



STATE OF WASHINGTON

## STATE BUILDING CODE COUNCIL

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### STATE BUILDING CODE COUNCIL SUMMARY SPECIAL MEETING MINUTES

**LOCATION:** The special meeting was held at  
DES Building – Room 2330  
1500 Jefferson St SE, Olympia, WA 98504  
with Zoom and teleconference options

**MEETING DATE:** Tuesday, December 12, 2023

**Members in Attendance:** Council Chair Tony Doan, Kjell Anderson, Jay Arnold, Todd Beyreuther, Justin Bourgault, Micah Chappell, Daimon Doyle, Tom Handy, Roger Heeringa, Matthew Hepner, Craig Holt, Tye Menser, Ben Omura, Pete Rieke, Katy Sheehan, Representative Keith Goehner, Senator John Lovick, Representative Alex Ramel, Senator Lynda Wilson

**Members Absent:**

**Staff In Attendance:** Managing Director Stoyan Bumbalov, Assistant Attorney General Dierk Meierbachtol, Krista Braaksma, Dustin Curb, Rozanna Ghanie, Annette Haworth

**Visitors Present:** Bryan Ahee, Larry Andrews, Sean Angeley, Tim Attebery, Ernesto Avelar, Mike Baranick, Kim Barker, Joseph Briscar, Emilie Brown, Ian Casey, Kathleen Collins, Cathie Coyle, Josie Cummings, McKenzie Darr, Mallorie Davies, Kevin Duell, Greg Ferguson, Erik Fossum, Miller Freeman, Chris Haas, Patrick Hanks, Gary Heikkinen, Willie Hill, Jason Hudson, Ty Jennings, Jacob Jimenez, Jonathan Jones, Jonny Kocher, Ann Larson, David Merchant, Dave Nehren, Erik Olton, Teague Peters, Kathleen Petrie, Brian Rogers, Lisa Rosenow, John Rothlin, Shaun Scott, Andrea Smith, Earl Smith, Michael Snook, Noosha Tashakor, Gavin Tenold, Quyen Thai, Jason Vandever, Bill Will, Ted Williams, Tom Young, TVW

Agenda Items	Council Actions/Discussion
1. Welcome and Introductions	The meeting was called to order at 10:00 a.m. by Council Chair Tony Doan. Roll was called and a quorum present. Everyone was welcomed and members of the public, who wished to, introduced themselves.
2. Review and Approve Agenda	<b>Motion:</b> Kjell Anderson moved to approve agenda and it was seconded by Justin Bourgault.

Craig Holt inquired how this Special Meeting came to be called without consultation to all members of the council. Stoyan Bumbalov explained that multiple council members requested this meeting. Assistant Attorney General, Dierk Meierbachtol, stated that if majority of members request a meeting under the Open Public Meetings Act (OMPA), RCW 42.30, no consultation by all council members is required.

Senator Lynda Wilson asked for clarification if this meeting is intended for reconsideration and revote as the two third threshold majority vote was not met.

Micah Chappell stated that the council had already taken action on the Commercial Energy Code on November 28, 2023, and did not feel we could approve the agenda.

Assistant Attorney General, Dierk Meierbachtol, explained that the Council vote to approve amendments to the Commercial Energy Code on November 28, 2023, Council Meeting met the 8-vote threshold for approval required by the statute and council bylaws, the vote did not appear to meet the two-thirds vote threshold established in the RCW 19.27A.025. He also clarified that members of the council did not call the meeting for the purpose of reconsidering the November 28 vote. Instead, the purpose of the special meeting is to address the two-thirds threshold and to take action on the Commercial Energy Code.

Senator Wilson asked for clarification what action would the council make today if it is not to revote; is the intent to avoid the Commercial Energy Code to avoid going to the legislature.

Assistant Attorney General, Dierk Meierbachtol, provided explanation of Robert's Rule of Order and explained that the council appears to have two pathways: to rescind previous motion or amend the previous motion that was adopted.

Kjell Anderson spoke to why he suggested this council meeting. On November 28, 2023, the council passed the EPCA de-risking provisions of the commercial energy code but now it will require the legislature's action. If the legislature fails to act, what would go into effect on March 15, 2024, would be the version of the commercial energy code that does not have the EPCA de-risking provisions which would open the council to more risk. If the council wants to control their own risk, they would want to hit the two-thirds majority vote.

Multiple council members sought clarification on the two-thirds majority vote. Assistant Attorney General, Dierk Meierbachtol clarified that if the agenda is passed, he could speak more to question.

	<p><b>Called the question:</b> Todd Beyreuther called the question. Kjell Anderson seconded.</p> <p><b>Amended Motion:</b> Senator Wilson moved to amend the agenda by striking item #4—Council Vote of the CR-103P. Micah Chappell seconded. Senator Wilson spoke to the motion stating that the intent to rescind and revote for the purpose of avoiding the legislature is not on the agenda. Micah Chappell stated that two alternate pathways were explained by Assistant Attorney General, Dierk Meierbachtol, to possibly revote and therefor item #4 is misleading and should be removed. Daimon Doyle also spoke in support of striking item #4. Assistant Attorney General, Dierk Meierbachtol, explained that if item #4 is removed, there could be concerns that the council would not be able to take action.</p> <p>Craig Holt object to the meeting. Roger Heeringa spoke to concerns of the legislative schedule and if the council needs to modify the effective date.</p> <p>Kjell Anderson explained that the people of Washington have had the codes delayed twice and leaving the Commercial Energy Code up to the legislature to act upon, which may or may not happen, does not serve the people and can delay and/or remove the energy code.</p> <p>Senator Wilson stated that the legislature would have time to address the code and the code would not be delayed if were in the hands of the legislature.</p> <p><b>Roll call was taken to approve amended motion. Motion failed 5 to 9.</b></p> <p><b>Roll call was taken to approve agenda. Motion passed 9 to 5.</b></p>
<p>3. Council discussion of RCW 19.27A.025 condition that Washington State Energy Code—Commercial provisions passed with less than two-thirds majority vote required legislative approval before going into effect, including the possible preemptive effect of the federal Energy Policy and Conservation Act (EPCA) of 1975 (42 U.S.C. § 6201 et seq.) based on the recent U.S. Court of Appeals for the Ninth Circuit ruling in CRA vs. City of Berkeley.</p>	<p>Todd Beyreuther asked if it is correct to say that the adopted provisions from December 2022 are superseded now by a disputed provision?</p> <p>Assistant Attorney General, Dierk Meierbachtol, addressed Todd Beyreuther’s question. If the code goes to the legislature and no action is taken, the version of the Commercial Energy Code approved by the council in April 2023 will go into effect on March 15, 2024.</p> <p>Discussion was heard on whether or not the Commercial Energy Code should be sent to the legislature versus rescinding November 28, 2023, vote and revote.</p> <p>Tye Menser expressed concerns if the provisions from the December 2022 Commercial Energy Codes vote go into effect versus the amended November 28, 2023, version, there will be a</p>

greater risk including legal vulnerability and possible issues in the future.

Roger Heeringa stated that the purpose of this special meeting is not to take powers away from the legislature but to seek how to pass the code. Roger asked for exact two-thirds wording from Robert's Rules of Order. Roger Heeringa expressed his opinion that based upon RCW 19.27A.025 which states, "A disputed provision is one which was adopted by the state building code council with less than a two-thirds majority vote," (emphasis added) that the votes from November 28 meeting met the 2/3 majority vote. He read the following references for his opinion; 1) the Roberts Rules, 11th Edition, Section VIII-46 states that, "a majority vote, that is a majority of the votes cast" which implies that the denominator in calculating is the votes cast, not the number of members present. 2) the Roberts Rules, 11th Edition, Section VIII-48 states, "Two-thirds Vote. A two-thirds vote means two-thirds of the votes cast, ignoring blanks which should never be counted. This must not be confused with a vote of two-thirds of the members present, or two-thirds of the members, terms sometimes used in by-laws. To illustrate the difference: Suppose 14 members vote on a question in a meeting of a society where 20 are present out of a total membership of 70, a two-thirds vote would be 10; a two-thirds vote of the members present would be 14; and a vote of two-thirds of the members would be 47," (emphasis added) which very clearly lays out that according to Roberts Rules, which governs our meeting and voting, that the proper way to calculate the November 28th vote is  $9/13 = 69\%$  which is more than 2/3rds.

Assistant Attorney General, Dierk Meierbachtol, opined that the two-thirds majority vote of the council present.

Jay Arnold stated that the council moving forward and taking action to correct the error at the November 28, 2023, meeting where the council did not have the chair's vote, is a part of de-risking as modifications added at that meeting are better compliant with EPCA than the December 2022 provisions.

Multiple council members asked to discuss what pathways are available and how to move forward.

Micah Chappell spoke to moving forward with November 28, 2023, approval of the Commercial Energy Code amendments and allow the legislature to take the risk or not. If the legislature wants to take that risk, the council can reconvene and propose the rule again as written.

Todd Beyreuther stated he would like to know what pathways are for this meeting as well as the legislative pathway. Todd Beyreuther also asked the question of what work would the council need to do in December to prepare for the legislative session.

	<p>Justin Bourgault stated that he agrees that the work has been completed but since the two-thirds vote was overlooked at the November 28, 2023, meeting, the council has to finish the work.</p> <p>Kjell Anderson agreed with Justin Bourgault that the council should finish what they started, and this code will sit through a legislative cycle. If during the legislative session, legislature wants to exercise an option to remove the EPCA provisions that the council placed, they have the opportunity to do that during the session.</p> <p>Micah Chappell asked if public comment would be taken. Council Chair, Tony Doan, explained that the asterisk on the agenda indicated that the council will not take public comment. The council can call on someone from the public to clarify a question, but the council will not entertain public comment.</p> <p>Pete Rieke spoke to why he also requested this special meeting: in order to have a vote in the subject matter as much as legally possible.</p>
<p>4. 2021 Washington State Energy Code - Commercial</p> <ul style="list-style-type: none"> <li>• Possible Council vote on CR-103p -Final Adoption</li> </ul>	<p>Kjell Anderson asked if rescinding the November 28, 2023, decision and then a motion to approve the Commercial Energy Code with modifications was acceptable.</p> <p>Assistant Attorney General, Dierk Meierbachtol, clarified that a vote to rescind would be in order under Robert's Rules. This would be a vote to rescind the approved motion that was made on the November 28, 2023, meeting. A positive vote would lead to the amendments that were approved at the meeting would no longer be approved and staff would not be directed to file the CR-103P. The 2022 code would go into effect if no other steps were taken after rescinding the motion from November 28, 2023. However, the council could go on to make a motion to approve the energy codes as amended or with additional amendments and vote. A specific motion was not identified in the agenda for this special meeting; therefore, Robert's Rules requires that the council would need either a vote of the majority of the voting members (eight minimum) or two-thirds vote to approve a motion to rescind or to approve the motion to amend something previously adopted.</p> <p>Daimon Doyle asked if staff had filed the CR-103P to which Krista Braaksma stated that the council must make a decision by December 1, 2023, on the residential code, but it does not affect the filing date of the CR103.</p> <p>Jay Arnold asked if the motion to amend something previously adopted, could it be done as a single motion? Assistant Attorney General, Dierk Meierbachtol, answered yes it can be done in a single motion.</p> <p>Senator Lynda Wilson asked if there is a motion to amend, a substantive amendment, would that require public comment?</p>

Assistant Attorney General, Dierk Meierbachtol, explained that if the council were to consider taking this path the motion would be amended and it would not necessarily be a motion to further amend the commercial energy code. But if the council were to consider this as an option, the council could make changes to proposed rules at the filing of CR-103.

Micah Chappell asked if this is to amend the commercial energy code or just the motion. Assistant Attorney General, Dierk Meierbachtol, provided an example from Robert's Rules on how to amend a motion that was previously adopted. Micah Chappell asked if we were to amend something previously adopted, would the amendment be the only item that required the two-thirds threshold and not the original motion. Would this still require the legislature to take action? Assistant Attorney General, Dierk Meierbachtol, stated it would be on the amendment and not the motion. But the least risky approach would be to rescind the vote and then take a vote on a new motion.

**Motion:** Kjell Anderson moved to rescind the motion to approve the commercial energy code, move it into CR-103P process that was made on November 28, 2023. Jay Arnold seconded. Kjell Anderson spoke to his motion stating that the legislature is a part of this process as this will sit through the legislative cycle and he would want to have the risk in the council's hands, intentionally, then having it in another entity's hands. The council is doing what the legislature asked the council to do which is putting a set of codes together and the legislature could take action in their session if they want to but do not force them to take action.

Todd Beyreuther asked if the Commercial Energy Code is written in the RCW that legislature can take action if it is disputed? Assistant Attorney General, Dierk Meierbachtol, explained that the two-thirds majority vote threshold for legislative approval only applies to the Washington State Commercial Energy Code.

Micah Chappell stated that if the council pauses and takes a step back, then we are not doing what the legislature wants. The best possible path would be not moving anything or not making any further modifications would allow the Commercial Energy Code to possibly come to fruition sooner.

Kjell Anderson spoke to Micah Chappell's comments stating that there are two reasons why he is not choosing Micah's path and one is the fossil fuel path in the Commercial Energy Code is equivalent in terms of energy performance to the heat pump path in the Commercial Code. The fossil fuel path is not a step backwards in terms of energy performance. It requires other things to be done other than choosing a higher efficiency appliance and allows an EPCA -covered appliance.

Katie Sheehan asked if there is a way to know what the amendment to the motion would be if the council does rescind. Assistant Attorney General, Dierk Meierbachtol, explained there would not be no need to do a motion to amend something that was previously adopted because it's no longer adopted. It's been rescinded and that would take the option off the table.

Kjell Anderson provided a projected motion to have a similar motion that was made at the November 28, 2023, meeting to move the Commercial Energy Code into the CR-103P with all the amendments that were a part of the successful motion and add another minor amendment that would move the heat flags from Option 2 to Option 1 to go along with a map that was added as well.

Micah Chappell asked if there are to be amendments, should this be open for public comment. Assistant Attorney General, Dierk Meierbachtol, if proposed substantive changes are made, then OPMA should speak to specific agenda item.

Todd Beyreuther asked if two actions can be taken by the council. Assistant Attorney General, Dierk Meierbachtol, explained that if the council rescinds, they can take a second action as the agenda notes *Possible Council vote on CR-103P*. If the council wants to amend that, the council can do that as well.

Roger Heeringa stated he was not convinced that the risk of going down this pathway is less than of a risk of doing nothing, was concerned about the impression to the public, and does not see a risk of the two paths being in the hands of the legislatures: either legislature does nothing, and the April 2023 codes being adopted or the legislature approve the November 28, 2023, amendments.

Kjell Anderson asked if the council rescinds, does the council allow for Public Comment?

Assistant Attorney General, Dierk Meierbachtol, OPMA's public comment requirement does not apply special meetings. Therefore, is up to the discretion of the council whether they want to have public comments.

**Motion withdrawn:** Kjell Anderson moved to withdraw motion to rescind the motion to approve the commercial energy code, move it into CR-103P process that was made on November 28, 2023. Jay Arnold second.

**Motion:** Kjell Anderson moved to amend the motion relating to the Commercial Energy Code at the November 28, 2023, meeting by inserting language to Table C406; add the prorating flags as shown in Option 2 for the tables in Option 1. This includes code language included before from which included Option 1 and list of minor

	corrections based on public comment that were included in the motion on November 28, 2023. Jay Arnold seconded. <b>Roll call was taken and motion passed 10 to 3.</b>
5. Adjourn	Meeting Adjourned 12:45 p.m.