vested with the authority and responsibility to administer and enforce the requirements of the Pennsylvania Construction Code Act, Act 45 of 1999, codified at 35 P.S. §§7210.101 to 7210.1103 (the "PCCA").

23. The Uniform Construction Code Review and Advisory Council is an independent administrative agency of the Commonwealth established pursuant to Act 106 of 2008.

24. The RAC is vested with the independent authority and responsibility to review the ICC model codes every three years, and determine if Pennsylvania should update the UCC by adopting the revisions in part or in whole. 35 P.S. §7210.107.

IV. STATEMENT OF FACTS

25. The PCCA established the requirements for the Uniform Construction Code ("UCC"), which sets the minimum legal standard to which buildings in Pennsylvania must be constructed.

26. The General Assembly's stated intent and purpose for the PCCA is:

- a. To provide standards for the protection of life, health, property and environment and for the safety and welfare of the consumer, general public and the owners and occupants of buildings and structures.

- b. To encourage standardization and economy in construction by providing requirements for construction and construction materials consistent with nationally recognized standards.
- c. To permit to the fullest extent feasible the use of state-of-the-art technical methods, devices and improvements consistent with reasonable requirements for the health, safety and welfare of occupants or users of buildings and structures.
- d. To eliminate existing codes to the extent that these codes are restrictive, obsolete, conflicting and contain duplicative construction regulations that tend to unnecessarily increase costs or retard the use of new materials, products or methods of construction or provide preferential treatment to certain types or classes of materials or methods of construction.
- e. To start a process leading to the design, construction and alteration of buildings under a uniform standard.

35 Pa. Cons. Stat. Ann. § 7210.102.

27. The PCCA was amended by Act 106 of 2008, which established the RAC, and again by Act 1 of 2011, which significantly changed the process for adopting new building codes.

A. The Pennsylvania UCC Is Based On The International Code Council Model Construction Codes

28. Pennsylvania, like many other jurisdictions, uses the model construction codes published by the International Code Council (“ICC”), a non-profit standards setting organization.

29. The model codes are updated by the ICC’s voting members every three years.

30. Anyone may participate in the ICC code development process. However, only governmental members—primarily code officials—have the authority to vote on proposed changes to the model codes.

31. Anyone may submit a proposed code change. Subcommittees with participants from across the construction industry review the proposed code changes.

32. At open, public code hearings, the proposed code changes are reviewed by the ICC voting members, and the voting members decide which code changes to accept.

33. After the changes have been adopted, the ICC publishes the new code edition.

34. Although the ICC creates the model codes, jurisdictions have independent code review and adoption processes to determine whether and how to use the model codes to update their building code laws.

B. The UCC Review And Advisory Council Is Supposed To Update The UCC To Keep It Current With The ICC Model Codes, Less Any Provisions That Are Not Appropriate For Pennsylvania

35. Pursuant to the PCCA, in Pennsylvania the review and adoption of building codes is performed by the RAC.

36. The RAC is made up of nineteen members from different segments of the construction industry, each seat allocated to an individual with specific credentials unique to that seat, as spelled out in detail at § 7210.107 of the PCCA.

37. Of the nineteen seats, four go to residential contractors (residential general contractor, residential contractor, modular housing representative and manufactured housing representative), one commercial general contractor, three to inspectors, one to a building code official, two to architects (one commercial and one residential), four to engineers, and four to elected officials.

38. The RAC members are appointed by the Governor.

39. The RAC has two main, and related, responsibilities: (1) gather information regarding proposed changes to the UCC, review and discuss that information, and make recommendations concerning whether or not to adopt those changes to Department, the Governor, and other

stakeholders; and (2) review the ICC's amendments to the codes every three years. 35 Pa. Cons. Stat. Ann. § 7210.107 (b).

C. Prior To Act 1, The Code Review Process Was Effective And In Line With Other States

40. Prior to Act 1, the PCCA was updated in a similar fashion to many other states.

41. The RAC had 12 months following publication by the ICC to review the new model code edition.

42. The RAC reviewed the new code edition and decided whether any provisions should be excluded from the PCCA (the "Opt-Out Process").

43. If a provision was excluded, the existing provision remained in place. Otherwise, the new edition replaced the existing code.

44. In 2008, the RAC reviewed the 2009 model codes under the Opt-Out Process. The RAC adopted all of the 2009 model codes.

D. The Requirement To Install Fire Sprinklers In One- And Two-Family Dwellings Raises The Ire Of The Pennsylvania Builders' Association

45. The 2009 model codes required the installation of fire sprinklers in one- and two-family dwellings.

46. The Pennsylvania Builders' Association ("PBA") sued the Department in this Court, alleging, *inter alia*, that using the ICC codes was an improper delegation of authority and that the RAC's adoption of the 2009 codes was invalid.

47. This Court held that the RAC process and the adoption of the 2009 codes were proper. See Pennsylvania Builders Ass'n v. Dep't of Labor & Indus., 4 A.3d 215 (Pa. Commw. Ct. 2010).

48. Unsatisfied with this result, the PBA lobbied the General Assembly to amend the PCCA to ban requirements of fire sprinklers in one- and two-family dwellings.

49. HB 377 was introduced by Representative Garth Everett on January 31, 2011. HB 377 addressed three discrete issues that the PBA wanted excluded from the 2009 codes—fire sprinklers, log walls and manufactured housing. A copy of HB 377 as introduced is attached as Exhibit 2.

50. On April 6, 2011, Senator John Gordner introduced an amendment to HB 377 which completely overhauled the code review process to make it functionally impossible to update the UCC (the “Gordner Amendment”). HB 377 with the Gordner Amendment is attached hereto as Exhibit 3.

51. The Gordner Amendment was completely unrelated to the subjects of the original bill.

52. The Gordner Amendment made significant changes to the RAC’s duties including:

- Instead of deciding which provisions to exclude, the RAC would now be required to review every change in the new code edition and decide which provisions to include (the “Opt-In Process”).
- Unless a new code provision was voted in, the old code provision remained in place.
- Each code provision requires a two-thirds majority of the 19-member RAC for adoption.

53. The Gordner Amendment also provided:

The Council shall examine the triennial code revisions applying all of the following criteria:

- The impact that the provision may have upon the health, safety and welfare of the public.
- The economic and financial impact of the provision.

- The technical feasibility of the provision.

54. Many members of the General Assembly were concerned about the Gordner Amendment.

55. Representative John Maher asked for clarification about the scope of what the RAC was entitled to consider:

Mr. MAHER. If this bill were to become law and the RAC would look at the complete universe of changes from the International Building Code, the triennial changes, and if it found one of those elements undesirable in year 1, if the International Building Code was further revised so that in year 4, would the RAC be able to enact the revised element or would the RAC only be limited to whatever the amendment was to that element that was not originally adopted?

Mr. EVERETT. Mr. Speaker, it is my understanding that at any triennial update, that the RAC would be able to select the sections that it wants to be the Pennsylvania Uniform Construction Code and make those into the Uniform Construction Code of the Commonwealth of Pennsylvania.

Mr. MAHER. Thank you. So your understanding would be, as drafted, that each 3 years the RAC would have the opportunity for any given section to decide whether to proceed or not proceed?

Mr. EVERETT. Yes, Mr. Speaker.

House Legislative Journal, April 13, 2011 at 682, attached hereto as Exhibit 4

56. Just six days after the Gordner Amendment was introduced, HB 377 with the Gordner Amendment passed the Senate on April 12, 2011, and passed the House on April 13, 2011. A copy of HB 377 as passed by the Senate is attached hereto as Exhibit 5.

57. HB 377 became Act 1 of 2011 when Governor Tom Corbett signed it into law on April 25, 2011.

E. The RAC Is Unable To Review The 2012 Codes Under The Act 1 Process, Rejects All Code Provisions Instead

58. The 2012 edition of the model codes were published in or about June, 2011.

59. The RAC began its review process of the 2012 model codes in or about October, 2011.

60. There were more than 900 changes to the model codes from the 2009 edition to the 2012 edition.

61. The RAC established a protocol for reviewing the 2012 model codes. *See* Exhibit 6.

62. The RAC was unable to review and vote on the code provisions individually. Instead, the RAC voted on the codes as a block.

63. No code received the two-thirds majority necessary to pass.

64. The RAC chairman and other members stated publicly that they decided not to accept the 2012 codes due to time restraints: “We had a one-year timeframe, which is not enough for the council to do its work.” *See* WITF, “For state’s building code, consensus that review requires more time.” Sept. 24, 2013. Accessed on June 17, 2015 at <http://www.witf.org/state-house-sound-bites/2013/09/for-states-building-code-consensus-that-review-requires-more-time.php>.

65. Another RAC member, Joe Mingioni, stated that their decision not to adopt new codes was more based on policy than Act 1 requirements: “We did have a chance to look at them individually, but I think the sentiment was growing that this is all happening too fast and we need to stop this - we need to slow this down. Because we did not have enough time to review those thousand code changes, and it was daunting at that point.” *Id.*

66. There is no evidence that the RAC reviewed the 2012 code changes based on the three criteria that Act 1 mandates.

F. In 2015, The Act 1 Process Fails Again

67. On June 5, 2014, the 2015 edition of the model codes was published.

68. The RAC began its review of the 2015 model codes on October 22, 2014.

69. Throughout the year-long process, debate raged among the RAC members regarding the scope of their review. According to the meeting minutes from the November 19, 2014 meeting, “The Council and the public discussed the confusion surrounding code adoption and the

Department of Labor & Industry's promulgation of regulations. The public requested an example of how the RAC would adopt a code revision that was changed in 2012 and 2015." *See* Exhibit 7.

70. Many RAC members believed that they should review the whole 2015 edition, including any changes from 2009 to 2012. If they could not review the 2009 to 2012 changes, many RAC members felt that the resulting code would be impossible to comply with or enforce.

71. On information and belief, RAC counsel advised the RAC that it could only review the changes from the 2012 to the 2015 codes, not the changes from the existing PCCA (the 2009 codes) to the 2015 codes. At the December, 2014 meeting, then RAC chair George ("Gig") Settle:

[R]eiterated Labor & Industry and [RAC] attorneys' interpretation of what the [RAC] may adopt when reviewing the 2015 code revisions, which is that the [RAC] may only adopt the 2015 code revisions not the 2012 revisions where there is no 2015 update. He recommended that if a subcommittee is stuck on a revision to send it to him, and he will get an opinion from Labor & Industry on the revision.

Mr. Malot commented that he thinks, along with PABCO, the [RAC] has the authority to review all 2015 and 2012 code revisions.

See Exhibit 8.

72. There was a conversation among RAC Members on the confusion surrounding what they should be reviewing. "The [RAC] agreed to send a letter to the General Assembly from the entire [RAC] supporting the passage of Senate Bill 1023, so that the [RAC] may look back at the 2012 revisions and adopt a code that is clear and workable." *Id.*

73. On or about February 11, 2015 the RAC authorized its Legislative Working Group ("LWG") to send a letter on its behalf, to the General Assembly, stating that the RAC could not

fulfill its statutory requirements under the current statute and interpretation of the “latest triennial code revision” language by the Department.

74. On February 25, 2015, the LWG sent a letter to legislators and staff, consisting of both House and Senate Leadership, House and Senate Labor and Industry Committee members, and Representative Eli Evankovich. *See* Exhibit 9.

75. The letter stated:

On behalf of the Legislative Working Group of the Uniform Construction Code Review & Advisory Council (UCC RAC) we wish to notify the legislature that, in our professional opinion as construction industry experts, *the RAC is unable to effectively fulfill its obligation to review and update the Uniform Construction Code (UCC) without legislative change...* We have concluded that *if the RAC reviews and adopts code provisions in accordance with the current interpretation of Act 1, it will result in a construction code which is impossible to promulgate, to understand, to comply with or enforce.* Such an outcome is surely contrary to the General Assembly’s intent in creating the UCC. An amendment to the Act is required as a long-term solution.

Id. at 4 (emphasis added).

76. The LWG illustrated the difficulty with Act 1 and the Department’s interpretation with the following example of two hypothetical code sections, “Provision 2012” and “Provision 2015”:

- a. Provision 2012 was revised from the 2009 edition, and the change was first included in the 2012 codes.
- b. Since the 2009 codes are still in effect, Provision 2012 is not included in the UCC.
- c. Provision 2015 was revised from the 2012 edition, and the change was first included in the 2015 codes.
- d. Provision 2015 references Provision 2012.

- e. In 2015, the RAC reviews and adopts Provision 2015, but cannot review or adopt Provision 2012.

Results:

- a. Provision 2015 is impossible to comply with or enforce because it depends on Provision 2012 which does not exist in the UCC.
- b. Per the current Act, Provision 2012 can never be adopted by the UCC.
- c. The ICC code book publications only identify that Provision 2015 was revised, not prior Provisions, so there is no clear method to identify what exists or does not exist in the UCC.

Id. at 4-5.

77. After several more months of debate, on April 16, 2015, the Department issued a memo reaffirming its position that the RAC may only review changes from the 2012 to the 2015 codes:

[T]he Department has determined that the RAC is precluded from reconsidering changes from past triennial codes, which have not been previously adopted and are not included in the current changes under review, and may only review the changes in the newest, or “latest,” edition being reviewed.

April 16, 2015 Letter from Cindy E. Schaeffer to the RAC, attached hereto as Exhibit 14.

G. Despite Their Misgivings, The RAC Reviews The 2012-2015 Code Revisions, And Recommends Adoption Of More Than 90% Of Them

78. As it did with the 2012 codes, the RAC established a protocol to review the 2015 codes.

See Exhibit 10.

79. Unlike the 2012 codes, a subcommittee was established to review the new or changed provisions in each subcode. The subcommittee was charged with reviewing the code changes in the relevant code section and applying the three criteria required by Act 1.

80. The subcodes were divided as follows:

- Administrative Code
- International Building Code (IBC)-Fire Safety
- IBC-General
- IBC-Mean of Egress
- IBC-Structural
- International Existing Building Code (IEBC)
- International Energy Conservation Code (IECC)-Commercial
- IECC-Residential
- International Fire Code (IFC)
- International Fuel Gas Code (IFGC)
- International Mechanical Code (IMC)
- International Plumbing Code (IPC)
- International Residential Code (IRC)-Building
- IRC-Mechanical
- IRC-Plumbing
- IRC-Electrical
- International Wilderness Urban Interface Code (IWUIC)

81. The subcommittees filled out spreadsheets with their decisions and submitted their recommendations to the RAC. *See Exhibit 11.*

82. On information and belief, neither the RAC as a whole nor its subcommittees reviewed any of the provisions of the 2012 codes.

83. On information and belief, neither the RAC nor its subcommittees performed a technical review to determine whether, if the subcommittees' recommendations were adopted, the disconnect between the 2009-2012 changes and the 2012-2015 changes would result in a code that could not be complied with or enforced.

84. On information and belief, neither the RAC as a whole nor its subcommittees determined whether any provisions from the 2012 codes were required to make any 2015 provisions effective.

85. After their technical review, the subcommittees recommended adopting more than 90% of the changes from the 2012 to 2015 codes.

H. The RAC Voting Meeting Is A Fiasco, Chair Tom McCosby “Regrets” That He “Proceeds With Th[e] Voting Procedure”

86. At the April 22, 2015 meeting, the Chair and several other members of the RAC warned that the voting on the changes between the 2012 and the 2015 codes would be a futile exercise. See Exhibit 12.

87. On May 20, 2015, the RAC met to vote on the 2015 codes nonetheless.

88. Thomas McCosby, Chair of the RAC, opened the voting meeting with the following public testimony, a copy of which is attached as Exhibit 13:

In my opinion, the RAC had two goals when we started. First, we wanted to update the UCC including the improvements available in the 2015 International Codes Council codes while controlling costs with better technologies. Second, we hoped to be able to craft a residential code without all the sections that don't apply in Pennsylvania; either due to our geographic area or changes made by the legislature.

Most people are unaware that the UCC references language from 5 codes not just the 2009 IRC, which is our base code. Most of us had hoped to be able to incorporate all of the benefits from the various codes we are following into one simple document.

Unfortunately, the legislature was unable to rescue us from our current path. SB 1023 of 2014 would have given us the time and resources to fix the UCC but came up short when time ran out last fall.

Now HB 635, an even better fix, has been delayed resulting in our need to vote on the amendments we have before us and possibly resulting in three more years of limited changes. It is with deep regrets that I now proceed with this voting procedure.

89. Several RAC members stated at the outset that they would not vote for any of the 2015 code changes because of the deficiencies of Act 1 and the Department's interpretation thereof:

Brooke Rush (General Contractor): It's not another matter, it is the matter... We might as well start the discussion now... I will lay down the gauntlet. I plan on voting no [on all code changes] at this point. Because I cannot in good conscience, after three years of

going through all this stuff, vote on something that I do not understand how [the ultimate code] will end up as a result.

I believe [the Department of Labor and Industry] will do the best that they can, but I think we will have [a code] so confusing that there's not a person or a shareholder or stockholder that will be able to understand this process.

Christian McQuail (Residential Architect): Well said.

Gig Settle (Mechanical Engineer): That was my position for a long time.

Exhibit 1 at 40-41.

I. The RAC Votes On Code Provisions Without Any Rational Basis, Much Less The Analysis Required Under Act 1

90. The RAC discussed the merits of adoption or rejection of less than thirty provisions out of 1900. Except for those few provisions, all of the remaining provisions were voted on as blocks by subcode without explanation or discussion.

91. Despite the requirement of Act 1 that each provision be considered, the RAC did not consider each provision. *Id.* at 30:8-9.

92. Throughout the hearing, the RAC members expressed confusion repeatedly about the process for review, and the process changed several times during the voting meeting. For example, the following colloquy occurred about mid-way through the voting process:

Mr. Rush: Wait, what are we doing?

Mr. Black: Voting on the same thing.

Mr. Rush: Mr. Chairman, I hate doing this and – but especially since--.

Mr. Black: Whoa, whoa, whoa, we're still in the vote.

Mr. Rush: I just wanted to understand the procedure. Chris is abstaining?

Chair: I don't know. We don't know yet. I'm about to ask for the nos. All those opposed, signify by raising your right hand. Okay. Two abstained.

Mr. Rush: We can abstain on anything procedurally?

Chair: Yeah.

Mr. Rush: We can abstain even if we don't—we came here to abstain.

Mr. Fegley: I believe we have to have a reason for an abstention.

Mr. Black: No, you don't. No, you don't.

Mr. Rush: You can abstain from a vote because you don't like it.

Mr. Black: Absolutely.

[Vote is taken]

Mr. Fegley: I have question for legal counsel. Is that correct? My understanding is that you have to have a reason—you have to state a reason for abstaining, because otherwise everybody here could---

OFF RECORD DISCUSSION

Id. at 115:24-117:19. *See also, e.g.,* 74:15-84:5.

93. The RAC did not allow public comment before voting on specific provisions, which is contrary to the RAC's internal procedures and the statutory requirement for the public to have meaningful opportunity to participate. *See id.* at 122:21-123:11, 127:8-16, and 35 P.S. § 7210.107(i)(2).

94. The RAC had several off-record discussions about procedures that were not explained to the public upon their completion. *See, e.g. id.* at 122:21-123:10.

95. Despite the positive recommendations of the subcommittees that performed the review of the code provisions, the RAC rejected all but 16 of the provisions.

96. The RAC did not provide any reasoning for its decisions to approve the 16 code provisions beyond citing the cost savings from adopting such provisions.

97. The RAC did no analysis, held no discussion and provided no reasoning for its decision to reject the remaining 1884 code provisions except for general statements that the process set forth in Act 1 as interpreted by the Department was so flawed that more than a handful of code changes would be *impossible* to comply with or enforce. For example:

Chair: [The existing code] is screwed up in very, very small ways at this point.

[Adopting] 1900 amendments is screwed up in a lot of big ways.

Mr. Lavalley: In my mind [adopting 89 changes recommended by the subcommittee] even further complicates the process because I do believe, and I agree with Councilman McQuail, that this process is going to be very difficult to impossible to implement out in the field with, you know, not addressing specifically what occurred in the 2012 codes.

Id. at 61:12-62:8. *See also*, e.g., *id.* at 14:11-17, 16:7-11, 40: 21-41:11.

98. The RAC made no reference to the three factors in Act 1 in rejecting the remaining 1884 code provisions.

99. None of the chairs of the subcommittees made a presentation to the RAC to explain their recommendations.

100. The subcommittees did not present any information to the RAC about the 2012 code provisions, including any potential problems with integrating the 2012 and 2015 codes.

101. Many RAC members stated throughout the voting session that they had not reviewed the public comments or the provisions that they were considering.

102. At one point in the proceedings, Karen Welsh, the chair of the RAC subcommittee responsible for reviewing a particular provision, could not articulate the basis for adopting the provision. She asked if anyone else in the RAC had experience with the provision who could

help her out. No one on the RAC provided any additional insight into the provision at issue. Nonetheless, they voted to reject the provision.

103. Some of the members that were boycotting the entire process voted to adopt some or all of the 16 provisions that were ultimately adopted. These members provided no explanation of their reasoning for adopting some provisions, but abstaining or rejecting the majority of because of their position that Act 1 and the Department's position made it impossible to approve code changes.

J. The PBA Exerted Undue Influence On The Process

104. Of the 16 provisions approved, the majority was based on recommendations made by the Pennsylvania Builders Association.

V. OBJECTIONS TO THE DETERMINATION

105. The RAC's failure to adopt the 2015 building codes consigned a new generation of buildings constructed throughout the Commonwealth to be built under antiquated building codes with outdated energy efficiency standards.

106. The perpetuation of outdated energy standards means that Pennsylvanians will continue to suffer from needlessly excessive pollution both from onsite energy equipment and electrical power generation facilities.

107. The Council's mission is to protect everyone's right to breathe clean air.

108. The RAC's failure to adopt the latest codes injures the Council's ability to succeed in its mission and injures many members of the Council who live in Pennsylvania near new housing or downwind of polluting power plants.

109. The failure of the RAC to adopt the 2015 building codes resulted from the progressive breakdown of the process by which Pennsylvania considers and adopts building codes.

110. In essence, the Pennsylvania Legislature mandated that the RAC only adopt new code provisions by individualized determinations, but did not give the RAC the time and resources needed to make such reasoned determinations.

111. The Department then compounded the problem by not allowing the RAC to consider previous years' code revisions. This is problematic because the building codes are built much like some buildings themselves—stacked vertically layer by layer, each new layer resting on the one below. In restricting the RAC from considering earlier layers of codes, the Department made it basically impossible to adopt any new codes moving forward.

112. Finally, the RAC itself made unreasonable determinations regarding code provisions that lack substantial basis.

113. Because of all these problems and complications, the determination at issue here suffered from a series of errors, including the following: (1) decisions constituting arbitrary abuses of discretion; (2) deprivation of due process; (3) erroneous interpretation of statutory language; (4) violation of Article 1, Section 27 of the Pennsylvania Constitution; (5) reliance on the unconstitutionally vague and untenable Act 1 as amended; (6) improper imposition of a supermajority voting requirement; and (7) violation of the federal Safe Drinking Water Act.

114. The Council addresses each error in turn below.

K. The RAC's Rejection Of All But 16 Of the 1900 Changes To The 2015 Building Codes Was Arbitrary, Capricious And Without Foundation

115. The Court may only overturn the decision of an administrative agency where there is “proof of fraud, bad-faith, arbitrary or capricious action, or a manifest abuse of discretion.” 36 Standard Pennsylvania Practice 2d § 166:16; Blumenschein v. Pittsburgh Housing Auth., 109 A.2d 331 (Pa. 1954).

116. On the other hand, administrative discretion does not entail unbridled freedom for an agency to do whatever it pleases. “Discretion vested in public agencies must not be exercised in an arbitrary or unreasonable manner.” Appeal of Gerald Buckley Post No. 1507, Veterans of Foreign Wars, from Order of Pa. Liquor Control Bd’s, Refusal to Grant Club Liquor License, 56 Pa. D. & C. 583, 584 (Quar. Sess. 1946).

117. The RAC’s decision to reject the 2015 code provisions was arbitrary and an abuse of discretion.

(1) The RAC Did Not Consider The Factors Set Forth In The PCCA In Deciding To Reject All But Sixteen Of The 2015 Code Provisions Under Consideration

118. Petitioners incorporate by reference as if fully set forth herein each of the preceding paragraphs.

119. 35 Pa. C.S.A. § 7210.107(b.1)(4) states that the RAC must “examine” the triennial code revisions applying all of the following criteria:

- The impact that the provision may have upon the health, safety and welfare of the public.
- The economic and financial impact of the provision.
- The technical feasibility of the provision.

120. The RAC divided the 2015 code changes into groups, and assigned each subcommittee a group of code changes to review. The subcommittees entered their recommendations into spreadsheets, with cells to document consideration of the PCCA factors.

121. However, the RAC overruled the recommendations of its subcommittees, and rejected all but 16 of the changes the subcommittees recommended for adoption. In doing so, there was no discussion or any evidence whatsoever that the RAC reviewed the provisions based on those criteria.

122. In fact, the RAC did not provide any analysis, based on the criteria required by the PCCA or otherwise, to explain the disconnect between the RAC's decision and the subcommittees' recommendations, except for the general statement that it could not do so because the constraints of Act 1 and the Department's statutory interpretation would make the resulting code impossible to use or enforce.

123. During the voting, the RAC did not vote on provisions individually unless requested by a RAC member. Instead, the RAC voted on all but a handful of the provisions as blocks by subcode.

124. Except for the handful of provisions discussed individually, the RAC did not discuss the applicability of any of the criteria required by the PCCA, or indeed any explanation at all for deciding to reject hundreds of code provisions recommended by its own subcommittees based on its consideration of these criteria.

125. The RAC violated the PCCA by failing to consider the criteria required by the UCC in making its decision. Therefore, the RAC's decision constitutes an arbitrary abuse of discretion.

(2) The RAC Rejected The Well-Reasoned Decisions Of Its Own Subcommittees

126. The RAC subcommittees reviewed the code provisions in detail, based on the three factors required by the PCCA.

127. The RAC subcommittees responsible for analyzing the code provisions recommended approval of approximately 90% of the provisions of the 2015 codes. Most recommendations were unanimous.

128. Despite the recommendations of *its own subcommittees*, the RAC approved only 16 provisions out of the 1900 considered.

129. The RAC did not provide any reasoning for its decision to reject the remaining provisions, even though they were recommended by the subcommittees.

130. The RAC ignored the evidence provided by the subcommittees in favor of adopting the provisions.

131. The RAC rejected many specific provisions that the subcommittees and other RAC members stated were obviously required for the health, safety and welfare of Pennsylvanians.

132. The RAC did not provide any distinction between why certain provisions were selected for approval and the remainder were not.

133. The RAC did not provide any justification for its decisions to approve the 16 code provisions beyond citing the cost savings from adopting such provisions.

134. Using cost as the sole criterion for adopting building codes when the statute requires more is an abuse of discretion.

(3) Several RAC Members Boycotted The Process Entirely, Except Where They Did Not

135. Several RAC members stated that they would not vote to approve any code provisions because they could not “in good conscience” approve code provisions that would result in a code that was impossible to use or enforce because of the deficiencies of Act 1 and the Department’s interpretation thereof.

136. Despite their disavowal of the entire process, some of these same members voted to adopt some or all of the 16 provisions that were ultimately adopted. They did not provide any explanation of their reasoning for adopting some provisions, but abstaining from voting on or rejecting the majority of them because of their position that Act 1 and the Department’s interpretation thereof made it impossible to approve code changes.

137. In addition to being a violation of the PCCA, the actions of these RAC members also indicate the arbitrary and capricious nature of the RAC’s decision-making.

(4) The RAC Process Was Convolutd And Members Often Did Not Understand What They Were Voting On

138. The voting process changed several times during the course of the May 20, 2015 hearing.

139. At many points, the RAC members expressed confusion regarding the process, what they were voting on and even what votes they were permitted to cast.

140. Many RAC members stated throughout the process that they had not reviewed the public comments or the provisions which they were considering.

141. At one point in the proceedings, the chair of the RAC subcommittee responsible for reviewing a particular provision could not articulate the basis for adopting the provision and asked if anyone else in the RAC had experience with the provision who could help her out. No one on the RAC provided any additional insight into the provision at issue.

142. Of the 16 provisions approved, the majority were based on recommendations made by the Pennsylvania Builders Association. The Pennsylvania Builders Association appointed at least three RAC members, including the Chair, to its internal committee to decide on the PBA's recommendations to the RAC. This clear conflict of interest reflects the biased and arbitrary nature of the RAC's decision.

L. The Procedures Under Which the RAC Operated Deprived Clean Air Council of Due Process to Protect its Rights

143. Due to the just-described confused and convoluted procedure by which the RAC came to its decisions, and the failure of many RAC members to even consider comments by the public, including Clean Air Council, the Council lacked the ability to protect its substantive rights, including those under the Environmental Rights Amendment, against adverse RAC action.

144. Moreover, the PCCA, although granting the RAC final decision-making authority, does not provide for a method to challenge proposed RAC decisions short of petitioning this Court.

145. Therefore the RAC's procedures have deprived the Council of due process.

M. The RAC's And the Department's Interpretation Of "Latest Triennial Code Revisions" Was Arbitrary, Capricious And Contrary To The Legislature's Intent and Common Sense

146. The Department's decision, and the RAC's decision to follow the Department's guidance, to interpret "revisions" to mean only the changes from 2012 to 2015, not the changes from the existing UCC, was arbitrary, capricious and without foundation.

147. The Department based its decision solely on a circular dictionary definition of the word "revision." This definition did not clarify the statute's meaning.

148. Without a clear understanding of the statute from its plain language, the Department and the RAC should have looked to the rules of statutory construction.

149. Where a statute or regulation is ambiguous, courts and administrative agencies apply the rules of statutory construction to ascertain the meaning of the laws. In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

- (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
- (2) That the General Assembly intends the entire statute to be effective and certain.
- (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
- (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
- (5) That the General Assembly intends to favor the public interest as against any private interest.

§ 1 Pa. C.S.A. § 1922.

150. The General Assembly's intent, as clearly articulated in the PCCA and its legislative history, was that the RAC should review the latest national standards and adopt them.

151. Professional usage and common sense dictate that the RAC should have reviewed the changes from the existing UCC and the 2015 code edition.

152. The Department's and RAC's interpretation of the PCCA violates four of the five statutory canons of construction: (1) As the RAC noted on many occasions, the outcome of reviewing codes under Act 1 and the Department's interpretation would have the absurd result of a code that would be impossible to use or enforce; (2) the statute would be ineffective and uncertain; (3) it would violate the constitutions of the United States and Pennsylvania; and (4) the law would damage the public interest in favor of the economic interests of the residential construction industry.

N. The RAC Failed to Perform its Duties Under the Pennsylvania Environmental Rights Amendment, Article I, Section 27

153. Article 1, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment ("ERA"), reads:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

154. Article 1, Section 27 contains two substantive requirements: (1) an individual right to a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment; and (2) a trustee duty that must be discharged by the Commonwealth.

155. The Commonwealth Court of Pennsylvania has found that the ERA Applies to "each branch of government." Pa. Env'tl. Def. Found. v. Com., 108 A.3d 140, 156, 171-72 (Pa. Commw. Ct. 2015) (finding that officials of the Pennsylvania Department of Conservation and Natural Resources are bound by Article 1, Section 27).

156. The 2015 building codes would improve Pennsylvania air quality, thus RAC's failure to adopt the 2015 building codes violates Article 1, Section 27 by infringing on the rights of Pennsylvanians to enjoy clean air.

157. The ERA trustee obligation entails multiple duties, all of which the RAC violated.

158. First, the ERA requires a predecisional analysis to determine whether any proposed project, law, regulation, or ordinance would cause unreasonable "actual or likely degradation" of air water quality, or other protected constitutional features, such as natural and scenic values of the environment. Robinson Twp., Delaware Riverkeeper Network et al. v. Com., 83 A.3d 901, 951-55 (Pa. 2013) (plurality); Pa. Env'tl. Def. Found., 108 A.3d at 157.

159. RAC violated Article 1, Section 27 by failing to conduct a predecision analysis to determine whether their decision to keep in place the 2009 building codes would cause an unreasonable actual or likely degradation of the air, or any other environmental impact.

160. Second, the RAC has a duty of prudence, which prohibits it from performing its duties respecting the environment unreasonably.

161. The RAC performed its duties respecting the environment unreasonably by offering no clear basis for its decision not to adopt the 2015 revisions.

162. The RAC performed its duties unreasonably by repeatedly disparaging the environmental and energy efficiency provisions of the building codes.

163. And third, the RAC has a trustee duty to treat all beneficiaries of the trust equally.

164. The RAC's failure to adopt the 2015 building code favors contractors and building owners at the expense of all Pennsylvania residents who must breathe unclean air.

O. The PCCA, as Amended by Act 1, Is Unconstitutionally Vague and Unworkable

165. Vague statutes offend the constitution because they

[M]ay (1) trap the innocent by failing to give a person of ordinary intelligence reasonable opportunity to know what is prohibited so that he may act accordingly; or (2) result in arbitrary and discriminatory enforcement in the absence of explicit guidelines for their application.... [A] legislative enactment will be deemed invalid ‘only if it is so vague and indefinite that courts are unable to determine with any reasonable degree of certainty the intent of the legislative body **or so incomplete, conflicting and inconsistent in its provision that it cannot be executed.**’

Blanco v. State Bd. of Private Licensed Sch., 631 A.2d 1076, 1080 (Pa. Commw. Ct. 1993)

(citations omitted) (emphasis added).

166. The Act 1 amendments to the PCCA are a clear manifestation of statutory language that is “incomplete, conflicting and inconsistent” and which, as evidenced by both the RAC’s words and actions, “cannot be executed.”

167. The RAC itself (and several of its members) have admitted, both in documents and public testimony, that the procedures required by the Act 1 amendments cannot be executed.

168. At the May 20, 2015 RAC meeting where the RAC voted on the 2015 codes, many RAC members stated that they could not vote to adopt any code provisions because to do so under the terms of the Act 1 Amendments and its interpretation by the Department would create a code which would be impossible to use or enforce.

169. The RAC was also unable to review the 2012 codes in accordance with the Act 1 Amendments.

170. The Act 1 amendments also allowed for “arbitrary enforcement” of the Act 1 Amendments by the Department and the RAC.

171. The RAC struggled throughout the process to understand what it was supposed to review, and ultimately adopted an essentially arbitrary selection of code provisions.

172. The RAC and the Department’s interpretation of the “latest triennial code revision” language was arbitrary, capricious and contrary to the intent of the Legislature.

173. The vague nature of the Act 1 amendments allowed for this arbitrary enforcement.

P. The Two-Thirds Majority Requirement Of Act 1 Is An Improper Delegation Of Authority

174. The two-thirds majority requirement for adoption of new building code provisions put in place by Act 1 of 2011 is an improper delegation of authority, violating Article II, Section 1 and Article III, Section 4 of the Pennsylvania Constitution.

175. Article II, Section 1 states “the legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”

176. Through Act 45 of 2008, the General Assembly delegated to the RAC the power to amend the UCC to include new model code provisions. This Court upheld the General Assembly’s right to delegate this authority in *Pennsylvania Builders Association*, and it is not challenged here.

177. However, as the RAC’s power to make laws is derived from the General Assembly’s authority, it is also bound by the limits on the General Assembly’s authority. It is axiomatic to say that the General Assembly cannot delegate power it does not have. 16 C.J.S. Constitutional Law § 256 (“The legislature cannot directly or indirectly, delegate the power to do that which the legislature itself cannot do.”).

178. Pursuant to Article III, Section 4 of the Pennsylvania Constitution, “No bill shall become a law, unless on its final passage...a majority of the members elected to each House is recorded thereon as voting in its favor.” Pa. Const. Art. III, Sec. 4 (emphasis added).

179. Reflecting this foundational premise, the Administrative Code also sets the voting authority of a regulatory body as a majority: “Words in a statute conferring a joint authority upon

three or more public officers or other persons shall be construed to confer authority upon a majority of such officers or persons.” 1 Pa.C.S.A. § 1905.

180. Act 1 increased the number of votes required to adopt code provisions from a simple majority of the RAC to a two-thirds majority of the entire 19-person council. This was unlawful.

181. The General Assembly has no authority to create a different or more stringent requirement for the RAC to amend the UCC than is set forth in the Constitution for the General Assembly to execute this action.

Q. The RAC’s Failure to Adopt Code Revisions Regarding Lead in Pipes is Contrary to the Safe Drinking Water Act

182. On January 4, 2011 Congress amended the section of the Safe Drinking Water Act (“SDWA”) addressing lead pipes, and mandated that the new requirements take effect on January 4, 2014.

183. Prior to the January 2011 revision (effective on January 4, 2014), “lead-free” pipes were allowed to contain a maximum of eight percent lead. Post-revision, the maximum allowed under SDWA is .25%.

184. Pennsylvania is responsible for implementing and enforcing the SDWA.

185. The 2009 building codes, and thus Pennsylvania’s UCC, allow at least 8% lead pipes.

186. The 2015 building codes reduced the amount of lead allowable in pipes to .25% to meet SDWA.

187. On information and belief, the RAC members did not consider the change in the SDWA in evaluating the 2015 building codes.

188. On information and belief, the RAC members did not consider the health, safety and welfare implications of high lead levels in drinking water in evaluating the 2015 codes.

189. During the May 20, 2015 voting meeting, the RAC did not single out the provision updating the lead pipe requirement for separate consideration, nor was there any discussion about the lead-level changes.

190. The RAC's decision to reject updated lead-pipe requirement was arbitrary, capricious and contrary to law.

191. As a result of the RAC's actions, the primary law governing the installation of plumbing fixtures, the UCC, conflicts with the SDWA. This threatens public health and has the potential to put Pennsylvania out of compliance with the SDWA.

VI. STATEMENT OF THE RELIEF SOUGHT

192. Wherefore, the Council respectfully requests that this Honorable Court enter an order (1) declaring Act 1 of 2011 null and void; (2) in the alternative, declaring the phrase "triennial code revisions" to include all of the changes to the model codes under review that differ from the existing UCC, and requiring only a simple majority of a RAC quorum for code provision adoption; (3) reversing the RAC rejection of the 2015 edition of the ICC Codes and remanding consideration of the codes to the RAC under the laws and rubric existing for their consideration prior to the enactment of Act 1 of 2011; (4) requiring the RAC to uphold its duties under the Pennsylvania Environmental Rights Amendment; (5) awarding attorneys' fees and costs; (6) granting other and further relief as the Court may deem necessary and appropriate under the circumstances.

Respectfully submitted,



ERNEST LOGAN WELDE

I.D. No. 315012
lwelde@cleanair.org
ALEXANDER G. BOMSTEIN
I.D. No. 206983
abomstein@cleanair.org

JOSEPH O. MINOTT
I.D. No. 36463
joe_minott@cleanair.org

Clean Air Council
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
(215) 567-4004
lwelde@cleanair.org

Dated: June 19, 2015

CERTIFICATE OF SERVICE

I, Ernest Logan Welde, hereby certify that the foregoing Petition for Review was served upon the following via certified mail, return receipt requested:

Cindy E. Shaeffer, Esq.
Assistant Counsel
Office of the Chief Counsel
Department of Labor & Industry
651 Boas Street, 10th Floor
Harrisburg, PA 17121
Counsel for Uniform Construction Code Review and Advisory Council

Secretary Kathy M. Manderino
Department of Labor & Industry
651 Boas Street, Room 1613
Harrisburg, PA 17121

Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120



Dated: June 19, 2015

Ernest Logan Welde, Esq.