To: Bob Hanbury

From: Bill Ethier, CAE, CEO & General Counsel, Home Builders & Remodelers Association of CT

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You asked about the potential liability of volunteer state code officials in the event someone is injured in a house fire if the code officials do not adopt the model code unamended (i.e., leave in the sprinkler mandate). Before speaking to the law on this issue, the argument that there could be liability for members of the codes and standards committee (CSC) if they amend a model code is ludicrous on its face for a number of logical reasons.

First, the IRC, as a model code – indeed, any model code or standard – has no force of law until it or its provisions are adopted by either the legislature or a regulatory body (i.e., the CSC). It would be a different situation if a particular provision was the adopted law and a code official, e.g., a municipal building official, chose to not follow it or enforce it. Such official may be subject to liability, but even then it would be a high bar for a plaintiff to overcome that official's governmental immunity. But, the argument sprinkler proponents are making here seems to equate the model code process itself with the force of authority of a legislative or regulatory body. There is no precedent for so elevating the stature of what is essentially a private, independent book publisher, even one that follows ANSI standards-making protocols.

Second, as we all know, the ICC model code process has its share of problems. It's not a perfect consensus system – but then such a system likely does not exist. Personally, I would love to air out in court how the sprinkler mandate was originally included by the ICC, exposing the ICC to how it was influenced and how the vote was rigged by sprinkler manufacturers funding fire officials' trips to the code meeting. Let someone sue the CSC or its members and we can intervene in their defense. The ICC's sprinkler mandate itself would disintegrate under judicial standards of procedural and substantive due process. Indeed, the first court decision in the nation on the validity of the sprinkler mandate was issued this year. The Minnesota Court of Appeals in Builders Association of Twin Cities v. Minnesota Dept of Labor and Industry (Oct 13, 2015, OAH8-1900-30855), held the sprinkler mandate there invalid as it "violates substantive due process because it is arbitrary and not the result of a reasoned determination." Alternatively, if the mandate is adopted here then we can sue the CSC in federal court and join the ICC into the lawsuit to get our day in court and have the sprinkler mandate removed from the IRC nationwide. Of course, NAHB and every HBA in the nation would sign on as parties. At the very least, the faulty ICC process would be exposed and a renewed effort nationwide to move away from ICC codes could take over.

Third, the argument that CSC members could be liable for failing to adopt a model code provision counsels that every model code should be adopted as is without review or amendment. Of course, why, then, would we even need a CSC? Just let the model code bodies dictate Connecticut's law. Are not just about all provisions of the ICC and NFPA models all about public safety? What is special about the IRC's SF sprinkler mandate that rises above all other code provisions that CSC amends or removes? Given the long history of performing extensive and thorough reviews and amendments of model codes going back many decades, when was the last time a CSC member was sued for exercising their governmental function in adopting a regulation, especially a technical one such as the State Building Code? I think never.

Fourth, I believe either 45 or 48 states have opted out of the sprinkler mandate. What is so unique about Connecticut's CSC process that makes members liable here but not members of similar bodies in other states? When have any such code officials, volunteers or paid governmental employees anywhere

in the nation, been sued for amending or deleting the sprinkler mandate from a model code? Again, I think never.

To the volunteer liability issue itself, Connecticut statutes make volunteers engaged in certain activities immune from lawsuits arising from acts of ordinary negligence - see the Office of Legislative Research (OLR) report on volunteer immunity at https://www.cga.ct.gov/2013/rpt/2013-R-0199.htm. That is, volunteers are immune from claims they committed ordinary negligence when exercising their discretion. However, they may be liable for claims they committed gross or wanton negligence.

Of course, the immunity is from liability only, not from suit. See generally, Stone v. Town of Newtown, 32 Conn. L. Rptr. 445 (Sup. Ct. 2002) (It appears from the legislative history of the act that this legislation is not a bar to a cause of action against a volunteer board member. It appears rather that the purpose of the legislation is to afford to volunteers the same indemnification protection that is afforded to municipal employees.). So, while volunteers enjoy immunity from ordinary negligence claims, nothing will stop somebody from suing. Anyone can file a lawsuit against anyone for anything.

The issue with which CSC members should be concerned is whether they could be liable for gross or willful and wanton negligence. According to the OLR report, "'Gross negligence' generally signifies more than ordinary inadvertence or inattention, but less than a conscious indifference to consequences." And, "the usual meaning assigned in legal treatises [to willful or wanton negligence] is an act intentionally done that is unreasonable, taken in disregard of a risk known to the actor or so obvious that he or she must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." So, given the extensive, thorough and repeated reviews the CSC has brought to the sprinkler mandate issue, nobody can claim the CSC has exercised any level of inattention to the issue, let alone more than ordinary inattention. If anything, CSC has exercised extensive attention on the issue. Nor has CSC acted intentionally unreasonably or in disregard of a risk so obvious and so great as to make it highly probable harm would follow. This is where facts would be brought to focus on the issue and the fact is in Connecticut homes that have been built since smoke detectors were mandated to be hard-wired with battery backup in the 1980s represent a tiny fraction of fire deaths that occur. The vast majority of residential fire deaths in SF homes are in older homes, often much older homes, which is why a sprinkler mandate in new homes makes no sense.

Alternatively, I can imagine somebody may claim that CSC members acted in reckless disregard for public health and safety. While not specifically related to state government officials, see Williams v. Housing Authority of City of Bridgeport for a discussion of what constitutes a "reckless disregard for health and safety." Under common law reckless conduct tends to be highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. Again, the history of fire deaths in Connecticut and the homes in which they occur show definitively that new homes are not the issue. There is absolutely nothing highly unreasonable or apparent about the risk of fire deaths in new home construction that would create any potential liability for CSC members. And, given the 45 – 48 states which have also amended out the sprinkler mandate, CSC's decision to again remove the mandate from the model code would be no departure from ordinary care.

Finally, there is an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. Of course, failing to leave the sprinkler mandate in the code that is adopted in CT would not subject any identifiable person to imminent harm.

So, for all of the logical and legal reasons above, CSC members would not be liable for exercising their governmental discretion to not adopt the ICC's sprinkler mandate for the state.