

1 X No Hearing is set
2 Hearing is set:
3 Judge/Calendar: Judge Murphy
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7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 NORTHWEST REGIONAL COUNCIL OF
9 THE NATIONAL CONSTRUCTION
10 ALLIANCE, a labor organization; BUILDING
11 INDUSTRY ASSOCIATION OF
12 WASHINGTON, a Washington non-profit
13 corporation; ANDREA SMITH, an individual;
14 ANDREWS MECHANICAL, INC., a
15 Washington corporation; ASSOCIATED
16 GENERAL CONTRACTORS OF
17 WASHINGTON, a Washington nonprofit
18 trade association; BLUE STAR GAS-
19 SEATTLE CO., a Washington corporation;
20 CENTRAL WASHINGTON HOME
21 BUILDERS ASSOCIATION, a Washington
22 nonprofit corporation; CRAIG REIMER
23 CUSTOM HOMES, LLC, a Washington
24 limited liability company; ENERGY SAVING
25 PRODUCTS, INC., a foreign profit
26 corporation; KYLE FOX, an individual;
27 LOMBARDI'S RESTAURANT GROUP,
LLC, a Washington limited liability company;
NEW TRADITION HOMES, a Washington
corporation; NEWPORT WEST, LLC, a
Washington limited liability company;
NORTHWEST HEARTH, PATIO &
BARBECUE ASSOCIATION, a Washington
nonprofit corporation; NORTHWEST
HVAC/R ASSOCIATION & TRAINING
CENTER, a Washington nonprofit
corporation; RED FLANNEL
CONSTRUCTION CO., LLC, a Washington
limited liability company; SOUNDBUILT
HOMES, a Washington limited liability
company; TENHULZEN RESIDENTIAL,
LLC, a Washington limited liability company;
TENHULZEN CONSTRUCTION, LLC, a
Washington limited liability company; TOWN
AND COUNTRY HOMES, LLC, a
Washington limited liability company;

Case No. 23-2-00615-34

**SECOND AMENDED PETITION FOR
DECLARATORY JUDGMENT (RCW
34.05.570(2) AND RCW 42.30.120)**

1 WALLACE PROPERTIES – BELLEVUE
2 NORTH, LLC, a Washington limited liability
3 company; and WASHINGTON BUSINESS
4 PROPERTIES ASSOCIATION, a Washington
5 nonprofit corporation

6 Petitioners,

7 v.

8 WASHINGTON STATE BUILDING CODE
9 COUNCIL,

10 Respondent.

11 **I. PARTIES**

12 1. Petitioner Northwest Regional Council of the National Construction Alliance
13 (“NCA”) is an umbrella labor organization representing four construction unions with a membership
14 exceeding 40,000 across the state. The NCA and its members are invested in all matters related to
15 construction and have a particular interest in natural gas infrastructure work.

16 2. Petitioner Building Industry Association of Washington (“BIAW”) is a non-profit
17 trade association with its principal office address located at 300 Deschutes Way SW, Ste. 300,
18 Tumwater, WA, 98501. BIAW promotes the interests of Washington homebuilders. BIAW
19 represents more than 8,000 member companies that employ approximately 265,000 people in all
20 aspects of home construction.

21 3. Petitioner Andrea Smith is an individual homeowner residing in Vancouver,
22 Washington. Ms. Smith has a personal interest in affordable housing, having experienced
23 homelessness as a child. Ms. Smith provides education and training on the reasons why people
24 experience housing insecurity and the root causes of it, including the lack of available, low-cost
25 housing. Ms. Smith is also personally concerned about individuals such as herself being unable to
26 maintain their homes because of the cost of repairs and lack of affordable options for required
27 appliances such as heat pumps and water heaters.

4. Petitioner Andrews Mechanical, Inc. is a Washington corporation with its principal
office address located at 2727 N Madelia St., Ste. 8, Spokane, WA 99207. Founded in 1989,

1 Andrews Mechanical offers comprehensive heating, ventilation, air conditioning, radiant heating
2 and cooling, commercial refrigeration, plumbing, and process-piping solutions to the greater
3 Spokane, WA region.

4 5. Petitioner Associated General Contractors of Washington (“AGC”) is a Washington
5 nonprofit trade association with its principal office address located at 1200 Westlake Ave. N, Ste.
6 301, Seattle, WA 98109. AGC promotes the interests of Washington contractors. It is the largest and
7 oldest commercial construction trade association in Washington, representing over 700 member
8 companies.

9 6. Petitioner Blue Star Gas-Seattle Co. is a Washington corporation with its principal
10 office address located at 108020 E Marginal Way S, Tukwila, WA 98168. Blue Star Gas-Seattle has
11 been serving and meeting the propane needs of the Puget Sound area since 2011. The company
12 markets and distributes propane for residential, commercial, and industrial applications such as space
13 and water heating.

14 7. Petitioner Central Washington Home Builders Association is a Washington nonprofit
15 corporation with its principal office address located at 3301 W Nob Hill Blvd., Yakima, WA, 98902.
16 The Central Washington Home Builders Association was founded in 1955, and has served as the
17 leading not-for-profit trade organization dedicated to residential construction and remodeling
18 throughout Central Washington.

19 8. Petitioner Craig Reimer Custom Homes, LLC is a Washington limited liability
20 company with its principal office address located at 18607 Olympic View Dr., Edmonds, WA 98020.
21 Craig Reimer Custom Homes, LLC was founded by northwest native, Craig Reimer, and builds
22 custom and spec homes in the Tumble Creek and Suncadia communities in Cle Elum, Washington.

23 9. Petitioner Energy Saving Products, Inc. is a foreign profit corporation with its
24 principal office address at 10400 SW Tualatin Rd., Tualatin, OR, 97062. Energy Saving Products,
25 Inc. was founded in 1938, and is a wholesale distributor of gas and electric HVAC equipment used
26 in commercial buildings throughout Washington.

1 10. Petitioner Kyle Fox is an individual landowner and prospective building applicant
2 residing in the state of Washington.

3 11. Petitioner Lombardi’s Restaurant Group, LLC is a Washington limited liability
4 company with its principal office address located at 2911 Bond St., Ste. 106, Everett, WA 98201.
5 Lombardi’s Restaurant Group, LLC is a family-owned business founded in 1987 that specializes in
6 Italian cuisine in Bellingham, Everett, and Bothell, Washington.

7 12. Petitioner New Tradition Homes is a Washington corporation with its principal office
8 address located at 11815 NE 113th St., Ste. 106, Vancouver, WA, 98662. New Tradition Homes was
9 founded in 1987, and builds and designs homes in the tri-cities region of Washington.

10 13. Petitioner Newport West, LLC is a Washington limited liability company with its
11 principal office address located at 4958 126th Pl. SE, Bellevue, WA 98006. Newport West, LLC
12 builds homes and has offered Washingtonians vision, advice, and management skills necessary for
13 homebuilding requirements for more than forty years.

14 14. Petitioner Northwest Hearth, Patio & Barbecue Association (“NWHPBA”) is a
15 Washington nonprofit corporation with its principal office address located at 5727 Baker Way NW,
16 Ste. 200, Gig Harbor, WA 98332. NWHPBA is a trade association representing and promoting the
17 interests of the hearth and barbecue products industry in the states of Washington, Idaho, Montana,
18 and Alaska. The Association includes manufacturers, retailers, distributors, manufacturers'
19 representatives, service and installation firms, and other companies and individuals—all having
20 business interests in and related to the hearth, patio, and barbecue products industry.

21 15. Petitioner Northwest HVAC/R Association & Training Center is a Washington
22 nonprofit corporation with its principal office address located at 204 E Nora Ave., Spokane, WA
23 99207. Northwest HVAC/R Association & Training Center provides education and training,
24 promoting the highest standards of workmanship, to improve the quality of installation and service
25 on HVAC, gas, and refrigeration equipment since 1955.

26 16. Petitioner Pacific Propane Gas Association (“PPGA”) is a Washington nonprofit
27 corporation with its principal office address located at 629 W Hillsdale St., Lansing, MI 48933. The

1 PPGA represents propane marketers, suppliers, and equipment manufacturers across Washington
2 State. PPGA members provide clean-burning and critical energy to agricultural, commercial,
3 industrial, and residential customers in Washington State.

4 17. Petitioner Red Flannel Construction Co., LLC is a Washington limited liability
5 company with its principal office address located at 41 NE Midway Blvd., Ste. 105, Oak Harbor,
6 WA 98277. Red Flannel Construction is a small residential remodel company dedicated to
7 completing quality home improvement for the residents of Whidbey Island and the San Juan Islands.

8 18. Petitioner Soundbuilt Homes is a Washington limited liability company with its
9 principal office address located at 12815 Canyon Rd. E, Ste. M, Puyallup, WA 98373. Soundbuilt
10 Homes was founded in 1980, and is a locally owned and operated company that has been building
11 homes in Washington for more than forty years.

12 19. Petitioner Tenhulzen Residential, LLC is a Washington limited liability company
13 with its principal office address located at 14701 148th Ave. NE, Ste 300, Woodinville, WA 98072.

14 20. Petitioner Tenhulzen Construction, LLC is a Washington limited liability company
15 with its principal office address located at 14701 148th Ave, NE, Woodinville, WA 98072. Together,
16 Tenhulzen Residential, LLC and Tenhulzen Construction, LLC specialize in designing, building,
17 and remodeling homes in Seattle’s Eastside cities and the unincorporated King County area.

18 21. Petitioner Town and Country Homes, LLC is a Washington limited liability company
19 with its principal office address located at 1901B E Sanders Rd., Ellensburg, WA 98926. Town and
20 Country Homes, LLC is a third-generation home-building company.

21 22. Petitioner Wallace Properties – Bellevue North, LLC is a Washington limited liability
22 company with its principal office address located at 330 112th Ave NE, Ste. 200, Bellevue, WA
23 98004. Wallace Properties develops properties throughout the Puget Sound region.

24 23. Petitioner Washington Business Properties Association (“WBPA”) is a Washington
25 nonprofit corporation with its principal office address located at 123 Fir St. NE #221, Olympia, WA
26 98506. The WBPA is the broadest coalition of business and professional associations focused on
27 commercial, residential, and retail real estate and property rights issues in Washington State.

1 29. The Act consists of multiple parts including the International Building Code, the
2 International Residential Code, and “Portions of the International Wildland Urban Interface Code.”
3 RCW 19.27.031.

4 30. The Legislature granted the Council authority to adopt, maintain, and amend the Act
5 via rulemaking, so long as the Code remains “consistent with the State’s interest as set forth in RCW
6 19.27.020.” RCW 19.27.074(1)(a).

7 31. The Legislature further established the Washington State Energy Code (“the Energy
8 Code”), to be “the maximum and minimum energy code” for residential and nonresidential buildings
9 in the State. RCW 19.27A.015.

10 32. Like rulemaking under the Act, the Legislature also granted the Council authority to
11 adopt rules for the Energy Code “follow[ing] the legislature’s standards.” RCW 19.27A.020(2).

12 33. The Energy Code must be designed, in relevant part, to “require new buildings to
13 meet a certain level of energy efficiency, but allow flexibility in design, construction, and heating
14 equipment efficiencies within that framework.” RCW 19.27A.020(2)(b).

15 34. Energy Code provisions for commercial buildings must “increase the energy
16 efficiency of typical newly constructed nonresidential buildings,” but also “must be technically
17 feasible, commercially available, and developed to yield the lowest overall cost to the building owner
18 and occupant” while meeting state energy reduction goals. RCW 19.27A.025.

19 35. Any decision by the Council to amend the Energy Code provisions for new
20 nonresidential buildings adopted with less than a two-thirds majority is considered a disputed
21 provision. Disputed provisions within an amendment must be approved by the Legislature before
22 going into effect. Decisions by the Council must be adopted on or before December 15 of a calendar
23 year. RCW 19.27A.025(3).

24 36. Energy Code provisions for residential structures must increase the energy efficiency
25 of newly constructed residential buildings, while at the same time satisfy the legislative standards of
26 allowing flexibility in design, construction, and heating equipment. RCW 19.27A.045.

1 37. Actions taken by the Council to adopt or amend the Act or the Energy Code must be
2 exercised in accordance with the Administrative Procedure Act, Chapter 34.05 RCW (“APA”).
3 RCW 19.27.074; RCW 19.27A.025, .045.

4 38. In addition to compliance with the APA, the Regulatory Fairness Act mandates that,
5 when engaged in a rulemaking, the Council “shall cause notice of the hearing to be published in the
6 state register” and said notice shall include . . . “[a] copy of the small business economic impact
7 statement [“SBEIS”] prepared under chapter 19.85 RCW.” RCW 35.05.320; RCW 19.85.040.

8 39. An SBEIS “must compare the cost of compliance for small business with the cost of
9 compliance for the ten percent of businesses that are the largest . . .” and must include “a statement
10 of steps taken by the Council to reduce the costs . . . or reasonable justification for not doing so[;]”
11 a description of how the [Council] will involve small businesses in developing the rule; a list of
12 industries required to comply with the rule; and an estimate of the number of jobs that will be created
13 or lost as a result of compliance with the rule. RCW 19.85.040.

14 40. Furthermore, the Open Public Meetings Act, Chapter 42.30 RCW, requires that
15 Council actions “be taken openly and that their deliberations be conducted openly.” RCW 42.30.010.
16 “[E]ven when not required by law, public agencies are encouraged to incorporate and accept public
17 comment during their decision-making process.” RCW 42.30.010.

18 **B. SBCC Adopts Rules to Ban Natural Gas in Residential and Commercial Structures**

19 41. In 2021, Governor Jay Inslee introduced legislation, House Bill 1084, that would
20 have required the 2027 State Energy Code to eliminate natural gas infrastructure for space and water
21 heating in new residential and commercial construction and required the elimination of natural gas
22 systems when construction is undertaken on existing buildings. The bill did not pass the Washington
23 State Legislature.

24 42. In 2022, Governor Jay Inslee introduced legislation, House Bill 1770, that would
25 have required the Energy Code to include specific standards for net energy consumption in
26 residential and commercial buildings. House Bill 1770 would also have granted the SBCC authority
27 to adopt code provisions that mandate all new buildings be net-zero ready, with required wiring for

1 electrical raceways and designated space for solar equipment for photovoltaic panel installation.
2 Lastly, HB 1770 included a “reach code” that would allow every city and county in the state to
3 voluntarily adopt standards, therefore negating the point of a uniform code to be enforced on a
4 statewide level. The bill did not pass the Washington State Legislature.

5 43. The SBCC, which is made up of Governor-appointed members, proceeded to adopt
6 amendments to the State’s Building and Energy Codes in 2022 and 2023, promulgating these same
7 legislative measures despite having no legislative authority to do so and in a manner that violates
8 procedurally required Legislative mandates necessary to the rulemaking process.

9 **a. SBCC Amendments to the Energy Code, Residential Provisions**

10 44. On August 23, 2022, the SBCC filed proposal WSR 22-17-149, to amend the Energy
11 Code-Residential Provisions to require, among other changes, that residential space heating and
12 service hot water be provided by a heat pump system. *See* 21-GP2-065, -066.

13 45. On January 3, 2023, after modifying its original proposal, the Council adopted
14 permanent changes to the Energy Code-Residential Provisions by a vote of 9 to 5. *See* WSR 23-02-
15 060. The Council generally cited RCW 19.27A.020, 19.27A.045, 19.27A.160, and 19.27A, as
16 authorities for this adoption. The rules codified the requirements that residential space heating and
17 service hot water be provided by a heat pump system.

18 46. The Council established an effective date of July 1, 2023, and amended WAC 51-
19 11R-40392 Section R403.13 to state that “space heating shall be provided by a heat pump system”
20 and WAC 51-11R-40340 Section R403.5.7 to state that “[s]ervice hot water in one- and two-family
21 dwellings and multiple single-family dwellings (townhouses) shall be provided by a heat pump
22 system. *See* WSR 23-02-060.

23 47. The Council’s amendments effectively threaten the elimination of all but electric
24 heating for both residential interiors and water due to the lack of commercially available natural gas
25 heat pumps. This de facto prohibition is in part based on energy efficiency crediting values adopted
26 by the Council that are designed to prohibit the use of appliances that use natural gas – as opposed
27 to achieving standards of efficiency as required by law.

1 48. This requirement exceeds the statutory authority of the Council. To the extent that
2 RCW 19.27 or 19.27A permit the SBCC to promulgate such prohibitions, it is an unconstitutional
3 delegation of authority by the Legislature.

4 49. The Council arbitrarily and capriciously adopted the rules in contravention of the
5 agency's mandated requirements to consider and impose Codes that are consistent with accepted
6 standards, permit use of modern technical methods and devices, and eliminate restrictive and
7 unnecessary regulations that increase construction costs or retard the use of new materials.

8 50. Prior to the Energy Code-Residential Provisions becoming effective, the Council
9 engaged in additional rulemaking in an attempt to bring this unlawful rulemaking action into
10 compliance.

11 51. Composed of a broad group of residents, businesses, trade organizations, and unions
12 in Washington State, the Petitioners are adversely affected by the Council's promulgation of
13 amendments to the Washington State Energy Code – Residential Provisions. RCW 19.27A.020,
14 19.27A.045, 19.27A.160. The Council's regulations effectively eliminate natural gas or propane use;
15 interfere with residential energy and appliance choice; unnecessarily increase the cost of
16 homebuilding, ownership, and maintenance; and jeopardize the jobs and livelihoods of thousands in
17 the trade industry.

18 **b. SBCC Amendments to the Energy Code, Commercial Provisions**

19 52. On January 5, 2022, the Council filed proposal WSR 22-02-076. As part of this
20 proposal, the Council contemplated amending the Washington State Energy Code-Commercial
21 Provisions to ban HVAC heating energy provided by fossil fuel combustion and impose a prohibition
22 on all but electric air-source heat pumps.

23 53. On July 1, 2022, after modifying its initial proposal, the Council adopted permanent
24 changes to the Energy Code-Commercial Provisions by a vote of 11 to 3. *See* WSR 22-14-091. The
25 Council cited RCW 19.27, 19.27A, 19.27A.020, 19.27A.025, 19.27A.160 as authorities for this
26 adoption. The rules codified the ban on HVAC heating energy provided by fossil fuel combustion
27 and the prohibition of all but electric air-source heat pumps with only few exceptions.

1 54. The Council established an effective date of July 1, 2023, and amended WAC 51-
2 11C-40314 Section 403.1.4 to state that “HVAC heating energy shall not be provided by electrical
3 resistance or fossil fuel combustion appliances[.]” WAC 51-11C-40402 Section 404.2.1 to state that
4 “service hot water shall be provided by an electric air-source heat pump water heating . . . system
5 meeting the requirements of this section[.]” and WAC 51-11C-40507 Section 405.7.1 to state that
6 “where dwelling unit appliances are served by natural gas, an electrical receptacle or junction box
7 and circuit shall be provided at each gas appliance with sufficient capacity to serve a future electric
8 appliance in the same location.” These appliances include gas ranges, cooktops, ovens, clothes
9 dryers, and domestic water heaters. *See* WSR 22-14-091.

10 55. The Council’s amendments effectively serve as a sweeping prohibition on HVAC
11 heating energy provided by fossil fuel combustion appliances, a prohibition of all but electric air-
12 source heat pump water heating in commercial buildings, and needlessly require installation of an
13 electrical receptacle or junction box and circuit at the locations of all gas appliances within a
14 dwelling unit in excess of the statutory authority of the agency.

15 56. The rules drastically and disproportionately increase the number of credits required
16 for buildings attempting to utilize the fossil fuel compliance path. *See* WSR 22-14-091, at 3, 24-25.¹
17 The rules allow no flexibility in design or construction, and effectively eliminate available heating
18 equipment efficiencies. Furthermore, the rules will have the effect of increasing the cost of
19 constructing and maintaining commercial buildings, which include multifamily complexes, and will
20 not yield the lowest overall cost to the building owner or occupants as statutorily required. To the
21 extent that RCW 19.27 or 19.27A permit the SBCC to legislate these prohibitions, it is an
22 unconstitutional delegation of authority by the Legislature. The Council’s adoption of these rules
23 also constitutes arbitrary and capricious agency action.

24
25
26 ¹ The Energy Code sets a specific minimum number of credit requirements that all new buildings,
27 changes in spacing or occupancy, or additions must meet.

1 57. Just prior to the Energy Code-Commercial Provisions becoming effective, the
2 Council engaged in additional rulemaking in an attempt to bring this unlawful rulemaking action
3 into compliance.

4 58. Composed of a broad group of residents, businesses, trade organizations, and unions
5 in Washington State, the Petitioners are adversely affected by the Council’s promulgation of
6 amendments to the Washington State Energy Code – Commercial Provisions. RCW 19.27, 19.27A,
7 19.27A.020, 19.27A.025, 19.27A.160. The Council’s regulations effectively eliminate natural gas
8 or propane use; interfere with commercial energy and appliance choices; unnecessarily increase the
9 cost of building, ownership, and maintenance; and jeopardize the jobs and livelihoods of thousands
10 in the trade industry.

11 **c. SBCC Amendments to the Wildland – Urban Interface Code**

12 59. RCW 19.27.031 requires, in part, that the Council adopt “portions of the International
13 Wildland Urban Interface Code, published by the International Code Council Inc., as set forth in
14 RCW 19.27.560.”

15 60. RCW 19.27.560 enumerates specific provisions of the 2018 International Wildland
16 Urban Interface Code that the Council “shall, upon the completion of statewide mapping of wildland
17 urban interface areas” adopt.

18 61. On August 23, 2022, the Council filed proposal WSR 22-17-150. As part of this
19 proposal, the Council contemplated adoption of portions of the Wildland Urban Interface Code
20 beyond those contemplated by RCW 19.27.560.

21 62. On January 3, 2023, the Council adopted the 2021 Washington Wildland – Urban
22 Interface Code, which included portions of the Wildland Urban Interface Code beyond those stated
23 by RCW 19.27.560. *See* WSR 23-02-056. The Council cited RCW 19.27.031, 19.27.074, and
24 19.27.560 as authorities for this adoption.

25 63. The Council established an effective date of July 1, 2023, and amended WAC 51-55
26 by implementing drastic changes to building requirements in Washington State. *See* WSR 23-02-
27 056.

1 64. On June 7, 2023, the Council delayed the July 1, 2023, effective date of the rules
2 adopted under Washington’s Wildland-Urban Interface Code regarding WAC 51-55. *See* WSR 23-
3 12-109. The Council stated its basis for the delayed effective date was “to evaluate what, if any,
4 changes are necessary to maintain compliance with the Energy Policy and Conservation Act given
5 the recent 9th circuit court of appeals ruling on Berkeley, California ordinance.”

6 65. The Council’s adoption of WAC 51-55 exceeds the statutory authority granted to the
7 agency by RCW 19.27.560. The Council’s adoption of this chapter was also an arbitrary and
8 capricious agency action.

9 66. Composed of a broad group of residents, businesses, trade organizations, and unions
10 in Washington State, the Petitioners are adversely affected by the Council’s promulgation of the
11 Wildland - Urban Interface Code beyond those contemplated by RCW 19.27.560.

12 **d. Additional SBCC Amendments to the State Building Code**

13 67. RCW 19.28.311 establishes the Electrical Board, which consists of fifteen
14 gubernatorially-appointed members who – with the advice of the Director of Labor and Industries –
15 must “advise the director on all matters pertaining to . . . standards of electrical and
16 telecommunications installation.”

17 68. One task delegated by the Legislature to the Director of Labor and Industries
18 concerning electrical installations is “. . . after consulting with the [Electrical Board] and receiving
19 the board’s recommendations” to adopt reasonable rules in furtherance of safety to life and property.
20 RCW 19.28.031.

21 69. On August 23, 2022, the Council filed proposal WSR 22-17-148. As part of this
22 proposal, the Council contemplated requiring a minimum of one 40-ampere dedicated 208/240-volt
23 branch circuit installed in the electrical panel for each dwelling unit. This requirement would be for
24 dwelling units with attached private garages or attached private carports. In other words, the proposal
25 requires that each garage or carport be installed with the means to charge an electric vehicle.

26 70. On January 3, 2023, after modifying its initial proposal, the Council adopted
27 permanent changes to the State Building Code. *See* WSR 23-02-058. The Council cited RCW

1 19.27.031 and 19.27.074 as authorities for this adoption. The changes codified the required
2 minimum of one 40-ampere dedicated 208/240-volt branch circuit installed in the electrical panel
3 for each dwelling unit. This requirement would be for dwelling units with attached private garages
4 or attached private carports.

5 71. The Council’s rulemaking established an effective date of July 1, 2023, and amended
6 WAC 51-51-0309 Section R309.6.2 to state that “a minimum of one 40-ampere dedicated 208/240-
7 volt branch circuit shall be installed in the electric panel for each dwelling unit . . .” *See* WSR 23-
8 02-058.

9 72. On June 7, 2023, the Council delayed the July 1, 2023 effective date of the rules
10 adopted under the State Building Code regarding WAC 51-51-0309 Section R309.6.2. *See* WSR 23-
11 12-104. The Council stated its basis for the delayed effective date was “to evaluate what, if any,
12 changes are necessary to maintain compliance with the Energy Policy and Conservation Act given
13 the recent 9th circuit court of appeals ruling on Berkeley, California ordinance.”

14 73. Composed of a broad group of residents, businesses, trade organizations, and unions
15 in Washington State, the Petitioners are adversely affected by the Council’s promulgation of
16 amendments to the State Building Code. The Council’s requirement that all newly constructed
17 dwelling units with attached private garages or attached private carports have a circuit for electric
18 vehicle charging exceeds the statutory authority granted to the agency by RCW 19.27. This authority
19 rests with the Director of the Department of Labor and Industry – not with the Council. Adoption of
20 this requirement was also arbitrary and capricious in that it adds unnecessary costs to the construction
21 of residential homes and imposes policy requirements rather than necessary building standards.

22 **C. SBCC Delays Effective Dates and Further Amends Rules to Ban Natural Gas in**
23 **Residential and Commercial Structures**

24 74. On April 17, 2023, the United States Court of Appeals for the Ninth Circuit issued
25 its opinion in *California Restaurant Association v. City of Berkeley*. 65 F.4th 1045 (9th Cir. 2023).
26 The case involved a challenge by a restaurant association to the City of Berkeley’s promulgation of
27 an ordinance prohibiting the installation of natural gas piping within all newly constructed buildings.

1 Although the federal District Court dismissed the lawsuit for failure to state a claim, the Ninth Circuit
2 reversed and remanded, holding in part that the federal Energy Policy and Conservation Act
3 (“EPCA”) preempts the City of Berkeley’s promulgation of building code ordinances that effectively
4 ban natural gas piping in buildings. 65 F.4th at 1056. The City of Berkeley then sought rehearing by
5 the panel or *en banc* review.

6 **a. SBCC Delays the Issuance of Energy Code, Commercial Provisions**

7 75. On May 30, 2023, the Council published Preproposal Statements of Inquiry related
8 to the Washington State Energy Code - Commercial Provisions, WAC 51-11C. *See* WSR 23-12-
9 041, -042. The Council stated that it would be “considering changes to the energy code to address
10 possible federal preemption issues regarding appliance regulation.”

11 76. On June 7, 2023, the Council delayed the effective date of the rules adopted under
12 Energy Code - Commercial Provisions, WSR 22-14-091, “for an additional 120 days, from July 1,
13 2023, to October 29, 2023, to evaluate what, if any, changes are necessary to maintain compliance
14 with [EPCA] given the recent 9th circuit court of appeals ruling on the Berkeley, California
15 ordinance.” *See* WSR 23-12-101.

16 77. On November 28, 2023, the Council via special meeting – and by a vote of 9 to 4 –
17 again amended the Energy Code - Commercial Provisions, WAC 51-11C, and established an
18 effective date of March 15, 2024. *See* Adopted Changes to Washington State Energy Code,
19 Commercial Provisions (Nov. 28, 2023) (CR 103 forms pending publication) (available at
20 https://sbcc.wa.gov/sites/default/files/2023-12/OTS-5008.3_post.pdf).

21 78. On December 12, 2023, the Council held yet another special meeting to discuss the
22 passage of WAC 51-11C on November 28, 2023, with less than the two-thirds majority vote –
23 rendering the approved motion disputed pursuant to RCW 19.27.025.

24 79. A primary concern for the Council at the December 12, 2023, special meeting
25 included concerns for additional Legislative approval of the WSEC-Commercial Provision
26 amendments as a result of a less-than-two-thirds majority vote at the November 28, 2023, special
27 meeting, and also the optics of additional amendments without additional public participation.

1 80. The December 12, 2023 special meeting was open to the public, however, the Council
2 elected against receiving public testimony. The Council supported this position by positing that it
3 had already received adequate public testimony at prior stages of its rulemaking.

4 81. As a result of the December 12, 2023 special meeting, and by a vote of 10 to 3, the
5 Council adopted an amendment to the November 28, 2023 motion to amend the Energy Code -
6 Commercial Provisions whereby the proposed amendments submitted for deliberation and adoption
7 at the November 28, 2023 special meeting were re-adopted in whole, but for the incorporation of a
8 single sentence within WSEC - Commercial Code Table C406.2(1) and (2).

9 82. On January 2, 2024, the United States Court of Appeals for the Ninth Circuit denied
10 a petition for rehearing or rehearing *en banc* and amended its original opinion while maintaining its
11 initial holding, in part, that “EPCA applies to building codes and that Berkeley’s Ordinance falls
12 with the Act’s preemptive scope.” *California Restaurant Association v. City of Berkeley*. No. 21-
13 16278, at 13 (rehearing *en banc* denied) (9th Cir. 2024).

14 83. The Petitioners remain adversely affected by the Council’s promulgation of
15 amendments to the Energy Code - Commercial Provisions. Even as amended, these regulations
16 effectively eliminate natural gas or propane use in commercial buildings and multifamily complexes;
17 interfere with commercial and consumer energy choice; increase the cost of construction, ownership,
18 and maintenance of commercial buildings; unnecessarily and detrimentally increase the cost of
19 multifamily housing; impair manufacturing and commerce of specific products; and jeopardize the
20 jobs and livelihoods of thousands in the trade industry.

21 **b. SBCC Delays the Issuance of Energy Code, Residential Provisions**

22 84. On June 7, 2023, the Council delayed the July 1, 2023, effective date of the rules
23 adopted under Energy Code - Residential Provisions regarding, among other portions, WAC 51-
24 11R-40392 Section R403.13 and WAC 51-11R-40340 Section 403.5.7. *See* WSR 23-12-102. The
25 Council stated its basis for the delayed effective date was “to evaluate what, if any, changes are
26 necessary to maintain compliance with the Energy Policy and Conservation Act given the recent 9th
27 circuit court of appeals ruling on Berkeley, California ordinance.”

1 85. On November 28, 2023, the Council again amended the Energy Code - Residential
2 Provisions, WAC 51-11R, and established an effective date of March 15, 2024. *See* Adopted
3 Changes to Washington State Energy Code, Residential Provisions (Nov. 28, 2023) (CR 103 forms
4 pending publication) (available at [https://sbcc.wa.gov/sites/default/files/2023-12/OTS-](https://sbcc.wa.gov/sites/default/files/2023-12/OTS-5010.1_post.pdf)
5 [5010.1_post.pdf](https://sbcc.wa.gov/sites/default/files/2023-12/OTS-5010.1_post.pdf)).

6 86. The Petitioners remain adversely affected by the Council's promulgation of
7 amendments to the Energy Code - Residential Provisions. Even as amended, these regulations
8 effectively eliminate natural gas or propane use in the home; interfere with commercial and
9 consumer energy choice; unnecessarily increase the cost of homebuilding, ownership, and
10 maintenance; impair commerce; and jeopardize the jobs and livelihoods of thousands in the trade
11 industry.

12 **c. SBCC Holds an Additional Meeting on January 19, 2024 to Address**
13 **Petitions for Reconsideration of the December 12, 2023 Rulemaking**
14 **Amendments**

15 87. On January 19, 2024, the Council considered two petitions for reconsideration which
16 raised concerns about the procedural process taken by the Council in promulgating amendments to
17 the State Building and Energy Codes and the lack of a Small Business Economic Impact Statement
(SBEIS) under the Regulatory Fairness Act. The Council denied both petitions.

18 **IV. CAUSES FOR DECLARATORY RELIEF**

19 88. Petitioners incorporate by reference the allegations contained in paragraphs 1 through
20 86 of this Petition, as though fully set forth below.

21 89. Petitioners seek judicial review of the Washington State Energy Code - Residential
22 Provision as amended in part by WSR 22-02-060 and again by an as-yet unpublished November
23 28, 2023 rulemaking; the Washington State Energy Code-Commercial Provision as amended in part
24 by WSR 22-14-091 and again by as-yet unpublished November 28 and December 12, 2023
25 rulemakings; the Washington Wildland - Urban Interface Code as implemented by WSR 23-02-056;
26 and the State Building Code as amended by WSR 23-02-058. All of which will become effective
27 without additional Legislative consideration on March 15, 2024.

1 90. Petitioners seek further declaratory judgment on the Council’s violations of the Open
2 Public Meetings Act, RCW 42.30

3 **A. Violation of the Administrative Procedure Act**

4 91. The Court may declare an agency rule invalid if “the rule violates constitutional
5 provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without
6 compliance with the statutory rule-making procedures; or the rule is arbitrary and capricious.” RCW
7 34.05.570(2)(c).

8 92. The Council exceeded its statutory authority under both RCW 19.27 and RCW
9 19.27A when it adopted the amendments to each of the Code provisions as discussed above.

10 93. To the extent that RCW 19.27 or 19.27A permit the Council to legislate the
11 prohibition of natural gas use in commercial and residential buildings, it is an unconstitutional
12 delegation of authority by the Legislature under article II, section 1 of the Washington Constitution.

13 94. The Council adopted the Energy Code, Wildland-Urban Interface Code, and State
14 Building Code provisions in noncompliance with the statutory rulemaking procedures set forth in
15 RCW 19.85, RCW 34.05.310 through .395, as well as in noncompliance with rulemaking procedures
16 and the Council’s own regulatory and bylaw requirements.

17 95. The Council adopted all of the Code provisions without regard to the attending facts
18 or circumstances of the required procedures, statutory authority, and without considering the costs
19 imposed on homeowners, workers, businesses, developers, and myriad others across the state, and
20 thus its actions were arbitrary and capricious.

21 **B. Violation of the Regulatory Fairness Act**

22 96. The Administrative Procedure Act permits a reviewing court to assess compliance
23 with the Regulatory Fairness Act under the APA’s arbitrary-capricious standard. RCW
24 34.05.570(2)(c).

25 97. The Council’s adoption of the Act and Energy Code provisions impose broad
26 prohibitions on the use of fossil fuel combustion appliances for HVAC heating, restrict all but
27 electric air-source heat pump water heating, and demand unnecessary costs across a state-wide

1 residential and commercial market.

2 98. The Council arbitrarily and capriciously adopted these Act and Energy Code
3 provisions with little to no regard to the necessary incorporation of an appropriate SBEIS as required
4 under the Regulatory Fairness Act, RCW 19.85.040, .070.

5 **C. Violation of the Open Public Meetings Act**

6 99. The Open Public Meetings Act permits a reviewing court to assess compliance with
7 the Open Public Meetings Act, and further provides for injunctive relief, the assessment of civil
8 penalties, and attorneys' fees and costs in the event an agency has violated the OPMA. RCW
9 42.30.120, .130.

10 100. The Council violated the Open Public Meetings Act by holding closed meetings to
11 discuss, amongst other topics, cost estimates for their proposed actions and bylaw changes to bring
12 forth in future Council meetings. "The people insist on remaining informed and informing the
13 people's public servants of their views so that they may retain control over the instruments they have
14 created." RCW 42.30.010.

15 **V. PRAYER FOR RELIEF**

16 101. Declare invalid the State Building Code Council's amendments to the Washington
17 State Energy Code - Residential Provision as amended in part by WSR 22-02-060 and again in the
18 as-yet-unpublished November 28, 2023 rulemaking; the Washington State Energy Code -
19 Commercial Provision as amended in part by WSR 22-14-091 and again in the as-yet-unpublished
20 November 28, and December 12, 2023 rulemakings; the Washington Wildland - Urban Interface
21 Code as implemented by WSR 23-02-056; and the State Building Code as amended by WSR 23-02-
22 058, all to become effective March 15, 2024.

23 102. Declare null and void any and all action taken by the Council and its members in
24 violation of the Open Public Meetings Act under 42.30.060.

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27 ////

1 103. Award the Petitioners their costs and expenses, including reasonable attorneys' fees,
2 as allowed under RCW 4.84.350; and RCW 42.30.120.

3 104. Order such other and further relief as this Court deems just and equitable.

4
5 DATED: January 23, 2024

6 LANE POWELL PC

7
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17 Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the date listed below, I caused to be served a copy of the foregoing document to the following persons in the manner indicated:

Table with 2 columns: Recipient Information and Manner of Service. Row 1: Noelia Gravotta, Molly Tack-Hooper, Jan Hasselman, Earthjustice, 810 Third Ave., Suite 610, Seattle, WA 98013. Row 2: R. July Simpson, Assistant Attorney General, William McGinty, Assistant Attorney General, Dierk Meierbachtol, Assistant Attorney General, Emma Grunberg, Deputy Solicitor General, Amy Hand, Paralegal, Christine Truong, Legal Assistant, Washington State Attorney General's Office, 1125 Washington St. SE, Olympia, WA 98504-0100.

DATED: January 23, 2024

s/Angela Craig
Angela Craig, Legal Assistant