

1 No Hearing is set
2 X Hearing is set: March 1, 2024, 9:00 a.m.
3 Judge/Calendar: Judge Carol Murphy
4
5
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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

**MOTION TO STAY THE EFFECTIVE
DATE OF THE STATE BUILDING
CODES AND ENERGY CODE**

MOTION TO STAY THE BUILDING CODE
Case No. 23-2-00615-34 - 1

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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. INTRODUCTION**

12 Nearly two years ago, the State Building Code Council (SBCC) promulgated a series of
13 regulations on residential and commercial properties (the Building Code¹ and Energy Code,
14 collectively “the Codes”), which *inter alia*, banned natural gas. Petitioners challenged those
15 regulations. But while that litigation was pending, the Ninth Circuit ruled that the City of Berkley’s
16 ban on natural gas was preempted by federal law, and the SBCC clawed back the entire package of
17 regulations, to evade the Ninth Circuit’s ruling. This led to an ad hoc process to rewrite and
18 reconsider the Codes.

19 At the end of that process, the SBCC submitted a revised set of regulations with an effective
20 date of March 15, 2024. But the SBCC’s revised Codes (and the process by which it developed and
21 promulgated them) violated the state Administrative Procedures Act (APA), the Regulatory Fairness
22 Act’s requirement for a small business economic impact statement (SBEIS), and the Open Public
23 Meetings Act (OPMA). As a consequence of the SBCC’s illegal acts, specific provisions of the
24 Codes are invalid and unenforceable. Accordingly, the Court should grant a stay of the effective date
25 of the codes pending conclusion of this judicial review. Petitioners are likely to succeed on the merits
26 of their challenge, and the failure to grant a stay would cost the Petitioners the fruits of their challenge

27 ¹ The State’s Building Code Act incorporates and references a series of other model codes: the
International Building Code, the International Residential Code, and portions of the International
Wildland Urban Interface Code, but wherever possible this motion will use “Building Code.”

1 to the regulations, as they would be forced to comply with the costly and unlawful Codes put forward
2 by the SBCC at significant burden and expense to Petitioners and Washington citizens.

3 **II. STATEMENT OF FACTS**

4 **A. Early Attempts to Adopt the 2021 Code**

5 In 2021 and 2022, Governor Inslee proposed and attempted to pass House Bill 1770 and
6 House Bill 1084, which would have dramatically revised the energy consumption standards for new
7 construction and given the SBCC additional authority to adopt related code provisions.²

8 After failing to secure legislative approval for these policies, the SBCC (whose members are
9 appointed by the Governor) attempted to obtain substantially similar policy outcomes via regulatory
10 action. On August 23, 2022, the SBCC filed its initial proposal for rulemaking for the Residential
11 Code. *See* WSR 22-17-149. This proposal was finalized and adopted as the Residential Code for the
12 2021 Code Cycle on January 3, 2023. As relevant here, the adopted regulatory framework, mandated
13 that space and water heating be provided by electric heat pump systems, with only limited
14 exceptions. *See* WSR 22-17-149 *amending* WAC 51-11R-40392 § R403.13 (space heating); WAC
15 51-11R-40340 § R403.5.7 (water heating). Functionally, these amendments prohibited the use of
16 gas-powered furnaces and water heaters, requiring all-electric builds.

17 The SBCC also proposed substantial revisions to the Commercial Code for the 2021 Code
18 Cycle. *See* WSR 22-02-076. As relevant here, the proposed Commercial Code, amended: (1) WAC
19 51-11C-11C-40314 § 403.1.4 to prohibit the use of HVAC systems using fossil fuel combustion or
20 electrical resistance (a *de facto* heat pump mandate) ; (2) WAC 51-11C-40402 § 404.2.1 to mandate
21 that hot water be provided by electric heat pump systems; and (3) WAC 51-11C-40507 § 405.7.1 to
22 mandate that alternate electrical service be provided for each and every dwelling unit appliance
23 served by natural gas. *See* WSR 22-14-091. These regulations banned the use of natural gas heating
24 appliances, and required expensive and needless installation of electrical service for any other natural
25

26 ² *See* Available at
27 <https://app.leg.wa.gov/billsummary?BillNumber=1770&Initiative=false&Year=2021> (H.B. 1770);
<https://app.leg.wa.gov/billsummary?BillNumber=1084&Initiative=false&Year=2021> (H.B. 1084).

1 gas appliance not expressly banned by the regulations.

2 **B. The SBCC Delays the Implementation of the Codes**

3 On February 28, 2023, Petitioners challenged the Codes on the grounds that they exceeded
4 the statutory authority granted to the legislature, were arbitrary and capricious, and to the extent the
5 SBCC did have authority to issue such regulations, that authority constituted an unconstitutional
6 delegation of legislative power. *See Miller Decl., Ex. 1.* During the pendency of that challenge (on
7 April 17, 2023), the United States Court of Appeals for the Ninth Circuit, found that substantially
8 similar regulations restraining consumers’ ability to use the natural gas appliances of their choice
9 was preempted by the Energy Policy and Conservation Act (“EPCA”). *See California Rest. Ass’n v.*
10 *City of Berkeley*, 65 F.4th 1045, 1056 (9th Cir. 2023) *amended and superseded by* 89 F.4th 1094
11 (2024). As a consequence of this ruling, the SBCC delayed implementation of all the challenged
12 regulations (and the entire promulgated Codes even where the stayed Code provisions did not touch
13 or concern natural gas appliances or electrical appliance infrastructure) “to evaluate what, if any,
14 changes are necessary to maintain compliance with the Energy Policy and Conservation Act given
15 the recent 9th circuit court of appeals ruling on Berkeley, California ordinance.” *See WSR 23-12-*
16 *101 (Commercial Energy Code); -102 (Residential Energy Code); -103 (Commercial Code), -104*
17 *(Residential Code); -106 (Mechanical Code); -107 (Fire Code); -109 (Wildland-Urban Interface*
18 *Code); -110 (Plumbing Code).*

19 **C. The SBCC Revises and Readopts the Codes**

20 On May 30, 2023, the SBCC published Preproposal Statements of Inquiry related to the
21 Commercial Energy Code. *See WSR 23-12-041, -042.* The SBCC’s public record of its 2021 Code
22 Cycle activity provides that WSR 23-12-042 also constituted the CR 101 Preproposal Statement for
23 the Residential Energy Code, despite the CR 101 referencing only the Commercial Energy Code.
24 *See 2021 Code Adoption Cycle—2021 Washington State Energy Code – Residential (Group 3 CR*
25 *101 Form)* (available at <https://sbcc.wa.gov/2021-code-adoption-cycle>). On October 18, 2023, the
26 SBCC published its revised proposed rules amending the Commercial and Residential Energy
27 Codes. WSR 23-21-105 (Residential Energy Code); -106 (Commercial Energy Codes).

1 The SBCC then held public hearings and solicited comments on its proposed code revisions.
2 As relevant here, on November 22, 2023, the SBCC received oral public comments on the proposed
3 Energy Codes. Andrea Smith, Gary Heikkinen, Kevin Duell, and Sarah Neibert all testified that it
4 was functionally impossible to obtain the number of credits required under the natural gas option
5 and so the Energy Codes worked as a de facto ban on natural gas. Miller Decl. ¶4. Tod Sakai, a
6 builder, objected to the proposed Building Codes on the grounds that, to meet the new efficiency
7 requirements, wall thickness would be substantially increased to account for additional insulation.
8 As a result, Mr. Sakai testified that specialty windows and fasteners would need to be used in
9 construction, substantially increasing costs. *Id.* at ¶5. An experienced builder of net zero homes,
10 joined in these objections, noting that the carbon costs alone of just the Building Code’s insulation
11 requirements could not be recovered over the useful life of a building, and that there would be
12 substantial noncompliance with the regulations. *Id.* At least six separate commenters recommended
13 that the SBCC not adopt the 2021 code and instead wait out this code cycle and adopt the less
14 problematic 2024 proposed international building code. *Id.* Carolyn Logue, representing the
15 Washington Air Conditioning Contractors Association and Northwest Hearth Patio & Barbecue
16 Association, commented that the appliances required by the code do not exist. *Id.* at 6.

17 Another meeting was held by the SBCC on November 28, 2023. *See* Miller Decl., Ex. 2
18 (Minutes Summary). That meeting was described by the SBCC’s counsel and director as being the
19 meeting for the final adoption of the proposed rulemaking which would move the proposed
20 regulations to SBCC staff to prepare the regulations for formal publication. Miller Decl. ¶13. The
21 director also apologized because in setting the meeting they had missed certain proposed
22 amendments because of the “huge amounts of documents and testimony” submitted during the
23 public hearings. *Id.* At that meeting, Senator Lynda Wilson, and members of the public, raised
24 serious concerns with the SBCC’s process, including the SBCC’s failure to conduct a proper Cost
25 Benefit Analysis or provide an SBEIS. Miller Dec. Ex. 2 at 2-3. The failure to conduct a full cost
26 analysis and to prepare a SBEIS for the proposed rules concerned Sen. Wilson, in part, because the
27 SBCC’s failure to comply with the APA deprived members of the public of the ability to

1 meaningfully engage in public comment and participate in this rulemaking. Miller Decl. ¶¶9-10. An
2 SBCC employee noted that the costs of the proposed regulation were deemed indeterminate because
3 the regulations utilized multiple options. *Id.* at ¶11. In the SBCC’s debate on the proposed
4 regulations and amendments, council members expressed reticence to approve these regulations
5 without updated economic analyses. *Id.* at ¶12. The managing director of the SBCC, interjected that
6 a new cost benefit analysis was not required unless the professional staff considered the changed
7 regulation to be “significant,” but he also noted that he had never seen a proposed change be deemed
8 significant. *Id.* Counsel to the SBCC, responded to remind the SBCC members of their duty to
9 determine that after considering alternatives, that the proposed regulations were the least
10 burdensome alternative and complied with state and federal law. *Id.* Several SBCC members agreed
11 with what they saw as the prevailing view of the public commenters: that the 2021 code was
12 fundamentally flawed and should be skipped in favor of the 2024 code. *Id.* at ¶14. SBCC members
13 Daimon Doyle and Sen. Wilson, both pointed out that the pre-existing code already met, and indeed
14 exceeded the legislature’s target to reduce energy consumption. *Id.* Doyle noted “that [Pacific
15 Northwest National Laboratory]’s analysis showed that **Washington State had gone more than**
16 **18%+ of the 2021 targeted goal and we are two code cycles ahead of where Washington State**
17 **should be.”** Miller Decl. Ex. 2 at 2 (emphasis added). The SBCC passed both the Commercial code
18 and the Residential code with amendments, but only the Residential code passed with a two-thirds
19 majority. *Id.* at 6-7.

20 Despite the fact that the November 28, 2023 meeting was expressly noticed as the meeting
21 to discuss and adopt the final proposed rules, the SBCC held two more meetings concerning the
22 proposed rules after its “final” adoption of the rules on November 28, 2023. First, on December 12,
23 2023, the SBCC reconvened. Miller Decl. Ex. 3 at 1. As the Minute Summary for that meeting
24 details, only some of the SBCC members knew the purpose of this meeting, because it was called
25 “without consultation to **all members of the council.**” *Id.* at 1-2. The Managing Director and the
26 SBCC’s counsel noted that a majority of members had requested that a meeting be held. *Id.* Sen.
27 Wilson asked for clarification as to whether the true purpose of this meeting was to conduct a revote

1 on the Commercial Code because it did not receive the two-thirds majority required to bypass the
2 legislature. *Id.* at 2. Another council member asserted that the council’s last action was the final vote
3 on the proposed legislation, and so the proposed meeting should not go forward. *Id.* Counsel
4 responded noting that “members of the council did not call the meeting for the purpose of
5 reconsidering the November 28 vote. Instead, the purpose of the special meeting is to address the
6 two-thirds threshold and to take action on the Commercial Energy Code.” *Id.* Counsel did not
7 directly answer whether the meeting was called to evade legislative review, but asserted that Roberts
8 Rules of Order would permit the SBCC to rescind its prior vote or amend the previous motion (the
9 adoption of the Commercial Code on November 28, 2023). *Id.*

10 Member Kjell Anderson admitted that he had suggested this meeting to obtain the two-thirds
11 majority necessary to bypass the legislature. *Id.* Given that the Director and Counsel previously
12 stated that a majority of the SBCC requested the meeting, Mr. Anderson apparently had coordinated
13 with perceived friendly members of the SBCC to orchestrate this action and trigger the meeting
14 outside of the public view and without the knowledge of all of the SBCC’s members. The overriding
15 concern of the meeting was finding the least problematic way to secure a two-thirds majority vote
16 on the Commercial Code, and avoiding a substantive amendment that might require public comment.
17 *Id.* at 4-6. The Council also discussed what votes they could take, given the limits of how they
18 described this public hearing, and still be compliant with the OPMA. *Id.* at 6-7. Ultimately, the
19 motion to rescind the November 28 vote was withdrawn, and a motion to amend a portion of a table
20 in the original regulation was passed by a two-thirds majority. *Id.*

21 Afterwards, Sen. Wilson sent a letter to the SBCC, asking when the SBCC intended to submit
22 the Commercial Code to the legislature for approval as required by RCW 19.27A.025(3), noting that
23 the November 28, 2023 vote was never rescinded and the amendment only purported to change a
24 single table, and so, at a minimum, no other provisions of the Commercial Code had the necessary
25 majority to avoid legislative review. *See Miller Decl. Ex. 4.*

26 On January 19, 2024, the SBCC again met and discussed this issue, with an unspecified
27 majority of the council agreeing that the prior vote obviated the need for legislative review and

1 requesting that the SBCC’s staff prepare a letter to that effect. Miller Decl. Ex. 5 at 2.

2 **III. EVIDENCE RELIED UPON**

3 The evidence relied upon consists of relevant Washington State Register (WSR), the
4 declarations and exhibits attached thereto, and the papers and pleadings of record in this action.

5 **IV. STATEMENT OF THE ISSUES**

6 Whether the Court should stay the challenged regulations pending this Court’s final judicial
7 review? **Yes.**

8 **V. ARGUMENT AND AUTHORITY**

9 **A. Applicable Standard for a Stay under the Administrative Procedure Act**

10 The Administrative Procedure Act provides that “[a]fter a petition for judicial review has
11 been filed, a party may file a motion in the reviewing court seeking a stay or other temporary
12 remedy.” RCW 34.05.550(2). If the underlying agency action is purportedly based on public health,
13 safety or welfare grounds, the APA provides a four-element standard for a stay. *See* RCW
14 34.05.550(3). However, because the challenged Codes here address energy efficiency and building
15 construction standards, rather than life safety, the requirements in RCW 34.05.550(3) do not apply.
16 Furthermore, because the APA does not provide a standard for granting a stay under RCW
17 34.05.550(2), courts rely on the general standards for granting stays on appeal of a lower court’s
18 actions. Accordingly, in cases such as this, courts consider only two elements in determining whether
19 to grant a stay: (1) if the issues presented by the appeal are debatable, and (2) if a stay is necessary
20 to preserve for the petitioner the fruits of a successful appeal, considering the equities of the situation.
21 *See, e.g., Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). Here Petitioners have
22 established both factors and this Court should issue a stay of the Codes pending review. With respect
23 to the first element “the merits of the controversy are considered only so far as to ascertain whether
24 the question presented is debatable.” *Shamley v. City of Olympia*, 47 Wn.2d 124, 126, 286 P.2d 702,
25 703 (1955). This is a low bar.

26 **B. Petitioners Will Prevail on the Merits of their Claims.**

27 An agency rule is invalid if it exceeds the agency’s statutory rule-making authority, violates

1 constitutional provisions, is arbitrary and capricious, or was adopted without complying with
2 statutory rulemaking procedures. *See* RCW 34.05.570(2)(c); *Washington Rest. Ass'n v. Washington*
3 *State Liquor & Cannabis Bd.*, 10 Wn. App. 2d 319, 327, 448 P.3d 140 (2019).

4 1. The SBCC exceeded its statutory authority.³

5 Well-settled principles govern the scope of an administrative agency's rule-making
6 authority. *Washington Fed'n of State Employees v. Dep't of Gen. Admin.*, 152 Wn. App. 368, 377,
7 216 P.3d 1061 (2009). An agency has no inherent powers, but "only such powers as have been
8 expressly granted to it by the legislature." *Washington Rest. Ass'n*, 10 Wn. App. 2d at 327-28.
9 Agencies cannot promulgate rules that amend or change legislative enactments. *Washington Fed'n*
10 *of State Employees*, 152 Wn. App. at 377. When an agency makes a rule that exceeds or is
11 inconsistent with its statutory authority, the rule is invalid. *Washington Rest. Ass'n*, 10 Wn. App. 2d
12 at 327-28. Here, the SBCC failed both substantively and procedurally to comply with statutory
13 provisions that govern its rulemaking authority.

14 First, substantively, RCW 19.27A.025 requires that the SBCC increase the energy efficiency
15 of typical newly constructed nonresidential buildings," but "[a]ny new measures, standards, or
16 requirements adopted must be technically feasible, commercially available, and developed to
17 yield the lowest overall cost to the building owner and occupant while meeting the energy
18 reduction goals." (emphasis added). Moreover, the legislature substantially cabined the SBCC's
19 discretion in promoting efficiency both by defining a definite end goal and the process the SBCC
20 should use to reach it. RCW 19.27A.160(1) provides "residential and nonresidential construction
21 permitted under the 2031 state energy code must achieve a seventy percent reduction in annual net
22 energy consumption, using the adopted 2006 Washington state energy code as a baseline." The
23 legislature further specifies, that the SBCC should "adopt state energy codes from 2013 through
24 2031 that incrementally move towards achieving the seventy percent reduction in annual net

25 _____
26 ³ Petitioners focus their arguments on the challenged Residential and Commercial Codes; however,
27 all of the Code provisions must be stayed because, as the SBCC recognized when previously
delaying the original effective date for each, they all interrelate.

1 energy consumption.” RCW 19.27A.160(2) (emphasis added). The legislature also authorized the
2 SBCC to defer the implementation of a proposed energy code if “economic, technological, or process
3 factors would significantly impede adoption of or compliance with” this statute. *Id.*

4 Substantial evidence before the SBCC, including an analysis by the Pacific Northwest
5 National Laboratory established that the energy efficiency goals for the next two cycles had already
6 been met. This fact was highlighted by SBCC members in its discussion on whether to adopt the
7 Code. *See generally* Miller Decl., Ex. 2. Moreover, members of the public submitted numerous
8 public comments imploring the SBCC to skip the 2021 code and adopt the 2024 code, because the
9 2021 code was unworkable, impracticable, and unduly expensive. As detailed above, the SBCC’s
10 enabling statute, expressly directed it to consider these burdens when moving incrementally towards
11 the legislature’s goal of a 70% reduction in energy consumption by 2031. The SBCC disregarded
12 this duty when it ignored the undisputed evidence that, under the existing code, the SBCC was
13 already ahead of the legislature’s goals for 2021. Instead, the SBCC insisted on a code that builders
14 and other interested parties repeatedly warned was unlawful and unworkable.

15 The SBCC never seriously considered the least burdensome alternative to the new Codes:
16 leaving the 2018 code in place and moving forward to the 2024 code. Indeed, in its response to
17 public comments, on at least 10 discrete occasions, the SBCC rejected those proposals with the
18 following boilerplate response: “**Missing a code cycle entirely is unacceptable**, and moving
19 forward with the 2021 codes at this time provides certainty for builders and designers, increases
20 energy efficiency, and enhances equity for building residents.” *See, e.g.,* Miller Decl. Ex. 6 at 2
21 (emphasis added). There is no support in the enabling statute for the proposition that it is
22 “unacceptable” for the SBCC to sit out one code cycle. To the contrary, the statute expressly
23 contemplates that it might not be feasible to pass a new code reducing energy consumption, even
24 when the failure to do so could bring the code out of compliance with the legislatively established
25 goals. RCW 19.27A.160 (2). The SBCC’s other rationale for insisting on a new code—that it
26 promotes certainty for builders and designers—is nonsensical. Builders and designers already
27 operate under the 2018 code: there is no certainty gained by changing it on them.

1 This is not the only instance of the SBCC failing to comply with its legislative mandate in
2 the process of pursuing this rulemaking. In 38 discrete responses to public comments, the SBCC
3 stated that: “skipping the 2021 code cycle **would make energy efficiency improvements required**
4 **by state law to be more stringent in the next cycle.**” *See, e.g.,* Miller Decl. Ex. 6 at 15 (emphasis
5 added). But this assertion misconstrues the plain language of the statute, and disregards the evidence
6 and testimony that the current building code was already practically two cycles ahead. RCW
7 19.27A.160 provides that the SBCC should adopt codes “that **incrementally move towards**
8 achieving the seventy percent reduction in annual net energy consumption” by 2031. The SBCC’s
9 response indicates that it failed to comply with its legislative mandate in passing the challenged
10 codes. There is no requirement that the SBCC cut energy consumption every year by a fixed
11 percentage. The code only requires incremental progress towards a set goal—which has already been
12 met.

13 2. The SBCC disregarded statutory rulemaking procedures.

14 The responses to public comment also present a procedural problem with the SBCC’s
15 adoption of the Code: its failure to consider public comments on the amendments. RCW 34.05.325
16 requires an agency to submit a concise explanatory statement of its proposed rule, “[s]ummarizing
17 all comments received regarding the proposed rule, and responding to the comments by category or
18 subject matter, indicating how the final rule reflects agency consideration of the comments, or why
19 it fails to do so.” “The purpose of such rule-making procedures is to ensure that members of the
20 public can **participate meaningfully in the development of agency policies which affect them.**”
21 *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945, 981, 474 P.3d 1107,
22 1126 (2020) (emphasis added) (quoting *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d
23 640, 649, 835 P.2d 1030, 1035 (1992)). As discussed above, the SBCC’s responses to many of the
24 comments did not discuss how the final rule considered the comments or explain why the SBCC
25 chose to disregard the comments. The SBCC’s proffered and copy-pasted explanations contradicted
26 the standards of its enabling statute and did not engage with the substance of the public’s concerns.
27 By failing to seriously consider and address the concerns of the commenters the SBCC denied the

1 public the ability to meaningfully shape public policy, as guaranteed by the APA.

2 Moreover, the managing director’s comments at what was supposed to be the final adoption
3 meeting on November 28, 2023, suggested that at the time the SBCC voted on the codes, they did
4 not have and had not reviewed all of the public comments and proposed amendments to the codes.
5 Compounding the problem of potentially omitted public comments, the SBCC’s explanatory
6 statement omitted substantial portions of critical public comments, and thus also failed to reply to
7 the substance of those criticisms. For example, as discussed above Tod Sakai testified that the
8 proposed codes would result in add-on effects compounding the costs of construction, but those
9 concerns are nowhere to be found in the SBCC’s summary of his comment. *See* Miller Decl., Ex. 6
10 at 20. Although the SBCC summarized Carolyn Logue’s comment that the appliances required by
11 the code do not exist, and Kevin Duell’s comment that the required energy credits are impossible to
12 achieve in a natural gas build, the SBCC’s response did not address the substance of their concerns
13 that compliance was impossible. *Id.* at 6, 13.

14 Beyond refusing to meaningfully engage with the public as required by the APA, the SBCC
15 also failed to procure and produce required economic analyses of its proposed rules. As counsel for
16 the SBCC noted the members were obligated to assess whether the proposed regulation was the least
17 burdensome alternative to achieve the legislature’s mandated goals. Miller Decl. ¶12. As relevant
18 here, the Regulatory Fairness Act requires a small business economic impact statement, *see* RCW
19 19.85.030, and the APA requires a preliminary cost-benefit analysis and a final cost-benefit analysis,
20 RCW 34.05.328(1)(c), for proposed rulemaking. In defending the decision not to procure new
21 economic analyses of the building codes, the director and some council members repeatedly relied
22 on the fact that the revised regulations added options to the original 2022 version of the building
23 codes. But without conducting a new economic analysis of the revised regulations, there is no basis
24 for the SBCC’s conclusion that the revised regulations impose no new costs or no new burdens on
25 small businesses. Indeed, Sen. Wilson observed that the new rules did more than just add options,
26 they altered the required efficiency credits for all system types: *i.e.*, a substantial material change
27 from the prior rule. *See* Miller Decl. ¶10. Moreover, the APA requires that a “final cost-benefit

1 analysis must be available when the rule is adopted” RCW 34.05.328(1)(c). However, no such
2 analysis was available at the time of the November 28, 2023 vote adopting the Codes. While the
3 SBCC’s director defended the lack of a final analysis on the grounds that this vote was a vote to
4 move the rulemaking to the professional staff for publication, and thus not the formal adoption of
5 the rule, that meeting was characterized as the final meeting to adopt the rules (and, at least with
6 respect to the residential codes, was in fact the final meeting discussing the regulations). The clear
7 intent of the statute is that a final analysis be available for the agency to review at the time it adopts
8 a new regulation, which did not happen here.

9 With respect to the Commercial Code, the SBCC ignored at least one other statutory limit on
10 its power in its haste to approve the code: RCW 19.27A.025(3). It is indisputable that the SBCC did
11 not pass the commercial code by a two thirds majority vote at the November 28, 2023 meeting. After
12 realizing that their rules would be subject to legislative review, members of the SBCC coordinated
13 a campaign to set a meeting (a mere two days before the statutory deadline) and take another stab at
14 reapproving its previously “approved” rulemaking. But this effort failed and only a motion to make
15 minor amendments to the codes passed at that eleventh-hour hearing. *See Miller Decl. Ex. 4; 5.*
16 Unsurprisingly, the SBCC still has not sought the required legislative review.

17 3. The SBCC’s adoption of the Code was arbitrary and capricious.

18 “An agency action is arbitrary and capricious if it is willful and unreasoning and taken
19 without regard to the attending facts or circumstances.” *Puget Sound Harvesters Ass’n v. Washington*
20 *State Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 945, 239 P.3d 1140, 1145 (2010). An agency acts
21 without regard to attending facts or circumstances when it “makes rules without considering their
22 effect on agency goals.” *Id.* at 950. In this case, the SBCC failed to consider all of the factors the
23 legislature instructed it to weigh. The overriding goal of this rulemaking process was to deliver a
24 policy win for the outgoing Governor, by passing regulation policies he could not get through
25 legislative action. While political goals alone do not establish arbitrary and capricious action, they
26 do inform this analysis and explain how the SBCC’s rush to pass unworkable and unnecessary rules
27 led to arbitrary and capricious action. To begin with, the SBCC’s enabling statute authorized it only

1 to promulgate codes that were “technically feasible, commercially available, and developed to yield
2 the **lowest overall cost to the building owner and occupant** while meeting the energy reduction
3 goals.” RCW 19.27A.025. It was repeatedly pointed out to the SBCC that the proposed regulations
4 were exceedingly expensive and burdensome, and could not reasonably be complied with. The
5 SBCC ignored those concerns in favor of enacting the Governor’s climate change policy goals, and
6 in the process it ignored factors the legislature required it to consider. The SBCC’s push also led to
7 complete disregard of other procedural requirements, including cost-benefit analyses and legislative
8 review of the commercial code. There is also no reasonable doubt that the SBCC’s disregard of these
9 factors was willful, because these concerns were repeatedly raised during the rulemaking process.

10 4. The SBCC violated the OPMA in developing and promulgating the Codes.

11 The OPMA requires that agency meetings be conducted in public view with a reasonable
12 opportunity for public participation. RCW 42.30.030. It also requires that “the minutes of all regular
13 and special meetings except executive sessions of such boards, commissions, agencies or authorities
14 shall be promptly recorded and such records shall be open to public inspection.” RCW 42.30.035.
15 The SBCC violated the OPMA in a number of notable ways, the most prominent of which was
16 displayed at the December 12, 2023 meeting. At that meeting, it was clear that Mr. Anderson and
17 others had engaged in private conversations with members they judged to support the regulation,
18 because that meeting was called only after a number of members contacted the professional staff to
19 request a new meeting. When the meeting began, SBCC staff, including its counsel and director, had
20 already prepared an avenue to redo the November 28, 2023 vote on the proposed regulations in a bid
21 to obtain a two-thirds majority and avoid legislative review. This agenda came as a surprise to the
22 minority of members opposed to the original passage of the rules. This process raises a serious
23 prospect that a majority of the SBCC planned, discussed, and coordinated major agency action
24 outside of the public eye. These undocumented secret meetings essentially saw a working majority
25 of the SBCC agree to a questionable procedural maneuver to evade legislative review outside of
26 public meetings. Only after the majority was obtained and the decision made did they hold a public
27 meeting to ratify the decision made behind closed doors. Moreover, this is not the only occasion in

1 which substantive decisions were made outside of documented public meetings, it was well known
2 that the SBCC's technical advisory groups ("TAGs") utilized workgroups with unknown members,
3 working outside of public view to develop portions of the regulations. *See* Smith Decl. ¶¶9-10.
4 Additionally, contrary to the OPMA's requirement that agencies promptly release a summary of
5 minutes for their public meetings, the SBCC and its associated TAGs failed to release minutes for
6 at least three meetings held about the challenged codes. *See* Miller Decl. ¶19.

7 **C. A Stay is Necessary to Preserve the Fruits of Petitioners' Appeal.**

8 If the Court does not grant a stay, Petitioners will lose the fruits of their appeal. Construction
9 is a time-consuming industry that requires months of advanced planning. *See* Smith Decl. ¶ 4, 8.
10 Because future projects must account for expected changes to the Codes, Petitioners and other are
11 already facing significant increase costs of compliance. *Id.* ¶ 5 When a construction project begins,
12 the designers and builders submit plans to the local permitting authority, which must comply with
13 the then applicable codes. *Id.* Once the plans are submitted under a given building code that code
14 will govern the new construction throughout the life of the project, even if the codes are changed
15 subsequently. *Id.* ¶¶ 7-10. To apply to build a property under a different set of codes, would require
16 starting again from scratch with a new permitting process. Because of this, if the challenged Codes
17 are permitted to go into effect, the Petitioners will be forced to submit designs under the challenged
18 codes and will be required to change their plans at significant cost and resubmit for new permits if
19 this case succeeds and the Codes are later changed. *Id.* Accordingly, the Petitioners will lose the
20 benefits of this challenge if a stay is not issued. Additionally, the equities weigh heavily in favor of
21 granting a stay. The SBCC has already stayed these regulations once (indeed it stayed the entire set
22 of Codes pending further amendments). Moreover, given that the SBCC is two cycles ahead of the
23 legislature's goals for energy efficiency, there is no pressing need for the SBCC to have its rule
24 changes implemented immediately, instead of waiting for a few months while the court considers
25 the merits of the Petitioners' challenges.

26 **VI. CONCLUSION**

27 For the forgoing reasons the Court should grant the motion and stay the Building Code.

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DATED: February 20, 2024

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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:

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DATED: February 20, 2024

s/Angela Craig
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