



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 31, 2020

TRANSMITTED VIA EMAIL

The Honorable Todd M. Lakey
Idaho State Senate
Idaho State Capitol
700 W. Jefferson Street, Room WW48
Boise, Idaho 83702
tlakey@senate.idaho.gov

Re: International Energy Conservation Code - Follow-up to January 28, 2020 and
January 29, 2020 Responses

Dear Senator Lakey:

Thank you for your questions. This letter is in follow up to our meeting of January 30, 2020 in which we discussed the legal analysis contained in letters to you dated January 28, 2020 and January 29, 2020. This letter is in further clarification and follow up the previously issued letters. You point out that the rule docket your questions refer to is 07-0301-1901.

- 1. The Legislature must reject IDAPA 07.03.01.004.04 in both docket numbers 07-0000-1900F and 07-0301-1901 to completely eliminate the requirement of compliance with the Idaho Energy Conservation Code.**

The prior letter from this Office addressed the rule that is currently in effect on a temporary basis, IDAPA 07.03.01.004.04, and the docket pending review by the Legislature, 07-0000-1900F. After the Legislature rejected the rules last year, the Governor's Office republished all IDAPA rules as both temporary and proposed rules in June. *See* 19-6SE Idaho Admin. Bull. 1-2 (June 19, 2019), *available at* <https://adminrules.idaho.gov/bulletin/2019/06SE.pdf>. Those rules included IDAPA 07.03.01.004.04, which adopts and amends the 2015 International Energy Conservation Code. *Id.* at 949. The temporary rules are in effect and will expire at the end of the 2020

legislative session. *See id.* at 27. In November, the proposed rules became pending rules, which are currently under review by the Legislature. Specifically, the pending rule docket that contains IDAPA 07.03.01.004.04 is 07-0000-1900F. *See* 19-11SE Idaho Admin. Bull. 525 (Nov. 20, 2019), *available at* <https://adminrules.idaho.gov/bulletin/2019/11SE.pdf>. The Senate Commerce and Human Resources Committee approved docket number 07-0000-1900F on January 16, 2020. *Hearing on Docket No. 07-0000-1900F Before the S. Commerce & Human Res. Comm.*, 65th Leg., 2nd Reg. Sess. (Idaho 2020), *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/standingcommittees/200116_schr_0130PM-Minutes.pdf.

The Idaho Building Code Board (Board) vetted adoption of the 2018 building codes, including the 2018 International Energy Conservation Code, in meetings from November 2018 to August 2019. *See, e.g.*, Minutes of Jan. 15, 2019, Idaho Building Code Board Meeting, *available at* https://dbs.idaho.gov/boards/bcboard/Minutes/bc_min01152019.pdf. As a result of the Board's efforts and separately from docket number 07-0000-1900F, the Board proposed docket number 07-0301-1901 in October 2019. 19-10 Idaho Admin. Bull. 24-37 (Oct. 2, 2019), *available at* <https://adminrules.idaho.gov/bulletin/2019/10.pdf>. In December 2019, docket number 07-0301-1901 became a pending rule, which is currently under review by the Legislature. *See* 19-12 Idaho Admin. Bull. 40-49 (Dec. 4, 2019), *available at* <https://adminrules.idaho.gov/bulletin/2019/12.pdf>.

While the prior letter from this Office addressed docket number 07-0000-1900F and the temporary rule that is currently in effect, I believe the analysis applies equally to docket number 07-0301-1901. However, the Legislature would need to reject IDAPA 07.03.01.004.04 in both docket numbers 07-0000-1900F and 07-0301-1901 to completely eliminate the requirement of compliance with the Idaho Energy Conservation Code (Idaho ECC).

2. **A local government may not adopt its own version of the Idaho Energy Conservation Code and legislative rejection of IDAPA 07.03.01.004.04 would prospectively nullify a local ordinance adopting the International Energy Conservation Code.**

From our discussion, you are seeking clarification with regard to whether a local government may adopt its own version of the Idaho ECC; and if legislative rejection of IDAPA 07.03.01.004.04 would prospectively void a local ordinance adopting the International Energy Conservation Code (International ECC). More directly, if the Legislature rejects the adoption of the International ECC, then would that Code be considered "adopted" under Idaho Code § 39-4116(2)? As explained more fully below,

rejection by the Legislature likely leads to the legal conclusion that the International ECC could no longer be considered adopted under Idaho Code § 39-4116(2).

Idaho Code section 39-4116(2) states:

Local governments that issue building permits and perform building code enforcement activities shall, by ordinance effective January 1 of the year following the adoption by the Idaho building code board, adopt the following codes as published by the International Code Council together with any amendments or revisions set forth in section 39-4109, Idaho Code, . . . : (c) Idaho energy conservation code.

These subsections allow a local government to adopt only the Idaho ECC as adopted by the Idaho Building Code Board. A local government may not adopt a version of the Idaho ECC that differs from the version of the Idaho ECC defined in Idaho Code section 39-4109(1)(c). Further, if IDAPA 07.03.01.004.04 were rejected, these subsections would prevent future adoption by a local government of the Idaho ECC because those provisions could no longer be considered adopted. Under the operation and limitations contained within the statute, there would no longer be an adopted International ECC or Idaho ECC code for the local government to adopt.

Idaho Code section 39-4116(4)(b) states:

A local jurisdiction shall not adopt any provision, chapter, section or part of the International Residential Code or residential provisions of the International Energy Conservation Code, or subsequent versions in their entirety, that have not been adopted or that have been expressly rejected or exempted from the adopted version of those codes by the Idaho building code board through the negotiated rulemaking process as provided in section 39-4109, Idaho Code.

This subsection prohibits a local government from adopting any code the Board has not adopted in rule. The Board cannot adopt a code in rule if the Legislature rejects the rule adopting the code. *See* Idaho Cont. art. III, § 29; Idaho Code § 67-5291(1). Thus, legislative rejection of IDAPA 07.03.01.004.04 (in both docket numbers 07-0000-1900F and 07-0301-1901) would rescind any adoption of the International ECC by the Board and in effect prospectively nullify any local ordinance adopting the International ECC.

Senator Todd M. Lakey
January 31, 2020
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I hope you find this analysis helpful. Please let me know if you have any additional questions or if I can provide further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read 'BK', with a long horizontal line extending to the right.

BRIAN KANE
Assistant Chief Deputy

BK:kw