

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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COMMONWEALTH COURT
OF PENNSYLVANIA
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PENNSYLVANIA BUILDERS ASSOCIATION; :
MURRY DEVELOPMENT CORP; WILLIAM MURRY :
& SON, INC.; WOODS EDGE BUILDERS, INC.; :
THE MURRY COMPANIES/SHER-WAL, INC. JOINT :
VENTURE; TOA PA IV, LP; TOA PA V, LP; :
TOA PA VI, LP; TOA PA VII, LP; and TOA PA XIII, LP. :
Petitioners :

v. :

No. 27 MD 2010

DEPARTMENT OF LABOR & INDUSTRY :
Respondent :

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

PETITION FOR REVIEW

INTRODUCTION

1. By Notice published December 26, 2009, at 39 Pa.B. 7196, the Department of Labor & Industry (“L&I”) promulgated regulations adopting the 2009 version of the International Code Council (“ICC”) model International Residential Code (the “IRC”) and the International Business Code (“IBC”) to replace the existing 2006 Codes as part of the Uniform Construction Code (the “UCC”) in the Commonwealth. The UCC applies, with exceptions, to “the construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every building or structure” *See* 34 Pa. Code § 403.1(a)(1) and (b). The IRC applies to detached one-family and two-family dwellings and one family townhouses not more than three stories in height; the IBC applies to all other buildings. Petitioners seek declaratory and injunctive relief as to the new regulations, and an injunction against their use and enforcement.

THE PARTIES

2. Petitioner, The Pennsylvania Builders Association (the “PBA”), is a Pennsylvania non-profit corporation with offices at 600 N. 12th Street, Lemoyne, PA 17043.

3. The PBA is a professional trade organization representing more than 9,000 member-companies, all located in Pennsylvania, who are involved in the building industry, primarily as builders, remodelers, material suppliers, subcontractors, and consultants. Chartered in 1952, the PBA represents its members on state regulatory and legislative issues. It brings this action in its own right and on behalf of its members engaged in the business of residential construction. Its members build primarily under the International Residential Code but some build under the International Building Code

4. Petitioners Murry Development Corp. and William Murry & Son, Inc. are, respectively, the builder and owner of real property comprising the Crossgates residential

development in Lancaster County. Petitioners Woods Edge Builders, Inc. and The Murry Companies/Sher-Wal, Inc. Joint Venture are, respectively, the builder and owner of real property comprising the Sutherland residential development in Lancaster County. Both developments include single family and townhouse configurations. All of the above Petitioners have offices at 1899 Lititz Pike, Lancaster, PA 17601. William Murry & Son, Inc. is a PBA member.

5. Traditions of America (“TOA”) is the general manager with respect to the development and construction of TOA communities for persons who are age 55 and older. In Pennsylvania, there are 5 current TOA communities, each of which has been and is being developed by a separate limited partnership, each with offices at 201 King of Prussia Rd., Suite 370, Radnor, PA, as follows:

- A. TOA PA IV, LP, is the owner of real property and declarant with respect to Traditions of America at Liberty Hill, a 55+ community located in Boalsburg, Pa. Building options include single family homes and “garden homes” in configurations of joined doubles, triples, and quadruples. Traditions of America at Liberty Hill has 52 building sites completed, there are 28 under contract, and 202 awaiting development.
- B. TOA PA V, LP, is the owner of real property and declarant with respect to Traditions of America at Liberty Hills, a 55+ community located in Freedom, Pa. Building options include single family homes and “garden homes” in configurations of joined doubles, triples, and quadruples. TOA Liberty Hills has 43 building sites completed, there are 27 under contract, and 153 awaiting development.
- C. TOA PA VI, LP, is the owner of real property and declarant with respect to Traditions of America at Hanover, a 55+ community located in Bethlehem, Pa. Building options include single family homes and “garden homes” in configurations of joined doubles, triples, and quadruples. Traditions of America at Hanover has 82 building sites completed, there are 36 under contract, and 123 awaiting development.
- D. TOA PA VII, LP, is the owner of real property and declarant with respect to Traditions of America at Silver Spring, a 55+ community located in Mechanicsburg, Pa. Building options include single family homes and “garden homes” in configurations of joined doubles, triples, and quadruples. Traditions of America at Silver Spring has 42 building sites completed, there are 30 under contract, and 137 awaiting development.

- E. TOA PA XIII, LP, is the builder at Traditions of America at Mt Joy, a 55+ community located in Mount Joy, Pa. Building options are all single family homes. TOA Mount Joy has 2 building sites completed, 7 under contract, and 114 awaiting development.

All of the triples and quadruple configurations are “townhouses” for purposes of the UCC.

Traditions of America is a PBA member.

6. Respondent Department of Labor & Industry (“L&I”) is an administrative agency of the Commonwealth with offices in the Labor & Industry Building, Harrisburg, PA 17121. L&I is the state agency responsible for the promulgation of the challenged regulations and has various other duties related to the Code.

JURISDICTION

7. This Court has jurisdiction over this matter under 42 Pa.C.S.A. § 761(a)(1).

8. Petitioners have no administrative process that is available to them to remedy the problems and issues raised in this Petition for Review.

9. Petitioners have no adequate remedy at law.

FACTS

The Legal Framework

10. Building or construction codes set the standards that must be met in the construction of buildings, and include almost every imaginable aspect of construction. Code compliance is required for issuance of occupancy permits.

11. Prior to April 9, 2004, there was no uniform construction code applicable throughout Pennsylvania.

12. In November of 1999, the Legislature enacted the Pennsylvania Construction Code Act, codified at 35 P.S. § 7210.101 *et seq.*

13. Section 301(a) of that Act directed L&I to promulgate regulations within 180 days establishing the then-current 1999 BOCA National Building Code, Fourteenth Edition, as the Uniform Construction Code. Section 301(a) further directed L&I's regulations to adopt the ICC International One and Two Family Dwelling Code, 1998 Edition, as an alternative available Code for detached one-family and two-family dwellings and one-family townhouses three or fewer stories in height. *See* 35 P.S. §§ 7210.301(a)(1-2).

14. Section 304(a)(1-2) of that Act directed L&I to promulgate regulations adopting as the new Uniform Construction Code for Pennsylvania the new "BOCA National Building Code or its successor building code" and the new "International One and Two Family Dwelling Code, or its successor building code." *See* 35 P.S. §§ 7210.304(a). The latter code has come to be known as the International Residential Code.

15. New Codes have been and are issued triennially (*e.g.*, 2003, 2006, 2009). L&I was and is required to promulgate the new regulations by December 31 of the year of the issuance of the new triennial Codes, to take effect January 1 of the next year. *See* 35 P.S. §§ 7210.304(a). L&I has typically done so in mid to late December of the relevant year.

16. For reasons not important at this time, L&I did not meet the 180 day deadline established by § 301(a). Instead, L&I regulations adopting the 2003 Uniform Construction Code as the building code applicable in Pennsylvania took effect on April 9, 2004. *See* 34 Pa.B. 319 (Jan. 10, 2004) amending 34 Pa. Code §§ 401.1 (defining the "Uniform Construction Code" as "The International Building Code First Edition 2003" and the "International Residential Code for One- and Two-Family Dwellings 2003," and any standards adopted by the Department in this chapter under ... 35 P.S. § 7210.301") and adding 403.1(a) (making the "Uniform Construction Code" as defined applicable to the construction, alteration, repair, movement, equipment, removal,

demolition, location, maintenance, occupancy or change of occupancy of every building or structure which occurs on or after April 9, 2004).

17. By Final Rulemaking published December 15, 2006, effective December 31, 2006, at 36 Pa.B. 7548, L&I adopted the 2006 editions of the "The International Building Code" and the "International Residential Code for One- and Two-Family Dwellings."

18. L&I published the final regulations adopting the 2006 Codes without going through notice-and-comment-rulemaking because, it explained, "the only changes being made are those either mandated by the act or those that reflect the numerous statutory amendments to the act" and noting that adopting the new triennial Code was mandatory. *See also* 34 Pa.B. 319 (Jan. 10, 2004) (§ 304(a) of the act "mandated" that the Department adopt the new 2003 editions of the ICC codes).

19. By Notice published December 26, 2009, at 39 Pa.B. 7196, L&I promulgated final form regulations adopting the 2009 versions of the ICC International Residential Code and the International Building Code to replace the existing 2006 Codes as the Uniform Construction Code in the Commonwealth.

20. The 2009 Code versions took effect as the Commonwealth's Uniform Construction Code on December 31, 2009.

21. As of 2009, the Commonwealth's Uniform Construction Code actually includes in addition to the International Residential Code and the International Building Code multiple more specific model Codes developed by the ICC – the International Mechanical Code, the International Fuel Gas Code, the International Plumbing Code, the International Fire Code, the International Energy Conservation Code, the International Existing Building Code, the International Wildland-Urban Interface Code, the International Performance Code, and Appendices E and H of the

International Building Code and Appendix G of the International Residential Code. *See* 34 Pa. Code § 403.21(a)(1-13). Most of the provisions of these other Codes are incorporated by reference into the International Residential/Building Codes.

22. By Act 2008-106, the Legislature amended the Construction Code Act to establish the Uniform Construction Code Review and Advisory Council (the “RAC”). The RAC’s central responsibility is to “[g]ather information” from involved parties “concerning issues with the Uniform Construction Code,” to evaluate that information, and ultimately make recommendations to the Governor and others concerning them. *See* 35 P.S. § 7210.107(b).

23. The RAC is to have 19 members, all of whom are designated to represent a particular group assumed to be interested in UCC issues. No RAC member is a state official. *See* 35 P.S. § 7210.107(c)(1-19).

24. More specifically, the RAC has the authority but not the duty (“may determine”) to determine that any new or amended provisions in any triennial revision is not “consistent with the intent and purpose of [the Code Act] or is otherwise inappropriate for inclusion in the Uniform Construction Code.” In making that determination, the RAC is to consider the legislative findings and statement of intent of the Construction Code Act and the purposes and the impacts that the provisions may have upon the public’s health, safety and welfare; their economic reasonableness and financial impacts; and their technical feasibility. *See* 35 P.S. § 7210.304(d)(1).

25. If the RAC reaches that determination as to any provision, L&I must exclude it when adopting the new UCC. In that event, the corresponding provision of the prior UCC version remains in effect. *See* 35 P.S. § 7210.304(d)(2).

26. The RAC must provide any such determination to L&I by May 1 of the year of issuance of a new triennial Code. *See* 35 P.S. § 7210.107(b)(3).

27. The RAC cannot modify or add to the new or amended provision but can only remove the provision from the UCC.

The International Code Council

28. The International Code Council (“ICC”) is a private, non-governmental membership association that develops model codes and standards for use in constructing residential and commercial buildings. *See generally* <http://www.iccsafe.org/AboutICC>.

29. The ICC was established in 1994 by three formerly separate code writing organizations, the Building Officials and Code Administrators International, Inc., the International Conference of Building Officials, and the Southern Building Code Congress International, Inc.

30. Any interested individual or group may submit a code change proposal and participate in the proceedings in which proposals are considered. The proposals are considered initially by ICC code development committees and thereafter by eligible voting members at the code change hearings.

31. At the September, 2008 ICC meetings at which the 2009 Code was adopted, there were substantial irregularities in the voting as to key proposed revisions, particularly regarding the persons eligible to vote. Those irregularities tainted the proceedings as to those key provisions.

Organizing the RAC

32. The appointments to the RAC were not finalized until early February of 2009.

33. The RAC held its first meeting – an organizational meeting – on March 9, 2008.

34. The RAC held a series of meetings in April, 2009 with respect to new and revised provisions in the 2009 triennial codes.

35. As earlier noted, the RAC’s authority includes reviewing new and revised provisions in each of the 2009 Codes as described in ¶ 22 above, *i.e.*, the International Residential

Code, the International Building Code, and the more specific codes such as the Plumbing and Mechanical Codes.

36. Because the RAC was not sufficiently or timely organized to perform its task during its first year of operation, the RAC was unable to perform its statutorily mandated provisions. Adding to the difficulty, the RAC had to review changes to codes that were not yet published in book form and had to rely on documents reflecting the changes as submitted to the ICC rather than looking at the newly published code and seeing how it fit together.

37. A number of the RAC members lacked firsthand experience in the code development process prior to assuming their RAC positions, a fact that made their informed consideration of the proposed Code changes as per the statutory mandate more difficult, particularly given the time limitations.

38. The RAC Chairman has testified before the Senate Labor and Industry Committee as follows:

There were hundreds of changes made by the International Code Council to these model codes for 2009, and the RAC is responsible for reviewing all changes and modifications. It was at that first meeting on March 9 that it became apparent that the Council simply did not have ample time to review the hundreds of changes. The Council made the decision to review only those changes to the codes where there was a request from the public or a Council member to exclude. In total, there were only 22 proposals to exclude provisions submitted, and there wasn't a single exclusion proposed to the biggest code book – the International Building Code, which regulates high-rise residential, commercial and industrial construction.

The Effect of New and Amended Provisions in the 2009 UCC

39. The 2009 UCC contains numerous new and amended provisions. Many of these amendments have the effect of increasing the cost of construction.

40. The Table below lists some the more substantial changes in the Uniform Residential Code with the associated cost for implementing the change for a newly constructed home of 2,271 square feet, (which is the national average size of a new home in 2009).

NEW REQUIREMENT	ASSOCIATED COST
<i>Fire Sprinklers</i> (applicable to townhouses now and to 1 and 2 family homes in 2011)	Cost ranges from \$6,041 (\$2.66/sq. ft) to \$7,494 (\$3.30/sq. ft)
<i>Increased Energy Requirements</i> (Insulation and fenestration increases, air infiltration barriers, duct sealing, attic insulation, programmable thermostats, blower door and duct blaster testing)	\$3,800
<i>Structural</i> (Increased Wall Bracing Requirements)	\$1,800
<i>Electrical and Mechanical</i> (Make-up air for kitchen exhaust hoods over 400 cfm, Increased dryer duct requirements, Arc fault breakers and tamper-proof receptacles)	\$1,800
TOTAL	\$14,041 to \$14,894

41. These changes increase the cost of construction. Petitioners estimate that the changes will add approximately \$15,000 to the cost of an average size home, priced from approximately \$215,000 to \$270,00, based on a range of construction costs.

42. The 2009 International Building Code includes approximately 370 revisions and the ICC book "Significant changes to the 2009 IBC" is approximately 350 pages in length.

43. The economic circumstances of the past 15 months have hurt the demand for the services of the home building and remodeling industry and the commercial building industry, including Petitioners and the members of the PBA.

44. Petitioners further reasonably believe that the Code revisions will adversely affect the availability of financing for homes, because the additional costs will not routinely be considered in appraising homes as part of the process of obtaining a mortgage.

45. Petitioners reasonably believe that new building code requirements that increase construction and remodeling costs and make appropriate mortgage financing less readily available will have a negative impact on the demand for their services.

CAUSES OF ACTION

COUNT I: Violation of Article II, § 1 of the Pennsylvania Constitution

46. Petitioners incorporate herein by reference ¶¶'s 1-45 as set forth above.

47. The ICC is a national body, with representatives from all 50 states plus from foreign countries, *see* http://www.iccsafe.org/gr/content/Documents/Chapters/icc_chapters.pdf. The ICC creates a uniform, international code; it is not in a position to respond to particular issues or particular statutory guidelines from a specific state.

48. Pennsylvania's Executive and the Legislative branches cannot insert their views into the ICC Code development process, nor remove from office any ICC officials whom they believe have acted improperly in any regard.

49. L&I does not exercise any discretion in its promulgation of regulations adopting the proposed ICC Codes. In the 2009 rulemaking preamble, L&I explained why it had not published the regulations as proposed: "the only changes being made ... are those specifically mandated by the act or that reflect the numerous amendments to the act," adding that "[t]he purpose of this final-omitted rulemaking is to update §§ 401.1, 403.21, 403.26 and 403.27 [of L&I's regulations]

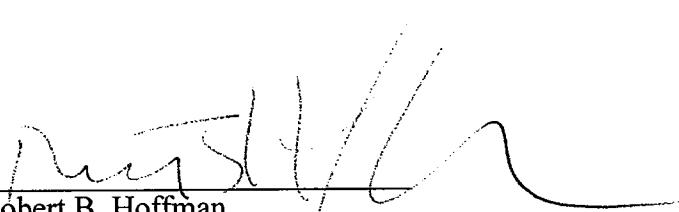
as required by section 304 of the [Code Construction] act, to incorporate the new successor building codes issued by the ICC” See 39 Pa.B. 7196. The regulatory materials concerning adoption of the 2003 and 2006 codes were quite similar. See 36 Pa.B. 7548 (Dec. 16, 2006) and 34 Pa.B. 319 (Jan. 10, 2004).

50. The 2009 Codes, primarily but not exclusively the 2009 International Residential Code, reflects important public policy determinations as to which there are substantial and legitimate arguments both supporting and opposing the determinations made. These types of changes should be made by the Legislature.

51. The statutory scheme and regulations violate Article II, § 1 of the Pennsylvania Constitution because they result in ceding the legislative authority of the Commonwealth of Pennsylvania, vested in the General Assembly, to a private entity – the International Code Commission.

WHEREFORE, based upon the foregoing, Petitioners request that the Court declare that the regulations promulgated by the Department of Labor & Industry at 39 Pa.B. 7196, (“L&I”) adopting the 2009 version of the International Code Council (ICC) International Residential Code, the International Building Code and other related codes to replace the existing 2006 Codes as the Uniform Construction Code in the Commonwealth are null and void as violative of Article I, § 1 of the Pennsylvania Constitution; enjoin the Department of Labor & Industry from taking action to establish those Codes as the Uniform Construction Code in the Commonwealth and to take affirmative action to advise municipalities and others; grant Petitioners their costs, including

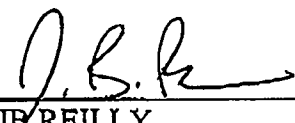
attorneys' fees insofar as available under applicable law; and such other relief as the Court determines to be necessary and proper.



Robert B. Hoffman
I.D. No. 23846
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
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Harrisburg, PA 17108-0865
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VERIFICATION

I, JB Reilly, hereby verify, subject to the penalties in 18 Pa.C.S.A. § 4904 relating to unsworn falsification, that I am the co-manager of the general partner of the several TOA entities that are Petitioners in this matter; that I am authorized to execute this Verification on their behalves; that I am familiar with the factual averments set forth in the foregoing Petition for Review; and that the factual averments therein are true and correct to the best of my knowledge, information and belief.



JB REILLY

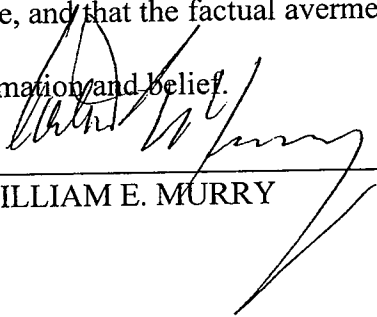
VERIFICATION

I, Douglas Meshaw, hereby verify, subject to the penalties in 18 Pa.C.S.A. § 4904 relating to unsworn falsification, that I am the executive vice-president of the Pennsylvania Builders Association; that I am authorized to execute this Verification its behalf; that I am familiar with the factual averments set forth in the foregoing Petition for Review; and that the factual averments therein are true and correct to the best of my knowledge, information and belief.


DOUGLAS MESHAW

VERIFICATION

I, William E. Murry, hereby verify, subject to the penalties in 18 Pa.C.S.A. § 4904 relating to unsworn falsification, that I am the president of Murry Development Corp., William Murry & Son, Inc., and Woods Edge Builders, Inc.; that I am authorized to execute this Verification its behalf; that I am familiar with the factual averments set forth in the foregoing Petition for Review; and that the factual averments therein are true and correct to the best of my knowledge, information and belief. I further verify that I hold legal authority to act on behalf of The Murry Companies/Sher-Wal, Inc. Joint Venture, and that the factual averments as to it are true and correct to the best of my knowledge, information and belief.



WILLIAM E. MURRY

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2010, I caused a copy of the foregoing document to be sent by certified mail, return receipt requested, to the individuals listed below:

Hon. Thomas Corbett
Attorney General
Office of Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Sandi Vito
Secretary
Department of Labor and Industry
Labor and Industry Bldg.
Harrisburg PA 17121

Roger Caffier, Esq.
General Counsel
Department of Labor and Industry
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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THE MURRY COMPANIES/SHER-WAL, INC. JOINT :
VENTURE; TOA PA IV, LP; TOA PA V, LP; :
TOA PA VI, LP; TOA PA VII, LP; and TOA PA XIII, LP. :
Petitioners :
v. : No. 27 MD 2010
DEPARTMENT OF LABOR & INDUSTRY :
Respondent :

**PETITIONERS' BRIEF IN SUPPORT OF APPLICATION FOR
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

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EXHIBIT A: Petitioners’ Brief in <i>Commonwealth ex rel. Pappert v. Coy.</i>	

Petitioners the Pennsylvania Builders Association *et al* have filed a Petition for Review and an Application for a Preliminary Injunction, both directed to regulations, newly promulgated by the Department of Labor & Industry (“L&I”), that adopt the 2009 version of the International Code Council (ICC) International Residential Code and other related codes to replace the existing 2006 Codes as the Uniform Construction Code in the Commonwealth. Petitioners submit this Brief in support of that Application.

BRIEF STATEMENT OF THE CASE

Petitioner the Pennsylvania Builders Association (the “PBA”) is a trade organization with more than 9,000 member-companies, all located in Pennsylvania, who are involved in the building industry, primarily as builders, remodelers, material suppliers, subcontractors, and consultants. It brings this action in its own right and on behalf of its members. Its members build both under the International Residential Code and the International Building Code. The individual Petitioners are members of PBA and builders, primarily of one and two family houses and townhouses. L&I is the Department that promulgated the regulations at issue and is, in general, the Commonwealth agency that oversees various issues relating to the Uniform Construction Code.

A. The Legal Framework

Construction codes set the standards that must be met in the construction of buildings, and include almost every imaginable aspect of construction. In November of 1999, the Legislature enacted the Pennsylvania Code Construction Act, codified at 35 P.S. § 7210.101 *et seq.* Section 301(a) of that Act directed L&I to promulgate regulations, within 180 days, establishing the then-current 1999 BOCA National Building Code, Fourteenth Edition, as the Uniform Construction Code. It also directed L&I to adopt the ICC International One and Two Family Dwelling Code, 1998 Edition, as an alternative available Code for detached one-family and two-family dwellings

and one-family townhouses three or fewer stories in height. *See* 35 P.S. §§ 7210.301(a)(1-2). The latter code has come to be known as the International Residential Code (“IRC”).

With respect to the future, § 304(a)(1-2) of the Code Construction Act directed L&I to promulgate regulations adopting as the new Uniform Construction Code for Pennsylvania the new versions of those codes, which became available triennially. L&I was required to do so by December 31 of the year of the issuance of the new Codes. *See* 35 P.S. §§ 7210.304(a).

For reasons not now important, L&I did not meet the 180 day deadline but ultimately issued regulations, effective April 9, 2004, adopting the 2003 versions of the Codes as the “Uniform Construction Code.” *See* 34 Pa.B. 319 (Jan. 10, 2004). As mandated by the statute, L&I amended its regulations in late 2006 to adopt the 2006 editions of the Codes. *See* 39 Pa.B. 7196 (Dec. 26, 2009). It has now repeated that process again, adopting the 2009 versions. That action gave rise to this litigation.

The Commonwealth’s Uniform Construction Code actually includes the International Residential Code, the International Building Code and multiple more specific Codes – the International Mechanical Code, the International Fuel Gas Code, the International Plumbing Code, the International Fire Code, the International Energy Conservation Code, the International Existing Building Code, the International Wildland-Urban Interface Code, the International Performance Code, and Appendices E and H of the International Building Code and Appendix G of the International Residential Code. *See* 34 Pa. Code § 403.21(a)(1-13). Most of the provisions of these other Codes are incorporated by reference into the International Building Code/International Residential Code.

B. The International Code Council

The Codes adopted as the Uniform Construction Code were developed by the International Code Council (“ICC”), a private, non-governmental membership association that develops model codes and standards used to construct residential and commercial buildings. *See generally* <http://www.iccsafe.org/AboutICC>. The ICC was established in 1994 by three formerly separate code writing organizations, the Building Officials and Code Administrators International, Inc., the International Conference of Building Officials, and the Southern Building Code Congress International, Inc. The Code revision process begins with a code change proposal, which anyone can submit. The proposals are considered initially by ICC code development committees and thereafter by eligible voting members at “code change” hearings. The “2009 Codes” were adopted at an ICC meeting held in September, 2008. There are substantial and serious allegations that the adoption process was tainted by irregularities in the voting as to key proposed revisions, particularly regarding the persons eligible to vote.

C. The Uniform Construction Code Review and Advisory Council (the “RAC”)

In the fall of 2008, the Legislature amended the Construction Code Act to establish the Uniform Construction Code Review and Advisory Council (the “RAC”). The RAC’s central responsibility is to “[g]ather information” from involved parties “concerning issues with the Uniform Construction Code,” to evaluate that information, and ultimately make recommendations to the Governor and others concerning them. *See* 35 P.S. § 7210.107(b). No RAC member is a state official. *See* 35 P.S. § 7210.107(c)(1-19).

With respect to the UCC revisions, the RAC “may” determine that any new or amended provisions in any triennial revision is not “consistent with the intent and purpose of this act or is otherwise inappropriate for inclusion in the Uniform Construction Code.” In making that determination, the RAC is to consider the legislative findings and statement of intent of the

Construction Code Act and the purposes and the impacts that the provisions may have upon the public's health, safety and welfare; their economic reasonableness and financial impacts; and their technical feasibility. *See* 35 P.S. § 7210.304(d)(1). If the RAC reaches that determination as to any provision, L&I must exclude it when adopting the new UCC and the corresponding provision of the prior UCC version remains in effect. *See* 35 P.S. § 7210.304(d)(2). The RAC must provide any such determination to L&I by May 1 of the year of issuance of a new Code version. *See* 35 P.S. § 7210.107(b)(3). The RAC cannot modify or add to any new or amended provision but can only remove the provision, in its entirety, from the UCC.

The 2009 Code revisions were the first the RAC had to address and, through no fault of its own, it had difficulties getting timely organized to perform the necessary inquiries. Adding to the difficulty, the RAC had to review changes to codes that were not yet published in book form (it had instead to rely on the code change documents submitted to the ICC rather than viewing the newly published code and seeing how it fit together) and a number of RAC members lacked firsthand experience in the code development process prior to assuming their positions.

The RAC Chairman has testified before the Senate Labor and Industry Committee as follows:

There were hundreds of changes made by the International Code Council to these model codes for 2009, and the RAC is responsible for reviewing all changes and modifications. It was at that first meeting on March 9 that it became apparent that the Council simply did not have ample time to review the hundreds of changes. The Council made the decision to review only those changes to the codes where there was a request from the public or a Council member to exclude. In total, there were only 22 proposals to exclude provisions submitted, and there wasn't a single exclusion proposed to the biggest code book – the International Building Code, which regulates high-rise residential, commercial and industrial construction.

D. The Effect of New and Amended Provisions in the 2009 UCC

The 2009 UCC, particularly the Residential Code, contains numerous new and amended provisions that have the effect of meaningfully increasing the cost of construction. Petitioners further believe that the Code revisions will adversely affect the availability of financing for residences, because the additional construction costs will not routinely be reflected in appraising homes as part of the process of obtaining a mortgage. The economic circumstances of the past 15 months have hurt the demand for the services of the home building and remodeling industry, including Petitioners and the members of the PBA. The combined effect of higher prices and reduced availability of financing will inevitably further harm the home building and construction business in ways that cannot be recouped later

ARGUMENT

I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION REGARDING THE 2009 CONSTRUCTION CODE PROVISIONS

A. The Applicable Standards

The standards for grant of a preliminary injunction are well established:

In order for a preliminary injunction to be granted, the court must apply the following standards: (1) the injunction must be necessary to prevent immediate and irreparable harm that could not be compensated by damages; (2) greater injury would result by refusing the injunction than by granting it; (3) the injunction restores the parties to the status quo that existed immediately before the alleged wrong; (4) the wrong is manifest and the injunction is reasonably suited to abate it; and (5) the applicant's right to relief is clear.

Tinicum Twp. v. Del. Valley Concrete, 812 A.2d 758, 762 n.8 (Pa. Commw. 2002). See also *City of Philadelphia v. District Council 33*, 598 A.2d 256 (Pa. 1991); *In Re: Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002). The two most important factors are: (1) the threat of immediate and irreparable harm; and (2) whether greater harm will be caused by issuing the injunction than by refusing it. *Wilkinsburg Educ. Assn. v. School Dist. of Wilkinsburg*, 667 A.2d 5, 7-8 (Pa. 1995).

B. Right To Relief

Under this criteria, Petitioners must demonstrate the sufficiency of their legal claims. Our claim here is simple: the statutory scheme and regulations violate Article II, § 1 of the Pennsylvania Constitution because they result in ceding the legislative authority of the Commonwealth of Pennsylvania, vested in the General Assembly, to a private entity – the International Code Commission.

It is firmly established that the legislature cannot delegate its law making authority to private persons. The leading case establishing that principle is *Hetherington v. McHale*, 329 A.2d

250 (Pa. 1974). There, the challenged statutory provision provided that certain revenue collected by the Harness Racing Commission would be allocated for agricultural research projects, to be selected by a 17 member committee that included 8 persons designated by three private agricultural organizations. The Supreme Court held that process violated the constitutional principle, reflected in Article II, § 1, that people are to be governed by their elected representatives, not by private individuals:

A fundamental precept of the democratic form of government imbedded in our Constitution is that the people are to be governed only by their elected representatives. [The challenged provision] violates this principle by surrendering to private organizations the power to select eight of seventeen members of a committee responsible for the disbursement of public funds.

In fact, the people of this Commonwealth, through their duly elected representatives, have no voice in the appointments of those selected by these three private groups. No opportunity is provided for the public interest to assert itself. Instead, private groups responsive only to the interests of their membership choose those charged with performing governmental functions.

329 A.2d at 253. Even the dissent, although disagreeing with the application of the principle, termed it “fundamental that the General Assembly cannot delegate its power to make laws to any other branch of government, or to any other body or authority.” *Id.* at 256. The principle is a corollary of the more common principle that the legislature cannot delegate the basic policy choices to an administrative agency. *See, e.g., Association of Settlement Companies v. Department of Banking*, 977 A.2d 1257 (Pa. Cmwlth. 2009).

The doctrine serves two interrelated purposes: “to insure that ‘basic policy choices’ be made by duly authorized and politically responsible officials” and “to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.” *Wm. Penn Parking Garage, Inc., v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975).

The Supreme Court in *Hetherington, Id. at 253*, noted its previous holding that “governmental powers cannot be delegated to private individuals or organizations,” citing to *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 199 A.2d 266 (Pa. 1964). There, the Court invalidated provisions of the Pennsylvania Fair Trade Act on the basis that “[p]rice regulatory power vests only in the elected legislative body” but “may not be delegated to private persons.” It concluded: “[t]he vesting of a discretionary regulatory power over prices, rates or wages, in private persons violates the essential concept of a democratic society and is constitutionally invalid.” *Id.*, 199 A.2d at 267-68. See also *State Board of Chiropractic Examiners v. Life Fellowship of Pa*, 272 A.2d 478, 481 (Pa. 1971) (invalidating provision of Chiropractic Registration Act requiring chiropractors to attend a two-day conference held by the Pennsylvania Chiropractic Society on the basis that the grant of power to the Chiropractic Society to establish educational standards for licensure was “an abrogation by the General Assembly of its constitutional legislative duties.”); *Santa Fe Natural Tobacco Company, Inc. v. Judge*, 963 F.Supp. 437, 440, 441 (M.D. Pa. 1997) (“delegation of legislative power violates the Pennsylvania Constitution's requirement that “the Legislative power of this Commonwealth shall be vested in a General Assembly,” and “the legislature may not hand de facto control over the [distribution and sale of cigarettes] to private parties, ‘uncontrolled by any standard or rule . . . not bound by any official duty, [and] free to withhold consent for selfish reasons or arbitrarily’” (quoting in part from *Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928); *Archbishop O'Hara's Appeal*, 131 A.2d 587, 592 (Pa. 1957) (“fundamental principle of our constitutional law is that the power conferred upon a legislature to make laws cannot be delegated by that branch of government to any other body or authority”).

Hetherington rejected the arguments that the private groups there had both numerous members and expertise: “claims of expertise do not sap the vitality of the fundamental principle that we are to be governed by our elected representatives in accordance with the Constitution.” 329 A.2d at 253. This Court has allowed a “private party delegation” when the private party did not make any decisions but instead was “merely a fact-finding vehicle by which the General Assembly has implemented its own policy decision” *Pennsylvania Chiropractic Federation v. Foster*, 583 A.2d 844, 849 (Pa. Commw. 1990).

Here, the situation is more egregious than private entities contributing members to a committee that would distribute a relatively small amount of public funds. Here, a private entity, the International Codes Commission, has been delegated the authority, in perpetuity, to establish standards to which all buildings in Pennsylvania must be built. The Construction Code Act *per se* is essentially a hollow enactment without the detail supplied by the regulations adopting the various ICC Codes. The Act itself imposes few actual construction requirements. Most of what is truly important in the day to day construction process comes from the Codes.

Petitioners note two related points. It may make sense for the Commonwealth to adopt various ICC Codes. There may be benefits in standardization and related economies of scale. But the proper way to do so is for the Legislature to actually *adopt* the Codes, by affirmative legislative action. That legislative action presumably follows review and the opportunity for interested parties to express their views on particular provisions they view as ill-considered. The vice is not in adopting the ICC Codes but in how the legislature has done so, essentially by giving the ICC a blank check and agreeing in advance to adopt whatever the ICC will produce.

This leads to the second point: that the Commonwealth’s original plan to adopt the then-existing 1999 BOCA National Building Code and the 1998 ICC International One and Two Family

Dwelling Code was entirely proper. Those Codes existed and the Legislature, by affirmative action, was adopting them. The “sight unseen” adoption of future codes is markedly different.

This form of delegation is also more egregious than the more common delegation to administrative agencies with arguably overly vague standards. In the latter, both the Executive and the Legislative branches can insert their views into the regulatory process, and the Executive (with or without legislative influences) has authority to remove from office a regulator who exceeds the desired scope of regulation. But more importantly, even if there is sufficient guidance in the statute for a regulatory agency, it should be obvious that the ICC pays no attention to those standards. It is not merely that the ICC is likely unaware of those standards but that it is a national body, with representatives from many states,¹ and ultimately responsive only to itself. It creates a uniform, international code, not one tweaked to specific state or even regional issues and concerns.

Finally, this is not a situation in which an administrative agency has been granted and then exercised discretion to reject or alter various proposed Code revisions. L&I has in its 2004, 2006, and 2009 regulation notices made clear that its actions were statutorily mandated. Most recently, in the 2009 rulemaking preamble, it explained why it had not published the regulations as proposed: “the only changes being made ... are those specifically mandated by the act or that reflect the numerous amendments to the act,” adding that “[t]he purpose of this final-omitted rulemaking is to update §§ 401.1, 403.21, 403.26 and 403.27 [of L&I’s regulations] as required by section 304 of the [Code Construction] act, to incorporate the new successor building codes issued by the ICC” *See* 39 Pa.B. 7196. The regulatory materials concerning adoption of the 2003 and

¹ The ICC website reflects the existence of “chapters” in all 50 states plus Australia, Canada, Kenya, and New Zealand. *See* http://www.iccsafe.org/gr/content/Documents/Chapters/icc_chapters.pdf.

2006 codes were quite similar. *See* 36 Pa.B. 7548 (Dec. 16, 2006) and 34 Pa.B. 319 (Jan. 10, 2004).

Simply put, the 2009 Codes have been put into place without an exercise of legislative authority but instead by granting the authority to establish construction codes to a private entity. That delegation of legislative authority is illegal.

C. Harm To The Parties And The Public

The harm here takes several forms.

First, Petitioners are incurring economic harm to their businesses that cannot be remedied or compensated by damages. *Three County Services, Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1001-02 n.1 (Pa. Super. 1985). The increased costs threaten to make an already difficult economic climate worse. Petitioners will provide additional details at hearing.

Second, L&I's constitutional violations here constitute irreparable harm *per se* under the *Israel* Doctrine, established by *Pa. P.U.C. v. Israel*, 52 A.2d 317, 321 (Pa. 1947). Under that doctrine, a court's finding that illegal activity occurred satisfies the burden of proving irreparable harm in the preliminary injunction context. *See Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980) (“[w]here a statute proscribes certain activity, all that need be done [to find irreparable harm] is for the court to make a finding that the illegal activity occurred.”); *Pa. P.U.C. v. Israel*, 52 A.2d at 321; *Bullock v. County of Lycoming*, 859 A.2d 518, 522 (Pa. Commw. 2004). In *Israel*, 52 A.2d at 321, the Supreme Court explained that “[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.”

This Court has found that the doctrine applies equally to the Commonwealth as a defendant or respondent. In *Council 13, American Federation of State, etc. v. Casey*, 595 A.2d 670 (Pa.

Commw. 1991), this Court found that the Commonwealth had failed to obey clear statutory requirements to pay certain state employees. The Court held that “the violation of an express statutory provision per se constitutes irreparable harm . . . and a preliminary injunction may issue where the other requisite elements are present” *Id.* at 670, citing *Israel, supra*.

Of course, this case involves violation of state *constitutional* provisions rather than statutes. While Petitioners are aware of no reported case applying the *Israel* Doctrine to a constitutional violation, it would seem easier, not harder, to do so when constitutional violations are at issue. Constitutional provisions embody the most exalted of principles, far more so than statutes. If a statutory violation constitutes irreparable harm, there is simply no reason why a state constitutional violation should not.

The Attorney General agrees, raising precisely that contention in *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201 (Pa. Commw. 2004). There, the Attorney General, as a petitioner seeking a preliminary injunction, argued that the *Israel* Doctrine applied to constitutional violations. The Attorney General pointed out in his brief that “violations of law constitute irreparable harm and that no further proof of harm is needed,” referring to former Representative Coy’s alleged violation of Article II, Section 6 of the Pennsylvania Constitution. *Id.* at 1204, n.2. Specifically, the Attorney General noted in his brief in opposition of preliminary objections in that case that it is a “well-settled principle that violations of law constitute irreparable harm in and of themselves; no further evidence is needed. This is even so when it is ‘only’ a statute which is violated; and it is, of course, all the more true in the case of violations of the Constitution.” *See* Exhibit A hereto at 5.

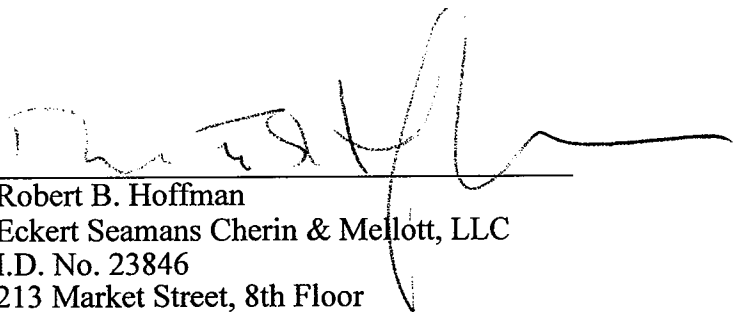
Petitioners further believe that a preliminary injunction will benefit the public at large, primarily the consumers who wish to purchase townhouses but for whom the additional costs are prohibitive.

D. The Status Quo Ante

Clearly, an injunction here would restore the parties to the status quo that existed, for many years, immediately before the alleged wrong, *i.e.*, the effective date of the regulations adopting the 2009 Codes.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court preliminarily enjoin L&I from enforcing, pending final decision in this matter, regulations promulgated by L&I at 39 Pa.B. 7196 adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes as the Uniform Construction Code in the Commonwealth; from taking further action to establish those Codes as the Uniform Construction Code in the Commonwealth; and to take affirmative action to advise municipalities and others of such actions.



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
ex rel. GERALD J. PAPPERT, :
ATTORNEY GENERAL OF :
PENNSYLVANIA, :
Petitioner :
v. : No. 640 M.D. 2004
JEFFREY W. COY, :
Respondent :
H. WILLIAM DeWEESE, :
Intervenor :

BRIEF IN OPPOSITION TO THE PRELIMINARY OBJECTIONS

GERALD J. PAPPERT
Attorney General

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Senior Deputy Attorney General

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JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

LOUIS J. ROVELLI
Executive Deputy Attorney General

Date: October 27, 2004

Statement of the Case

This action challenges the propriety of Respondent's appointment to the Gaming Control Board of Pennsylvania by Intervenor, the Minority Leader of the House of Representatives, under Article 2, Section 6 of the Constitution of Pennsylvania. Petitioner, the Attorney General of Pennsylvania, filed a petition for review addressed to the original jurisdiction of the Court together with an application for special and summary relief. On September 24, 2004, a senior judge of this court, sitting as chancellor, denied the application for special and summary relief and dismissed the petition for review based on ripeness.

On October 15, 2004, the Supreme Court of Pennsylvania reversed the September 24, 2004 decision of this Court. On remand, the Attorney General has filed a brief in support of his application for special and summary relief, and Respondent and Intervenor both have filed a brief in opposition to the application and in support of their preliminary objections to the petition for review. A complete statement of the case and argument appear in the Attorney General's brief filed October 20, 2004. This brief is submitted to briefly address points raised by the Respondent and Intervenor in their briefs.

Summary of Argument

The Constitution of Pennsylvania provides in Article 2, Section 6 that a member of the Senate or House of Representatives may not be appointed to any civil office during the time for which he was elected to the legislature. Respondent was elected to the House of Representatives at the general election in 2002; the time for which he was elected does not expire until November 30, 2004. Thus, his September 3, 2004 appointment by the Minority Leader of the House to the Gaming Control Board is prohibited by the Constitution.

Respondent's reliance on two decisions of the Supreme Court of Delaware is misplaced; neither decision is persuasive nor even apposite to this case. Respondent's suggestion that there is no demonstrated harm from his appointment likewise is without merit; violations of law constitute irreparable harm in and of themselves. The harm in this case is apparent: the appointment of Respondent to the Gaming Control Board was made in violation of the Constitution.

respondent suggests, neither of these opinions involved the question of whether a legislator can remove his or her ineligibility for appointment to another office by resigning immediately before the appointment. *Opinion of Justices* held merely that *sitting* legislators could be prohibited by statute from receiving a salary for a second office; it said nothing at all about the effect of a resignation and did not even discuss the Delaware Constitution's version of the language which is at issue in this case. *Id.*, 245 A.2d at 173-174. In *Biggs*, similarly, the issue was whether a legislator who was appointed to another office thereby automatically vacated his seat in the legislature.¹ The legitimacy of the legislator's appointment to the *other* office was not an issue in *Biggs*, and nowhere in *Biggs* does the court discuss it.

2. The Harm Caused by Intervenor's Unconstitutional Appointment of Respondent is Apparent.

In support of their preliminary objections, and in opposition to the Attorney General's application for special and summary relief, Respondent

¹ The Delaware Supreme Court held that he did, 172 A.2d at 419-420, but, astonishingly, refused to enforce its own decision and the plain language of the Delaware Constitution, in the face of a legislative resolution that no vacancy existed. *Id.*, at 420-423. It is difficult to imagine a Pennsylvania court adopting such a supine position.

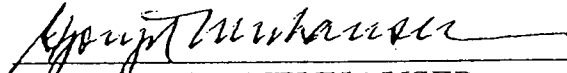
and Intervenor suggest that both the application for relief and the underlying petition for review should be dismissed because the Attorney General has not shown any “harm.” These contentions overlook the well-settled principle that violations of law constitute irreparable harm in and of themselves; no further evidence of harm is needed. This is so even when it is “only” a statute which is violated; and it is, of course, all the more true in the case of violations of the Constitution. See, e.g., *Public Utility Commission v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947)(violation of statute is harm *per se*); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (violation of First Amendment constitutes irreparable harm). In short, as long as the unconstitutional appointment of Respondent is allowed to stand, the harm continues. Despite the lengths to which Respondent and Intervenor would go to argue to the contrary, the prohibition contained in Article 2, Section 6 could not be more straightforward. The harm in this case is quite simple: the appointment of Respondent was made in violation of the Constitution and the Court should say so.

Conclusion

For the above-stated reasons and those presented in the Attorney General's brief submitted in support of the application for special and summary relief, the preliminary objections of Respondent and Intervenor should be overruled and the Court should grant the application for special and summary relief.

Respectfully submitted,

GERALD J. PAPPERT
Attorney General

By: 
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Senior Deputy Attorney General

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Chief, Appellate Litigation Section

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Date: October 27, 2004


CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2010, I caused a copy of the foregoing document to be sent by certified mail, return receipt requested to the individuals listed below:

Hon. Thomas Corbett
Attorney General
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Strawberry Square, 16th Floor
Harrisburg, PA 17120

Sandi Vito
Secretary
Department of Labor and Industry
Labor and Industry Bldg.
Harrisburg PA 17121

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA BUILDERS ASSOCIATION; :
MURRY DEVELOPMENT CORP; WILLIAM MURRY :
& SON, INC.; WOODS EDGE BUILDERS, INC.; :
THE MURRY COMPANIES/SHER-WAL, INC. JOINT :
VENTURE; TOA PA IV, LP; TOA PA V, LP; :
TOA PA VI, LP; TOA PA VII, LP; and TOA PA XIII, LP. :
Petitioners :

v. :

No. 27 MD 2010

DEPARTMENT OF LABOR & INDUSTRY :
Respondent :

**ORDER ON APPLICATION FOR SPECIAL RELIEF IN
THE NATURE OF A PRELIMINARY INJUNCTION**

AND NOW, this day of , 2010, upon consideration of the Petitioners' Application For Special Relief In The Nature Of A Preliminary Injunction and the response thereto, after hearing, and in accordance with the forgoing Memorandum, it is hereby ordered that Petitioners' Application is GRANTED.

The Department of Labor and Industry, its employees and agents, and all persons in active concert with them, are enjoined, pending final resolution of this matter, from enforcing regulations promulgated at 39 Pa.B. 7196 adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes as the Uniform Construction Code in the Commonwealth; from taking further action to establish those Codes as the Uniform Construction Code in the Commonwealth; and to take affirmative action to advise municipalities and other of such actions.

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COMMONWEALTH COURT
OF PENNSYLVANIA
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Petitioners shall file with the Prothonotary security in the form of a suitable bond or otherwise in the amount of \$500.

, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA BUILDERS ASSOCIATION; :
MURRY DEVELOPMENT CORP; WILLIAM MURRY :
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Petitioners :
 :
v. : No. MD 2010
 :
DEPARTMENT OF LABOR & INDUSTRY :
Respondent :

**APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION**

Petitioners The PENNSYLVANIA BUILDERS ASSOCIATION *et al* (collectively the “PBA”), respectfully request, pursuant to Rule 1532, Pa.R.App.P., that the Court enjoin the Department of Labor & Industry (“L&I”), pending resolution of this matter, from enforcing regulations promulgated by the Department at 39 Pa.B. 7196 adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes to replace the existing 2006 Codes as the Uniform Construction Code in the Commonwealth; from taking action to establish those Codes as the Uniform Construction Code in the Commonwealth; to take affirmative action to advise municipalities and others of such actions; and to grant such other relief as the Court determines to be necessary and proper. Petitioners request that the Court schedule a prompt hearing on the Application; the underlying regulations at issue took effect on or about January 1, 2010. In support of this request, Petitioners aver as follows:

1. Petitioners have filed a Petition for Review directed to the Court’s original jurisdiction, the contents of which are incorporated herein by reference.

2. Briefly summarized, the Petition for Review challenges L&I regulations adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes to replace the existing 2006 Codes as the Uniform Construction Code (the “UCC”) in the Commonwealth.

3. The UCC applies, with exceptions, to “the construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every building or structure” See 34 Pa. Code § 403.1(a)(1) and (b). This Application focuses on L&I’s adoption of the UCC as it applies to the “construction *et al*” of all detached one-family and two family dwellings and one family townhouses not more than three stories in height, *i.e.*, to the International Residential Code.

4. The statutory scheme and regulations violate Article I, § 1 of the Pennsylvania Constitution because they result in ceding the legislative authority of the Commonwealth of Pennsylvania, vested in the General Assembly, to a private entity – the International Code Commission.

5. Petitioners believe that they have a substantial likelihood of success on the merits of their claim; Petitioners will be harmed in ways not compensable by damages should interim relief not be granted; and the public interest will be served by grant of injunctive relief.

6. The effect of the regulatory changes challenged in this litigation is to increase the cost of construction by approximately \$15,000 for an average size home, priced from approximately \$215,000 to \$270,00, based on a range of construction costs.

7. The economic circumstances of the past 15 months have severely hurt the demand for the services of the home building and remodeling industry, including Petitioners and other PBA members.

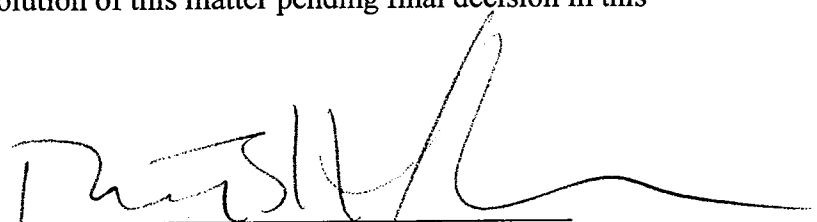
8. Petitioners further reasonably believe that the Code revisions will adversely affect the availability of financing for homes, because the additional costs will not routinely be considered in appraising homes as part of the process of obtaining a mortgage.

9. Petitioners reasonably believe that new building code requirements that increase construction and remodeling costs and make appropriate mortgage financing less readily available will have a negative impact on the demand for their services.

10. The Commonwealth's violation of law constitutes irreparable harm as a matter of law.

11. Grant of a preliminary injunction will restore the parties to the position they were in, for three years, prior to the adoption of the 2009 Code provisions.

WHEREFORE, based upon the foregoing, Petitioners request that the Court preliminarily enjoin Respondents from enforcing regulations adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes as the Uniform Construction Code in the Commonwealth; from taking action to establish those Codes as the Uniform Construction Code in the Commonwealth; to take affirmative action to advise municipalities and others of such actions; and to grant such other relief as the Court determines to be necessary and proper, all pending final resolution of this matter pending final decision in this matter.



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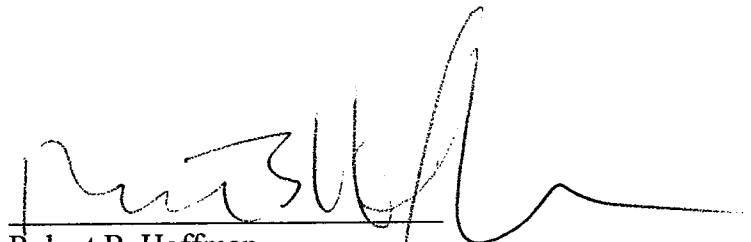
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