

WHO REMEMBERS THE SMALL BUILDERS?: HOW TO IMPLEMENT OHIO'S NEW STATEWIDE RESIDENTIAL BUILDING CODE WITHOUT SINKING OHIO'S SMALL BUILDERS

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INTRODUCTION

So you've finally decided to add that new master bedroom suite to your home. The first thing you are likely to do is get an estimate of the cost for the addition from a contractor. Assume that the original estimate for materials and labor is \$10,000. However, you live in a state with a residential building code in effect throughout the state. Suddenly, several extra expenses appear on your initial estimate, such as plans that must be certified by a licensed architect or portions of work that must be performed by a licensed specialty contractor (for example, plumbing or electrical work). Two major problems immediately emerge. First, considering the possibility that the cost of the addition exceeds the increase in fair market value that the addition should bring, do you, the homeowner, have the ability to cover this extra cost? Second, assuming that compliance with the building code increases prices and results in fewer homeowners seeking his services, does the contractor have the ability to continue in his line of work?

If you happen to live in a state where there is no residential building code, the situation takes a decidedly different, but still negative, turn. The added expenses of the above scenario are eliminated, which brings you back to your original estimate. However, you now run the risk of incompetence by the builder. Without certified plans or the threat of inspections, the contractor may not build an addition that is structurally sound. In addition, the specialty work, such as electrical installation, may not be done properly (especially if the builder has minimal experience or if your original structure has older electrical fixtures and wiring). Not only do you run the risk of damage to personal property (for example, due to electrical fire), but you also stand a chance of suffering physical harm from electrical shock. Although the price of your new addition has been reduced to a more manageable amount, personal safety becomes a major issue.

Each scenario must balance the interests of the contractor against the interests of the homeowner. States and localities generally balance these

interests¹ by implementing some type of residential building code. The issue for each state that has done so has been to determine which type of code best fits that state's needs.² Ohio has weighed in on this issue with the passage of 125 H.B. 175.³ The primary goal of this law was to authorize the creation of a uniform set of residential construction standards to be applied statewide.⁴

Unfortunately, the governing provisions of 125 H.B. 175 do not adequately safeguard the interests of either the homebuilders or the homeowners. While Ohio must implement a uniform statewide residential building code, the governing provisions of that code need to consider and protect both groups, particularly the small builder,⁵ who often seems to be ignored in these types of situations.⁶ This article provides some

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¹ The state also must consider the interests of others, such as the insurance industry, particularly in areas prone to hurricanes, earthquakes, or other natural disasters, as well as its own interests in the protection of life and property or in the uniformity of building codes between different jurisdictions.

² See *infra* text accompanying notes 13–28.

³ H.R. 175, 125th Gen. Assem. (Ohio 2004).

⁴ Representative Stephen Buehrer, Floor Statement at Ohio House of Representatives (May 26, 2004), available at <http://www.ohiochannel.org> (select "Video Archive II-Ohio House of Representatives," then select "2004," then "Wednesday, May 26, 2004." Under "Segment #2," select "HB #175 [Sub] Third Consideration").

⁵ Under Ohio law, "small business" is defined as "an independently owned and operated business having fewer than four hundred employees." OHIO REV. CODE ANN. § 121.24(A)(9) (West 2005). For purposes of this article, the term "small builder" will be further defined generally as a builder specializing in either new residential construction or residential improvement, who operates as a sole proprietor or as a partnership. The small builder will typically average one to two new homes or four to six home improvement projects per year and will maintain no more than two jobs at a time throughout the year. Often, the small builder will operate with a crew of three to five employees and will turn over less than \$500,000 per year with little profit margin.

⁶ For example, while H.B. 175 was being considered, a fiscal analysis was prepared to determine the impact of the bill. OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL
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recommendations for Ohio's residential building code that are designed to protect the builders' economic interests while adequately safeguarding the homeowner from both personal injury and property damage. Part I discusses different building codes that are currently in use throughout the United States. Part II explains the goals and identifies the key provisions of 125 H.B. 175. Part III analyzes the potential effects of adopting a statewide residential building code on small contractors and those who employ their services. Part IV makes recommendations that will protect builders while maintaining the primary goal of implementing a building code that ensures uniform, safe residential construction. Finally, Part V makes predictions, discusses the implications of the recommendations, and concludes the following: (1) Ohio needs to adopt a uniform statewide residential building code that will both provide its citizens with safe, affordable housing and protect small builders; (2) 125 H.B. 175 did take some steps in that direction by providing for a performance-based building code with appropriate disciplinary measures and protective exceptions; and (3) the law needs to provide for a mandatory, rather than voluntary, building code, as well as for other alterations to better protect both the small builder and the homeowner.

I. BACKGROUND ON BUILDING CODES

The history of building codes can be traced as far back as the Code of Hammurabi.⁷ In the United States, building codes were used in the "earliest settlements."⁸ These codes were decidedly less complex than the codes in use today.⁹ For example, New Amsterdam (now New York) had

IMPACT STATEMENT, H.R. 175, 125th Gen. Assem. (Ohio 2004), available at <http://www.lbo.state.oh.us/fiscal/fiscalnotes/125ga/HB0175EN.HTM>. However, this analysis was exclusively focused on the impact on state and local government. *Id.* While the impact on government is important, no analysis was made as to the possible economic impact on builders. Telephone Interview with Steven Buehrer, Representative, Ohio House of Representatives (Nov. 3, 2004). It seems strange that a law that would have a definite effect on a major state industry would not be analyzed to determine to some degree what the impact would be on that industry.

⁷ Michael D. Turner, *Paradigms, Pigeonholes, and Precedent: Reflections on Regulatory Control of Residential Construction*, 23 WHITTIER L. REV. 3, 5 (2001).

⁸ Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 J. MARSHALL L. REV. 349, 349 (1996).

⁹ *See id.*

local ordinances that regulated the construction of chimneys and roofs to protect against the threat of fire.¹⁰

Over time, the use of building codes became more widespread throughout the United States.¹¹ By the 1970s, nearly every state and a vast number of large- to mid-size cities had adopted some form of building code.¹² The majority of state building codes focus on commercial construction rather than residential construction, although the implementation of residential construction standards is on the rise.¹³ A total of thirty-five states currently have some form of building code that governs the construction of one- and two-family dwellings.¹⁴

The adopted codes tend to be based on one of the four national model codes that are currently in use throughout the United States.¹⁵ The Uniform Building Code (UBC), developed by the International Congress of Building Officials,¹⁶ is primarily used in the western and north-central states.¹⁷ The Basic Building Code, developed by the Building Officials Conference of America (BOCA),¹⁸ tends to be the most widely used code

¹⁰ CHARLES G. FIELD & STEVEN R. RIVKIN, *THE BUILDING CODE BURDEN* 2 (1975).

¹¹ See Kelly, *supra* note 8, at 350.

¹² See *id.*

¹³ See generally NAT'L CONFERENCE OF STATES ON BLDG. CODES AND STANDARDS, *DIRECTORY OF STATE BUILDING CODES & REGULATIONS* (4th ed. 1987) [hereinafter *DIRECTORY OF STATE BUILDING CODES*] (listing the years that different states passed their residential building codes). A survey of the years of passage of a residential building code reveals that a number of states passed their codes in the 1970s. See *id.* Two states passed codes in the 1900s, one state passed its code in the 1930s, three did so in the 1960s, and eleven passed their residential building codes in the 1970s. *Id.*

¹⁴ *Id.* Some dispute exists as to the accuracy of this statistic. My survey of state building codes indicated that thirty-five states had some form of residential building code in force. In comparison, Michael D. Turner reports that twenty-four states have some form of building code. Turner, *supra* note 7, at 29. Turner's count comes from a report published by the Institute for Business and Home Safety that surveyed state building codes to determine which states had residential codes in force. *Id.*

¹⁵ Kelly, *supra* note 8, at 350–51.

¹⁶ *Id.* at 350.

¹⁷ See FIELD & RIVKIN, *supra* note 10, at 42. Minnesota, California, and North Dakota are examples of UBC states. *DIRECTORY OF STATE BUILDING CODES*, *supra* note 13, at 11, 49, 71.

¹⁸ Kelly, *supra* note 8, at 350–51.

in the north-central and northeast states.¹⁹ The Southern Standard Building Code (SSBC), developed by the Southern Building Code Congress,²⁰ is the code most used in the South.²¹ Finally, the National Building Code (NBC), developed by the American Insurance Association,²² is used in scattered regions throughout the United States except for the West.²³ Supplemental codes, focusing on specialty areas of construction, are utilized in the United States as well.²⁴ Examples include the National Plumbing Code and the National Electric Code.²⁵

A typical model code is divided into three parts: definitions, licensing requirements, and the actual standards.²⁶ The definitions section of the specific building code is usually an introductory section that defines key work areas, such as plumbing or electrical work.²⁷ The licensing requirements describe who is authorized to do what types of work.²⁸ The actual standards section is the “heart of the code.”²⁹ The standards will, depending on the type of code used, either specify the types and quantities of material used and describe the point in the building process where this material is used, or specify certain minimum performance standards that must be met in each phase of the building process.³⁰

¹⁹ FIELD & RIVKIN, *supra* note 10, at 42. Michigan and Massachusetts both use this code. DIRECTORY OF STATE BUILDING CODES, *supra* note 13, at 45, 47.

²⁰ Kelly, *supra* note 8, at 351.

²¹ FIELD & RIVKIN, *supra* note 10, at 42. Arkansas, Georgia, and South Carolina use this code for residential construction. DIRECTORY OF STATE BUILDING CODES, *supra* note 13, at 9, 21, 83. South Carolina allows its localities to choose between the SBC and the One and Two Family Dwelling Code produced by the Council of American Building Officials. *Id.* at 83.

²² Kelly, *supra* note 8, at 351.

²³ FIELD & RIVKIN, *supra* note 10, at 42. The American Insurance Association developed this code “as part of their underwriting procedures” involving risk of fire loss. *Id.* The Association is not made up of building officials, so its code is not always included in building code analyses. *Id.*; see also DIRECTORY OF STATE BUILDING CODES, *supra* note 13, at iv–v (omitting the NBC from its reporting of state building codes).

²⁴ Kelly, *supra* note 8, at 351.

²⁵ *Id.*

²⁶ FIELD & RIVKIN, *supra* note 10, at 41.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *id.* at 38.

II. OHIO'S EXPERIENCE WITH BUILDING CODES

A. *History of Ohio Building Codes*

Ohio's own building code history can be traced back to the early part of the twentieth century.³¹ The earliest regulations covered buildings such as schools and industrial buildings.³² In the 1950s, those standards were compiled into a building code.³³ At that time, the Ohio legislature did not implement that code as state law.³⁴ A few years later, however, the legislature created the board of building standards, which adopted the revised building code as the state building code.³⁵

This code was compiled into a document called the *Ohio Building Code*.³⁶ In 1978, the board decided to repeal most of that code and adopted, with special Ohio modifications, the BOCA code as the Ohio building code.³⁷ This code was not applied to one- and two-family dwellings; it was applied to industrial/modular housing.³⁸ Currently, Ohio

³¹ DIRECTORY OF STATE BUILDING CODES, *supra* note 13, at 72.

³² *Id.* Standards for these types of buildings were, and still are, regulated by the Department of Industrial Regulations. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ THE PREVIEW GROUP, INC., KNOW YOUR CODE: A GUIDE TO THE OBC, at viii (2004).

³⁷ *Id.*

³⁸ See DIRECTORY OF STATE BUILDING CODES, *supra* note 13, at 73. Such homes, referred to in the Ohio Revised Code as either "industrialized unit[s]" or "manufactured home[s]," are defined in § 3781.06(C)(3)–(4). An industrialized unit is defined as "a building unit or assembly of closed construction fabricated in an off-site facility, that is substantially self-sufficient as a unit or as part of a greater structure, and that requires transportation to the site of intended use." *Id.* § 3781.06(C)(3). A manufactured home is defined as "a building unit or assembly of closed construction that is fabricated in an off-site facility and constructed in conformance with the federal construction and safety standards." *Id.* § 3781.06(C)(4).

An additional type of housing structure, the mobile home, is defined in § 4501.01(O) of the Ohio Revised Code as follows:

[A] building unit or assembly of closed construction that is fabricated in an off-site facility, is more than thirty-five body feet in length or, when erected on site, is three hundred twenty or more square feet, is built on a permanent chassis, is transportable in one or more sections, and does

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does not have a statewide residential building code.³⁹ Thus, at this point, local governments have the authority to adopt their own residential building standards if they wish.⁴⁰

B. Provisions of H.B. 175

125 H.B. 175 was introduced in the Ohio House of Representatives on May 7, 2003 by its primary sponsor, Representative Steven Buehrer.⁴¹ An amended version, signed into law, went into effect on May 27, 2005.⁴²

The law has two primary goals. The first is to authorize the creation of uniform residential construction standards for Ohio by creating an advisory committee, which will recommend the residential building code as well as the mechanisms for its enforcement.⁴³ The second is to create a Notice and Right to Cure provision that sets forth procedures for consumers to bring claims against residential contractors for construction defects.⁴⁴

H.B. 175 focused on creating uniform statewide building standards for single-, two-, and three-family dwellings and was designed to cover the new construction of any such dwellings, as well as any remodeling or addition to these dwellings.⁴⁵ The law is not the actual building code that Ohio would use; rather, the law creates or empowers administrative bodies

not qualify as a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code or as an industrialized unit as defined in division (C)(3) of section 3781.06 of the Revised Code.

All three of these types of housing structures are excluded from the definition of residential building. *Id.* § 3781.06(C)(9).

³⁹ Buehrer, *supra* note 4.

⁴⁰ *Id.*

⁴¹ FINAL STATUS REPORT OF LEGISLATION—125TH GA, 125th Gen. Assem., at 5 (Ohio 2005), available at <http://www.lsc.state.oh.us/status125/sr1125final.pdf>.

⁴² *Id.*

⁴³ See Buehrer, *supra* note 4.

⁴⁴ *Id.*; see also OHIO LEGIS. SERV. COMM'N, FINAL ANALYSIS, H.B. 175, 125th Gen. Assem., at 11 (Ohio 2004), available at <http://www.lsc.state.oh.us/analyses125/04-hb175-125.pdf>.

⁴⁵ See OHIO REV. CODE ANN. § 307.37(A) (West 2005). Section 307.37(A) defines “proposed new construction” as a “proposal to erect, construct, repair, alter, redevelop, or maintain a single-family, two-family, or three-family dwelling or any structure that is regulated by the Ohio building code.”

whose functions are to develop and implement the state residential code.⁴⁶ One of those bodies is an advisory committee whose primary job is to recommend a residential code modeled after one issued by a national, model code organization.⁴⁷ The committee has two other major purposes. The first is to “[a]dvise the board [of building standards] regarding the establishment of standards for certification of building officials who enforce the state residential building code.”⁴⁸ The second is to “[a]ssist the board in providing information and guidance to residential contractors and building officials who enforce the state residential building code.”⁴⁹

The law also revises the role of the board of building standards. The board was formerly required to “formulate and adopt rules governing the

⁴⁶ *Id.* § 4740.14. The law recreates the Residential Construction Advisory Committee, which had been abolished under Am. Sub. H.B. 25 of the 125th General Assembly in 2003. OHIO LEGIS. SERV. COMM’N, *supra* note 44, at 5–6 & n.2. The board of building standards, the other affected administrative agency, has its role slightly revised. *See infra* notes 50–54 and accompanying text.

⁴⁷ § 4740.14(C)(1). The committee, officially known as the Residential Construction Advisory Committee, is created under the specifications of § 4740.14(A)–(B). *Id.* § 4740.14(A)–(B). The committee’s makeup is as follows:

Of the advisory committee’s members, three shall be general contractors who have recognized ability and experience in the construction of residential buildings, two shall be building officials who have experience administering and enforcing a residential building code, one . . . shall be from the fire service certified as a fire safety inspector who has at least ten years of experience enforcing fire or building codes, one shall be a residential contractor who has recognized ability and experience in the remodeling and construction of residential buildings, and one shall be an architect . . . with recognized ability and experience in the architecture of residential buildings.

Id. § 4740.14(A). The committee’s primary job is set out under § 4740.14(C)(1). The committee is to recommend to the board of building standards a building code based on some form of model code, with any changes necessary to fit special state requirements. *Id.* § 4740.14(C)(1); *see also supra* text accompanying notes 15–25. If the board does not accept the committee’s recommendation, then the committee must revise the code and resubmit it until the board accepts it. § 4740.14(C)(1).

⁴⁸ *Id.* § 4740.14(C)(2).

⁴⁹ *Id.* § 4740.14(C)(3). The committee shall also advise the board of building standards regarding interpretation of the residential building code and provide any other necessary assistance. *Id.* § 4740.14(C)(4)–(5).

erection, construction, repair, alteration, and maintenance of all buildings . . . specified in section 3781.06 of the Revised Code.”⁵⁰ However, the board is now also responsible for “incorporat[ing] those rules into separate residential and nonresidential building codes.”⁵¹

In addition to this new mandate, the board also retains various other duties and powers. The board is responsible for determining whether a particular new material or new construction process is in compliance with the performance standards of the residential code.⁵² It also certifies municipal, township, and county building departments and their personnel

⁵⁰ OHIO REV. CODE ANN. § 3781.10(A) (West Supp. 2001). The board's role is described in § 3781.10, a section that has been considerably revised, with several subsections removed and a considerable amount of new language added. See 2004 Ohio Legis. Serv. Ann. L-2717 (West). For example, § 3781.10(E)(7)(c) of the Ohio Revised Code specified enforcement authority for inspections and who may make inspections, such as “[o]fficers or employees of the municipal corporation, township, or county” or “persons . . . under contract to furnish inspection services to the municipal corporation, township, or county.” § 3781.10(E)(7)(c)(2)(a)–(b). However, in H.B. 175, subsection (E)(7)(c)(2) has been completely removed from § 3781.10. Compare OHIO REV. CODE ANN. § 3781.10(E)(7)(c)(2) (West Supp. 2001), with OHIO REV. CODE ANN. § 3781.10(E)(7)(c) (West Supp. 2005).

⁵¹ OHIO REV. CODE ANN. § 3781.10(A)(1) (West Supp. 2005).

⁵² *Id.* § 3781.10(C). This section states, “[T]he board shall determine by rule that any particular fixture, device, material, process of manufacture, manufactured unit or component, method of manufacture, system, or method of construction complies with performance standards adopted pursuant to section 3781.11 of the Revised Code.” *Id.* (emphasis added). Once the board makes its determination regarding compliance, that ruling becomes enforceable as part of the building code. *Id.* Section 3781.10(C) later states:

No department, officer, board, or commission of the state other than the board of building standards or the board of building appeals shall permit the use of any fixture, device, material, method of manufacture, newly designed product, system, or method of construction at variance with what is described in any rule the board of building standards adopts or issues or that is authorized by any section of the Revised Code.

Id. (emphasis added).

to enforce the residential code.⁵³ Finally, the board has the power to recommend any provisions that will carry out the purposes of § 3781.06.⁵⁴

Section 3781.11 provides the purpose of the rules that are passed by the board of building standards.⁵⁵ The first purpose, found in § 3781.11(A)(1), is to “provide [for residential building] standards and requirements that are uniform throughout the state.” The second purpose, to “[f]ormulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability,” is located in § 3781.11(A)(2). Section 3781.11(A)(3) states the third purpose, which is to “[p]ermit . . . the use of materials and technical methods, devices, and improvements . . . which tend to reduce the cost of construction and erection without affecting minimum requirements for the health, safety, and security of the occupants . . . and without preferential treatment . . . of materials or products or methods of construction.” A fourth purpose, in § 3781.11(A)(4), “[e]ncourage[s], so far as may be practicable, the standardization of construction practices, methods, equipment, material, and techniques.”

The general framework for the type of residential building code to be developed and used is described in §§ 307.37, 505.75, and 3781.11 of the Revised Code. The residential code Ohio intends to pass will be a voluntary code, meaning that counties and townships are free to adopt the code if they choose, according to §§ 307.37(B)(1)(a) and 505.75(A)(1), respectively. The language of the law in both sections is permissive, stating that the county commissioners or board of township trustees “may

⁵³ *Id.* § 3781.10(E)(1)–(3).

⁵⁴ *Id.* § 3781.10(D). The board also has several other minor powers listed throughout § 3781.10, such as making certain reports to the general assembly regarding amendments to § 3781.06, making investigations necessary to carry out its powers, or creating rules for the review of applications for amendments to the residential code. *Id.* § 3781.10(C)–(D).

⁵⁵ Section 3781.11(A)(5) focuses on the impact of the rules of the board of building standards on school buildings, which is not relevant for purposes of this article. Other purposes of the rules are found in subsection (B), which provides that the rules are to “supersede and govern any order, standard, or rule” of the divisions of industrial compliance and the fire marshal, the department of health, and counties and townships that conflict with these rules, and in subsection (C), which requires that “[t]he construction, alteration, erection, and repair of buildings” be conforming to the rules of the board. *Id.* § 3781.11(B)–(C). Subsection (D) merely contains minor definitions for use in this particular section. *Id.* § 3781.11(D).

adopt local residential building regulations” so long as the regulations do not “differ from the state residential building code.”⁵⁶

The code will also be a performance-based code, rather than a prescriptive or specifications code. According to § 3781.11(A)(2), the board of building standards must “[f]ormulate such standards and requirements, so far as may be practical, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability.” A performance-based code defines its standards for the building process in terms of objective statements of functions.⁵⁷ For example, a wall may be described in terms of its load-bearing capability, rather than by the specific material used in the wall.⁵⁸ Performance standards do not specify the materials or construction methods to be used in the building process.⁵⁹

The law contains several other key provisions. Sections 3781.12–13 describe the procedure for amending the residential code.⁶⁰ Section

⁵⁶ *Id.* §§ 307.37(B)(1)(a), 505.75(A)(1) (West 2005 & Supp. 2005). National building codes are also written in this manner. JONATHAN F. HUTCHINGS, NATIONAL BUILDING CODES HANDBOOK, at xx (1998). Hutchings notes that in the wording of national codes, the word *may* is considered permissive, while the word *shall* is considered mandatory. *Id.*

⁵⁷ FIELD & RIVKIN, *supra* note 10, at 38.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ “Any person may petition the board of building standards to adopt, amend, or annul a rule . . . to permit the use of any particular fixture, device, material, system, method of manufacture, product of a manufacturing process, or method or manner of construction or installation that complies with performance standards” OHIO REV. CODE ANN. § 3781.12(A). Once the board has been petitioned, then the board, pursuant to § 3781.11(B), conducts any necessary testing to determine whether the petitioned “fixture, device, material, system, assembly, or product of a manufacturing process, or method or manner of construction or installation” should be adopted under § 3781.10. If the board determines that the subject of the petition should be adopted into the residential building code, then the board must conduct a public hearing to discuss the subject of the petition. *Id.* § 3781.11(C). Assuming that no reason to prevent adoption of the proposed change arises out of the public hearing, then the change is made to the residential building code. *Id.*

The next section, § 3781.13, allows “[a]ny person interested” to question the actions of the board of building standards. A person is considered “[a]ny person interested” in one of two ways:

[E]ither because of ownership or occupation of any property affected by any rule described in section 3781.12 of the Revised Code, or as the

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3791.04 creates the process for plan approval and initiating construction of a residential building.⁶¹ Section 4740 provides for the licensing of specialty contractors, such as plumbing or electrical contractors.⁶² Finally, §§ 3781.99 and 3791.99 explain the penalties imposed for violations of the residential code.⁶³

producer, manufacturer, seller, or distributor, of any building material, industrialized unit, plumbing, heating, or ventilating system or device, or any other device, product, assembly, or equipment, the use of which is not provided for by any rule”

Such a person may then petition the board of building standards for a hearing on the reasonableness of the board’s actions in either changing or refusing to change the rule that affects that interested person. *Id.* The board would then hold a hearing to determine whether the action taken was unreasonable or unlawful; if this is found to be true, then the board may either annul the new rule, confirm the prior rule, or amend the rule under § 3781.12. *Id.*

⁶¹ Before commencing construction, the owner is required to submit plans for the construction to the local building department that has jurisdiction for approval, under § 3791.04(A)(1). The remaining subsections of § 3791.04 describe the responsibilities of the owner and of the local building department, the effects of application of the section to the submitted plans, and the penalties for violation of this section. For example, subsection (D) allows the local building authorities to “adopt rules to provide for the approval . . . of the plans for construction of . . . part of a building or structure before the complete plans and specifications for the entire building or structure are submitted.” *Id.* § 3791.04(D). Subsection (J) gives the penalty for violation of this section as a fine of not more than five hundred dollars. *Id.* § 3791.04(J).

⁶² *Id.* § 4740.10. Section 4740.01(A) lists five different specialty contractors for purposes of the building code: heating, ventilating, and air conditioning contractor; refrigeration contractor; electrical contractor; plumbing contractor; and hydronics contractor.

⁶³ *Id.* §§ 3781.99, 3791.99; OHIO LEGIS. SERV. COMM’N, *supra* note 44, at 9. Under § 3781.99(B), “whoever violates this chapter or any rule adopted or order issued pursuant to it that relates to the construction, alteration, or repair of any building, and *the violation is not detrimental to the health, safety, or welfare of any person* shall be fined not more than one hundred dollars.” *Id.* (emphasis added). Section 3781.99(C) is identical to subsection (B), except that the violation is classified as a “minor misdemeanor.” The key difference is that under subsection (C), “*the violation is detrimental to the health, safety, or welfare of any person.*” *Id.* (emphasis added). Under § 3791.99, violations of § 3791.04 are treated in a similar manner.

III. ANALYSIS OF THE EFFECTS OF A STATEWIDE BUILDING CODE

A. *Direct Effects on Small Builders*

Residential building codes are generally implemented to protect the interests of homeowners, particularly the interest in safe housing.⁶⁴ While this is a legitimate interest worth protecting, it seems that building codes do not protect the interests of small homebuilders as well. Of course, credible arguments may be made that the adoption process of building codes allows for trade unions or manufacturers to protect their economic interests.⁶⁵ However, the small builder is the one person who seems to be ignored in the building code creation and adoption process.

The adoption of a statewide residential code could have several detrimental effects on the small builder. The most obvious and immediate effect is the need to allocate the likely increase in costs that the code would impose. The builder will have to pay fees for his own licensing requirements under the code.⁶⁶ Certain phases of the building process will require the use of licensed specialty contractors, who will also be forced to absorb their own cost increases, particularly for their own licensing requirements, thereby forcing the costs for the general contractor to increase.⁶⁷ Builders will also have to increase overhead generally, to take into account penalties for possible code violations or increases in time and material expenses for bringing a project into compliance with a building

⁶⁴ Kelly, *supra* note 8, at 349; *see also* FIELD & RIVKIN, *supra* note 10, at 3 (“[T]he objective of fostering safe and sanitary housing has in large measure been achieved.”).

⁶⁵ “[T]he code has served a goal beyond that of health and safety. Job security has been served to the benefit of specific labor interests and to the detriment of others, irrespective of any efficiency gains or losses to the eventual consumer.” FIELD & RIVKIN, *supra* note 10, at 41, 71–101 (describing the problems that home manufacturers faced in integrating new technology into their products); *see also* Kelly, *supra* note 8, at 351 (describing the role that business and labor groups play in code revisions and updates). Kelly also briefly discusses a specific example of how codes can protect special interest groups: the attempt to approve the use of ABS pipe in residential construction. *Id.* at 362. ABS pipe, which is widely used today in all types of construction, was invented in 1948; however, it was not approved for use in houses with FHA loans until 1960. *Id.* Model building codes continued to prohibit its use until 1966, and one-third of local governments surveyed for the study that Kelly discusses still prohibited it as late as 1976. *Id.* The approval of ABS was resisted by the iron pipe trade groups, who were simply trying to protect their place in the market. *Id.* at 351 n.6.

⁶⁶ OHIO LEGIS. SERV. COMM’N, *supra* note 44, at 8.

⁶⁷ *See supra* text accompanying notes 28, 62.

inspector's requirements.⁶⁸ The builder also must consider administrative costs, such as fees for local building departments to approve plans or registration fees with the local building departments.⁶⁹

All of these cost increases force the builder to choose between losing profits or increasing prices. For a general contractor who develops subdivisions or maintains several large projects, the costs can be spread out over all of the jobs to limit the effect.⁷⁰ However, for the small builder, who likely only has a few small projects or only one or two large projects, this option is not practical.⁷¹ Thus, the small builder is forced to increase his prices to stay in business; however, he must be careful not to price himself out of work completely.

Another effect on small builders is the likelihood that such builders may be forced to hold down multiple licenses. Recall the structure of the typical building code, particularly the first two sections.⁷² These sections, which define each type of work and specify who is qualified to perform it, work together to create a market for specialty contractors.⁷³ However, the small builder often takes on projects, such as room additions, which require only a small portion of specialty work. The building code requires the use of a specialty contractor regardless of the amount of work involved.⁷⁴ If the builder does not want to pay for the specialty contractor, his only other viable option is to hold down multiple specialty licenses so

⁶⁸ OHIO LEGIS. SERV. COMM'N, *supra* note 44, at 9, 11–14.

⁶⁹ OHIO LEGIS. SERV. COMM'N, *supra* note 6. Ohio projects an increase in state revenues of \$397,029, offset by only minimal expenses, from additional fees collected by local building departments. *Id.* The law also allows for reasonable fees to be collected under § 3781.10(G) and fees for extensions on plan approvals under § 3791.04(C). OHIO REV. CODE ANN. §§ 3781.10(G), 3791.04(C) (West Supp. 2005). Interestingly enough, despite the fact that a fiscal analysis was performed from the perspective of the government, no corresponding economic impact analysis was done from the perspective of the builder. Buehrer, *supra* note 6. This lack of economic analysis reinforces the point that the builder, particularly the small builder, is the forgotten party in the adoption process of H.B. 175.

⁷⁰ See Turner, *supra* note 7, at 21 (describing the homebuilding industry in California).

⁷¹ See *id.*

⁷² See *supra* text accompanying notes 26–30.

⁷³ See FIELD & RIVKIN, *supra* note 10, at 41.

⁷⁴ See *id.* Building codes generally do not appear to specify a minimum amount of work to be done before a specialty contractor is needed. See generally HUTCHINGS, *supra* note 56, at 411–25 (citing the electrical provisions of the SBC and discussing in detail the National Electric Code, which supplements the SBC).

that the builder can perform the work on his own. Of course, choosing this option forces the builder to comply with the licensing requirements for each specialty license he chooses to hold, resulting in more lost time and administrative fees.

One possible consequence of these effects is that the builder is likely to obtain fewer building projects. Because of the cost increases, consumers are likely to react in one of three ways. The first is that the consumer will simply be unwilling to pay the increased costs and will choose not to begin a building project. The second is that the consumer may scale down the project to the point that the builder cannot feasibly afford to take on the project. A third option is for the consumer to attempt the project himself, either complying with the building code on his own or simply ignoring the code completely. Of course, this last option goes completely against a major goal of the building codes, which is to provide safe housing.⁷⁵

A second consequence is that the builder may be forced to close down his business completely. Most builders work with a very limited amount of financial flexibility, so a single major increase in cost, or even a few minor increases, could force a builder to shut down.⁷⁶ Further, construction work is seasonal,⁷⁷ so a builder who is relying on the primary construction season to finance his business during more difficult times may be forced out of business if increased costs decimate the seasonal profits.

B. Effects on Consumers

While a fixed residential building code presents advantages to consumers, the code presents consequences as well. The first, discussed above, is that consumers will probably be forced to pay higher prices for a project. Currently, the average cost of housing in many areas exceeds \$270,000.⁷⁸ While not all of a home's cost can be attributed to the presence of residential building codes, certainly a measurable portion of the cost can be attributed to them.⁷⁹

⁷⁵ Kelly, *supra* note 8, at 349; *see also* FIELD & RIVKIN, *supra* note 10, at 3.

⁷⁶ Alain Lecusay, Comment, *The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change*, 15 ST. THOMAS L. REV. 425, 426 (2002).

⁷⁷ *See* FIELD & RIVKIN, *supra* note 10, at 48.

⁷⁸ John W. Schoen, *By Some Measures, Houses Are Still Cheap*, MSNBC.COM, July 13, 2005, <http://www.msnbc.msn.com/id/8544466>.

⁷⁹ *See* Kelly, *supra* note 8, at 349.

Early studies of home manufacturing have also indicated a 15% increase in cost due to code compliance.⁸⁰ In addition, a study performed by the Urban Land Institute in the early 1990s showed that taxation resulting from building code regulation may range from \$1,200 to \$10,000 per home.⁸¹ So, not only does government regulation through building codes affect initial housing costs, but that regulation also impacts future cost. All of these statistics point to one thing: code compliance raises costs for the consumer.

The consumer may suffer other consequences from the passage of a building code. Because of increased cost, consumers may have to forgo building or remodeling a home. If more small contractors are forced out of business, the consumer will have limited choices in selecting a contractor if the consumer does decide to undergo a building project. The possibility exists that consumers may bear a greater tax burden, as contractors who are forced out of business may require government assistance until they are able to find other lines of work.

C. *Effects on Suppliers*

Suppliers may also be impacted negatively by the institution of a state residential building code. If the likely increased costs force consumers to forego projects or cause contractors to close their businesses, then material suppliers will also suffer economically. Suppliers could face an entirely new problem as well: the potential for a negative impact on building innovation.⁸²

Building codes, particularly those that specify the types of materials to be used in a building project, can limit innovation by prohibiting specific construction technology.⁸³ Even the performance-based codes may have

⁸⁰ FIELD & RIVKIN, *supra* note 10, at 76–77. In the late 1960s, home manufacturers were asked to estimate the added cost for code compliance on a basic, factory-produced home valued at \$12,000. *Id.* at 76. They placed the additional cost at an estimated \$1,838, which is a 15% increase over the original value of the home. *Id.* at 76–77.

⁸¹ See Kelly, *supra* note 8, at 356–57 & n.14. Kelly spends a great deal of time in his article discussing how government regulations, such as building codes, cause an increase in housing costs. *See id.* at 355–60.

⁸² *See id.* at 359–60.

⁸³ See FIELD & RIVKIN, *supra* note 10, at 56. Field and Rivkin note that local building officials tend to “resist practices with which [they are] unfamiliar.” *Id.* The officials often have risen to their positions through the local construction economy, meaning that they are trained to use certain material and follow specific building techniques. *See id.*

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this effect because before new materials may be used in a building, they must undergo some form of approval process where the manufacturer or designer must show that the materials can meet those standards.⁸⁴ In addition, code provisions are often affected by special interest groups seeking to protect their niche in the building industry.⁸⁵

Two good examples of these limits on innovation are the battles involving the switch from conduit to flexible electrical cable and from cast iron pipe to plastic pipe.⁸⁶ Both conduit for electrical use and cast iron pipe for plumbing use require specialized tools and skilled labor for installation.⁸⁷ However, flexible electrical cable and plastic pipe may be

Field and Rivkin also describe the difficulty that home manufacturers have faced in adopting innovations in building technology, such as off-site preassembled electrical and plumbing packages, plastic pipe, and non-metallic sheathed cable. *See id.* at 80–81. They state, “Of the home manufacturer’s top five most important innovations, three were placed by building officials among the top five innovations most difficult to adopt.” *Id.* at 81.

⁸⁴ *See supra* note 65. Sections 3781.10(C), 3781.12(A)–(B), and 3781.13 of the Revised Code provide the Ohio process for approving new materials or construction methods. *See also* FIELD & RIVKIN, *supra* note 10, at 37–41 (explaining the process of setting standards in performance-based codes and the testing procedures involved in testing new materials or processes to determine whether they meet those standards). Standards are certified for inclusion in a model code by a standardization association such as the American National Standards Institute (ANSI) or the American Society for Testing Materials (ASTM). *Id.* at 38. The association submits a proposed standard to committees that represent the construction industry and public interests for consideration. *Id.* If the committees reach a consensus on the acceptability of a proposed standard, then that standard is accepted for certification and eventual inclusion in a model code. *Id.*

Of course, the standards are meaningless unless they are developed through proper research and testing procedures. *Id.* at 39. Various trade associations conduct a great deal of the research and testing. *Id.* at 38. However, most of the testing procedures are designated to testing agencies, like the Underwriters Laboratory, so that the agencies may develop credible procedures and certify the products that are tested. *Id.* at 39. At the time Field and Rivkin published *The Building Code Burden*, no national standard for performance criteria existed. *Id.* They noted that Congress had established a National Institute of Building Sciences (NIBS) and mandated it to develop and promulgate national performance criteria. *Id.* Field and Rivkin envisioned the NIBS as having the potential to develop uniform performance-based codes and testing procedures. *See id.* at 135–37.

⁸⁵ *See supra* note 70 and accompanying text (discussing the ABS approval process as an example).

⁸⁶ *See* Kelly, *supra* note 8, at 351.

⁸⁷ *Id.*

easily installed by a homeowner using reasonable care.⁸⁸ Certainly, labor groups were negatively affected by the switches with both materials, so it was reasonable to assume that those groups would fight to prevent the widespread use and acceptance of the newer products, as well as to exclude those products from model codes.⁸⁹ These switches are but two examples of how special interest groups attempt to control model code provisions in order to protect themselves in the industry.

IV. RECOMMENDATIONS FOR OHIO'S BUILDING CODE

While all the effects discussed above focus on the negative impact of building codes, they do not necessarily imply that building codes in and of themselves are a bad thing. Even those scholars who point out the flaws in the arrangement of current building codes do not advocate the complete abolition of these codes.⁹⁰ Ohio just passed H.B. 175 in 2005, thus putting into effect the process for adopting a statewide residential building code.⁹¹ Ohio legislators need to take the opportunity to amend this law and the underlying residential building code so that the law adequately protects the small builders—who will ultimately be most negatively affected—without losing sight of the homeowner's interests in safe housing. With all this in mind, this article proposes several recommendations to both the law and the future code that should protect the small builder.

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 367–68 (calling for flexibility in building codes and simpler performance standards). Kelly states at the beginning of his article that “[t]he basic purpose of codes is sound, but their operational effect must also be sound.” *Id.* at 349. He concludes by recommending that residential building codes need to be more flexible in order to produce innovation. *See id.* at 367–68. Field and Rivkin argue for sweeping reforms in the building code process. *See* FIELD & RIVKIN, *supra* note 10, at 131–38. Their proposed reforms exist on two levels. They charge the states with the responsibility of adopting statewide residential building codes and recommend that the states work to maintain uniformity in those building codes. *See id.* at 132–34. They also recommend that the federal government develop and enforce a national building code, establish a nationwide uniform product approval process, and coordinate and certify state building code programs to promote uniformity. *Id.* at 134.

⁹¹ FINAL STATUS REPORT OF LEGISLATION—125TH GA, *supra* note 41, at 5.

A. *Proposed Legislatively Built-In Protections*

1. *Mandatory Residential Building Code*

The majority of the protections this Article will suggest can be implemented legislatively. The first proposal is to make the residential code a mandatory one as opposed to the voluntary code for which the law currently provides. If the current format of the law is followed, there is the possibility that a county or township will simply not adopt the state residential code.⁹² If a jurisdiction did not adopt the state residential code, then that jurisdiction would be without a building code at all.⁹³ Section 307.37(B)(1)(a) states that “[n]o local residential building regulation shall differ from the state residential building code . . . unless the regulation or code addresses subject matter not addressed by the state residential building code.”⁹⁴ Builders in a jurisdiction with no residential building code would then be free to build however they want, without regard for anything other than their own financial welfare.

While this proposal could certainly protect small builders, it is only a short-term solution. Long-term problems may result in voluntary code setting. For example, a small builder, who may be an excellent builder normally, could possibly be wiped out by a single act of negligence if that act resulted in serious injury.⁹⁵ Also, a voluntary code system potentially eliminates the consumer protections that a building code purports to provide. Clearly, the state would wish to avoid such a situation. However, allowing the state residential building code to remain voluntary could result in this exact situation.⁹⁶

⁹² The permissive language used in the law leaves open the possibility that a local jurisdiction will choose not to adopt the state residential code.

⁹³ OHIO REV. CODE ANN. §§ 307.37(B)(1)(a), 505(A)(1) (West 2005 & Supp. 2005).

⁹⁴ Section 505.75(A)(1) contains nearly identical language. The language in each example indicates that local jurisdictions may no longer maintain their own codes, a practice that they are currently able to follow. Buehrer, *supra* note 6.

⁹⁵ Because of the limited financial flexibility of most builders, one major award for damages against a small builder could force that builder to liquidate his entire business in order to comply with the judgment.

⁹⁶ Rep. Buehrer indicated that the reason for the voluntary code system was primarily political. Buehrer, *supra* note 6. He stated that the Ohio Municipal League (the state association of villages and cities) was not fond of the bill, but would not object to its passage. *Id.* However, the League would apparently have been “violently opposed” to the bill if it promulgated a mandatory code. *Id.* Rep. Buehrer also noted that there were cost issues for mandatory enforcement of a building code, and that the code was voluntary in
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A second problem with the law's voluntary adoption process is that the process allows too much local regulation. In the proposed regulatory scheme, the state building code may be adopted by a particular county or by a specific township within that county.⁹⁷ One immediate possibility that may arise is that in a given county that does not adopt the code, more than one township may adopt the code.⁹⁸ Besides the creation of multiple enforcement agencies within a county, the possibility also exists that each township may amend the code differently, thus creating multiple building codes within a county that did not seek to adopt the uniform state code. This situation opens the door to mass confusion for builders who operate within that county, as they may be forced to build to different sets of standards for projects that are relatively close together.

A third concern is that the local regulation may contribute to problems with innovation. Charles G. Field and Steven R. Rivkin, in their book, *The Building Code Burden*, discuss the problems caused by local networks in the construction industry who seek to protect their interests either in the labor market or in the materials market.⁹⁹ One particular situation that they describe involved problems that arose from the close relationship between the local building inspector and the builders in that area.¹⁰⁰ Because the builders and inspectors were so familiar, the inspectors were more likely to block approval of a unique building technique or material that disfavored local builders.¹⁰¹

terms of enforcement only. *Id.* This appears to conflict with the language of the law, but even if the law is voluntary only in terms of enforcement, the results would still be substantially the same. Jurisdictions could still choose not to enforce the code, which would allow builders to build as if no code existed.

⁹⁷ See *supra* text accompanying note 56.

⁹⁸ OHIO REV. CODE ANN. § 505.75(A)(1) (West Supp. 2005). Section 505.75(A)(1) states that “[a] board of township trustees may adopt local residential building regulations governing residential buildings as defined in section 3781.06 of the Revised Code.” *Id.* Additionally, some townships within that county may not adopt the building code at all, meaning that at least three different sets of building standards could be present within a single county.

⁹⁹ See FIELD & RIVKIN, *supra* note 10, at 45–56 (describing problems facing local building inspectors as well as problems caused by those inspectors). See also *supra* note 70 and accompanying text.

¹⁰⁰ See FIELD & RIVKIN, *supra* note 10, at 51.

¹⁰¹ See *id.*

One last problem with too much local regulation is that the burden of enforcement is placed on governmental entities that are too small to compensate the enforcement officials adequately.¹⁰² Field and Rivkin also mentioned in their description of the building inspectors that the inspectors tend to be retired contractors too set in their ways to allow for innovation.¹⁰³ The position of inspector simply tends not to be prestigious enough to attract “bright, young professionals” into the field because of the limited salaries and limited budgets of local building departments.¹⁰⁴ Also, the limited funds of the local government prevent the opportunity for the inspectors to receive adequate training.¹⁰⁵

These problems will likely be eliminated by implementing a mandatory building code. No jurisdiction will be without a building code, so fewer problems with lack of consumer protection will exist. Enforcement will originate at the state level, and local departments will be more like state entities, which are backed by state resources. Officials will be better trained and better compensated, and might even be less influenced by local builders and suppliers. While the Ohio Municipal League is strongly opposed to a mandatory code, the Ohio General Assembly should make this change in the law despite the political pressure.¹⁰⁶

2. “General Contractor” License

A second legislative protection is to create some type of “general contractor” license or “home improvement” license that will allow small builders, who do not wish to subcontract more than one or two phases of a building project, to perform basic specialty construction tasks themselves. For example, consider the master bedroom suite problem from the introduction. The plumbing work in this type of project is minimal, amounting to basic steps such as installing a toilet or connecting a sink.

¹⁰² *Id.* at 47.

¹⁰³ *See id.* at 48–51. Statistics show that over one-half of all chief building inspectors are over fifty years old. *Id.* at 49. Further evidence indicates that over 40% of chief building inspectors are former general contractors. *Id.* at 50.

¹⁰⁴ *Id.* at 49.

¹⁰⁵ *Id.* at 47.

¹⁰⁶ It is likely that the League fears that a mandatory code will cause them to lose a great deal of political power, a fear that most local jurisdictions have with respect to statewide building codes. *See id.* at 106–07 (discussing the fight in Massachusetts over the content of the statewide building code).

Connecting the new plumbing to the old system is probably the most difficult task.

However, none of these steps requires more than a very basic knowledge of plumbing, making the requirement for a specialty contractor an unnecessary expense. Allowing the contractor to hold this “general contractor” license will give him the ability to perform these plumbing tasks rather than subcontracting out to the licensed plumber. This measure will cut costs, benefiting both the contractor and the consumer. Further, the contractor will know the scope of the tasks that he could perform under the license and will be more likely to bring in a licensed plumber if he found himself in a situation beyond his granted authority. The same will be true for other specialty fields such as electrical work and drywalling.

3. Approval of Plans not Sealed by an Architect

A third protective measure is to allow for plans to be approved for residential construction that are not necessarily prepared individually by an architect or engineer. Currently, the Ohio Revised Code as amended by H.B. 175 allows for this protection.¹⁰⁷ Of course, great potential for abuse is possible if the provision were read to allow someone to construct a residential building based on a rough sketch on a piece of notebook paper, but the requirement that a residential building plan meet with code specifications should eliminate that pitfall.¹⁰⁸ Because the code specifications theoretically provide for safe construction, any plan that can meet with the requirements of the code should therefore be safe for habitation. This provision also allows the builder to cut the cost of hiring

¹⁰⁷ Compare OHIO REV. CODE ANN. § 3791.04 (West Supp. 2001) and OHIO REV. CODE ANN. §§ 4703.18, 4733.18 (West Supp. 2000), with OHIO REV. CODE ANN. §§ 3791.04, 4703.18, 4733.18 (West Supp. 2005). Section 3791.04(A)(2)(b) says, “No seal is required for any plans, drawings, specifications, or data submitted for approval for any residential buildings as defined in section 3781.06 of the Revised Code”

¹⁰⁸ See OHIO REV. CODE ANN. §§ 307.40, 505.77 (West 2005 & Supp. 2005). Sections 307.40(A)(1)–(2) and 505.77(A)(1)–(2) use nearly identical language to prevent a person from building a residential building in a county or township that has adopted the state residential code “unless that person fully complies with the state residential building code.” The acceptable plans contemplated by this suggestion would be the plans that one might find in a building supply store, where sample plans are available in building packages. Those packages include a more detailed set of building plans that have been prepared by an architect or engineer.

an architect or engineer to design a plan from his estimate, thus saving the consumer on that project.

4. *Disciplinary Measures*

The final legislative protection that this Article suggests is to provide for appropriate disciplinary action for violations of the building code. This appears to be one area in which the law has covered most of the appropriate grounds. Consumer remedies for violations of the building code are found primarily in §§ 307.40 and 505.77 of the Revised Code. These sections first appear to reaffirm the availability of previous remedies given by law.¹⁰⁹ The sections next provide flexible language for equitable relief for violations of the building code.¹¹⁰

In addition to the above remedies, the law also designates, for certain violations of the bill, penalties of fines and classifies these violations as misdemeanors.¹¹¹ The board of building standards may also suspend or revoke the license of a contractor who has committed certain violations of

¹⁰⁹ *Id.* Sections 307.40(B) and 505.77(A)(4) both begin, “In addition to any remedies provided by law,” which seems to indicate that all previous remedies at law are intended to be available within the framework of the law. In the face of new legislation creating statutory causes of action, Ohio courts have shown at least one situation in which they would still accept previous common-law remedies in addition to those newly created by statute. *See Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795, 800 (Ohio 1997) (holding that the Ohio Products Liability Act did not abrogate the common-law action for negligent design). The Ohio Supreme Court stated, “[T]he General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent.” *Id.* at 798. The Court went on to say, “Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force.” *Id.*

¹¹⁰ §§ 307.40, 505.77. Sections 307.40(B) and 505.77(A)(4) list people who can bring an action for violations of the building code and then describe the types of equitable relief available to those people. Equitable relief includes “a suit for injunction, abatement, or *other appropriate action.*” *Id.* (emphasis added). Also, people who could bring suit include the board of building standards, the local building department, or “any owner of an adjacent, contiguous, or neighboring property who would be especially damaged by [the] violation.” *Id.* The language in both of these quoted segments indicates the flexibility that the law provides for dealing with code violations.

¹¹¹ *See supra* note 63 and accompanying text.

the building code and may refuse to issue or renew a license for the same grounds.¹¹²

One additional disciplinary remedy of a sort is the “Notice to owner of contractor’s right to cure defects” provision, which is a major addition to the law.¹¹³ While a detailed discussion of this provision is beyond the scope of this article, the provision is still worth mentioning. This provision is designed to allow a contractor the opportunity to correct any defects in a construction project without facing litigation, while preserving the consumer’s right to bring a claim for construction defects.¹¹⁴ The goal of the provision is to encourage settlement of residential construction claims involving defects.¹¹⁵

B. Proposed Exceptions for “Do-It-Yourself” Consumers

In addition to the legislative protections for contractors that should be built into the code, an exception of some type for the “do-it-yourself” consumer must be created. This exception will allow such a consumer to perform residential construction without extensive procedural requirements. Obviously, this is not a protection for small builders, as they would lose out on any work performed directly by the consumer. This exception is designed instead to provide some protection for consumers’ interests.

First, consumers can expand their choice of builders for a construction project by simply considering doing the work on their own. Second, such an exception will likely cause builders to keep their prices lower to continue to obtain business. The exception also allows for suppliers to continue marketing their products by emphasizing the ability of the consumer to install the product easily on his own. Innovation can also flourish as a result because material producers would have incentive to create building products that could be more easily integrated into a construction project, thus encouraging the consumer to do the project himself.

¹¹² OHIO LEGIS. SERV. COMM’N, *supra* note 44, at 9. The list includes convictions for misdemeanors involving moral turpitude or any felony, violations of rules for contractor licensing, or any fraud, misrepresentation, or deception against the board or in business. *Id.*

¹¹³ OHIO REV. CODE ANN. § 1312.03 (West 2005).

¹¹⁴ OHIO LEGIS. SERV. COMM’N, *supra* note 44, at 11–14.

¹¹⁵ Buehrer, *supra* note 4.

Of course, the consumer should still be required to obtain plan approval to ensure that the project would be safe for habitation.¹¹⁶ Strict limitations on this exception also must exist so that the consumer will not attempt to perform specialty tasks that include an increased risk of injury or degree of difficulty.¹¹⁷ In addition, the consumer should be required to disclose to a subsequent owner any work done by that consumer or to assume full liability for either assembly of the materials or for substantial change to materials used in a particular project to further protect suppliers and producers.¹¹⁸

C. *Flexible Material Choices*

A third method of protecting both builders and consumers is for the law to continue to promote the use of a performance-based code. Such a code logically offers the best chance for innovation by simply setting forth the standards that materials must meet in each phase of the construction rather than specifying exactly what and where materials may be used. Equivalency provisions leave open the possibility that a new product can quickly be implemented into the construction industry simply by showing that the product meets the performance standards.¹¹⁹ Innovation on the part of building materials manufacturers should be encouraged by such a code, which would benefit both builders and consumers. Small builders will be able to offer a finished product of higher quality featuring the latest in building technology, while consumers will benefit from better value for the project and possibly higher property values at the same level of safety.

Not all commentators feel that performance-based codes promote innovation, however. Eric Damian Kelly argues that the equivalency

¹¹⁶ See *supra* note 108 and accompanying text.

¹¹⁷ For example, a task such as connecting a breaker box to the electric meter would not be a task that the typical consumer would be able to complete safely and competently.

¹¹⁸ Currently, a seller of real estate is required to “disclose material matters relating to the physical condition of the property to be transferred, including . . . the condition of the structure of the property, including the roof, foundation, walls, and floors; . . . and any material defects in the property that are within the actual knowledge of the transferor.” § 5302.30(D). The question then becomes whether the work of a do-it-yourself consumer qualifies as a material matter (or even a material defect) requiring disclosure.

¹¹⁹ See *supra* note 84 (listing the bill provisions that detail Ohio’s approval process). Ohio’s process for amending the building code to allow for the use of new materials appears to be relatively short, potentially making it easier for new building products to reach Ohio markets for use in construction projects. See *supra* note 77.

standards in the performance-based codes actually stifle innovation.¹²⁰ Kelly claims that the burden of proof in seeking a substitution in a performance-based code lies with the builder, who is likely to be overwhelmed by the highly technical aspects of the code.¹²¹ However, in reality, the burden should rest on the manufacturer who has developed the new product rather than on the builder, who simply wants to integrate the product into his work.¹²² The manufacturer should have more of an interest in seeing that a new product meets performance standards, because without approval, the product will not reach that state's markets and will fail to produce any profits for its manufacturer.

Further analysis of new building materials in use contradicts Kelly's position. Jonathan Hutchings points out that 75% of the materials used in construction today have been invented in the last fifty years.¹²³ Of that 75%, 80% have been invented in the last ten years.¹²⁴ In fact, Hutchings states, "It is estimated that, of all the things we will be building with by the year 2025, 90% have not even been invented yet."¹²⁵ Clearly, innovation has not been stifled by the use of performance-based codes, at least not to the extent that Kelly argues.

One technique that Ohio could use to expedite the approval process for new construction materials is to provide for the equivalency standards to be met by way of the testing procedures of national testing agencies.¹²⁶ This will streamline the approval process even more in Ohio, thus providing more incentive for manufacturers to develop new building products.¹²⁷ The biggest obstacle then will be to convince builders to use the new products. For smaller builders seeking an edge over their larger

¹²⁰ Kelly, *supra* note 8, at 361–63.

¹²¹ *Id.* at 361.

¹²² See FIELD & RIVKIN, *supra* note 10, at 40–41.

¹²³ See HUTCHINGS, *supra* note 56, at xiv.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See FIELD & RIVKIN, *supra* note 10, at 120–24, 132, 137 (arguing for a federal product certification process). Field and Rivkin believe that the approval procedures for new building technology should be turned over to the federal government to help simplify and standardize the approval process, thus making it more feasible for innovators to develop and market new products. See *id.* at 120–24.

¹²⁷ See *id.* at 120–24.

competition, the opportunity to incorporate new materials into their building projects will likely be seen as a welcome one.¹²⁸

D. Reevaluation Procedures for the Building Code

Regardless of whether all the previous recommendations offered are implemented within the residential building code, if the code is allowed to remain unchanged for a significant period of time, eventually it will become too outdated to be of any benefit.¹²⁹ To keep Ohio's residential code as current as possible without overwhelming the state agencies responsible for adoption and revision, a full evaluation should be performed on the code every three years. This evaluation period is a commonly used time frame in building code provisions.¹³⁰ If the evaluation period were longer, then the problems of stagnation in the code, and consequently in both the building techniques and the building materials used in the construction industry, would begin to develop.¹³¹ If the period were shortened, then the board of building standards would be forced to review the code constantly, limiting its ability to carry out its other responsibilities adequately. In addition, builders and enforcement officials alike would be faced with uncertainty every year as to what the code provisions would contain and how they would be interpreted. The three-year period seems to best balance these two competing problems.

V. IMPLICATIONS OF THESE RECOMMENDATIONS

The perfect building code is impossible to create. Parties seeking to protect their own interests in the construction industry will oppose building codes as a whole or at least some details within a particular proposed code.¹³² The competing interests of these different parties inevitably force compromises in whatever building code is adopted, thus defeating, or at least diluting, the effectiveness of the code once it is in place.¹³³

¹²⁸ See *id.* at 80–81 (describing the difficulty in accepting certain innovations in building products, such as ABS and PVC pipe or non-metallic sheathed cable).

¹²⁹ See *id.* at 45 (discussing the lag time between updates in model codes and corresponding adoption of those updates in jurisdictions using those codes).

¹³⁰ See Turner, *supra* note 7, at 37.

¹³¹ See FIELD & RIVKIN, *supra* note 10, at 45.

¹³² See, e.g., Buehrer, *supra* note 6 (discussing the generally negative attitude of the Ohio Municipal League toward H.B. 175).

¹³³ See FIELD & RIVKIN, *supra* note 10, at 106–07 (identifying the battle for statewide building code reform in Massachusetts). Field identified two major concessions that had to
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Regardless of how any building code is written, some parties will be dissatisfied. The objective is not to create the perfect building code for Ohio, but to create a building code that will at least address the concerns of the small builders while still protecting the public interest in safe, sanitary housing.

Difficulties exist in the implementation of performance-based codes generally. One of Kelly's arguments against performance-based codes that does have some merit is that equivalency provisions do not address design innovations as well as they address the individual materials.¹³⁴ Thus, while a performance-based code may allow for innovation in terms of the building products used, the code may not so easily allow for innovation in terms of building techniques. Also, innovative building techniques are more readily developed by builders, which then reinforces Kelly's other argument discussed earlier as to the difficulties that a builder would face in seeking a building code amendment.¹³⁵

The question then becomes how to create an equivalency provision that addresses a new design or building method to stimulate innovation in those areas of construction. For any builder, the ability to complete a project in a satisfactory manner while speeding up the process is a great benefit because that ability allows him to complete more projects and therefore generate more profit. For the consumer, the opportunity to see the desired project completed and ready for use in a shorter time without compromising its safety is of great importance. Therefore, an equivalency provision that also satisfactorily addresses techniques would be one of great benefit to a building code, if it can be properly devised.

Another problem with performance standards, even in national codes, is that the standards are often designed by those who are involved in the major industry groups.¹³⁶ These groups obviously design the standards in such a way as to protect their own interests in the construction industry.¹³⁷ For example, a particular trade union might draft standards in such a way

be made to the bill that would reform the building code before it would be passed. *Id.* at 107. Despite the concessions, the bill required three legislative sessions to pass. *Id.*

¹³⁴ Kelly, *supra* note 8, at 362.

¹³⁵ See *supra* notes 120–21 and accompanying text.

¹³⁶ See FIELD & RIVKIN, *supra* note 10, at 41, 61–64, 79 (focusing on local building codes); see Turner, *supra* note 7, at 30–36 (describing the housing industry's involvement in promulgating model codes), 40–44 (discussing the competition between the ICBO and the IAMPO regarding California's adoption of a model mechanical code).

¹³⁷ See FIELD & RIVKIN, *supra* note 10, at 41.

that the work that needs to be done to meet those standards can only be performed by a contractor licensed in that field, which happens to be the field encompassed by that union.¹³⁸ The consumer, unfortunately, is typically forgotten in these power struggles. This problem presents the question of whether the performance standards are actually able to provide for the safety of the consumer, which further calls into question any equivalency provision that is applied.

Again, these issues with performance-based codes reiterate the impossibility of creating the perfect building code. I believe, though, that these problems can and will be overcome for the most part by the recommendations that this Article has proposed. Initially, as with most extensive new legislation, some confusion will likely be present in the building industry as contractors attempt to comply with new licensing and building requirements. Additional confusion will also potentially be present in the governmental structure in terms of confirming who is responsible for enforcement or what regulations are in place. However, because the recommendations call for a mandatory code, these areas of confusion will be lessened and cleared up quickly because the code will be uniform throughout the state and only one enforcement body will be present in each county.¹³⁹

A mandatory code also reduces, and perhaps eliminates, the problems inherent in excessive local regulation by underfunded, understaffed local building departments.¹⁴⁰ A mandatory code will eliminate the need for individual townships to adopt the code because the encompassing county will be required to adopt the code.¹⁴¹ Fewer jurisdictions adopting the code will mean fewer local building departments, and those departments that do exist will essentially be state, rather than local, entities. Those departments

¹³⁸ *See id.*

¹³⁹ *See supra* text accompanying notes 92–105 (identifying problems with a voluntary code).

¹⁴⁰ *See supra* notes 97–105 and accompanying text (describing the problems with too much local regulation).

¹⁴¹ The only reason that an individual township may still need to adopt the building code itself is if unique building conditions existed in that township only, forcing the township to require special amendments to the code. However, this situation is likely to exist only under extremely limited circumstances. Most of the time, if unique building conditions exist in a township, then those conditions most likely exist for the entire county.

will have access to state resources, meaning that the departments will have better funding to hire and train enforcement officials.¹⁴²

Small builders who are the most capable will likely apply for the general contractor license in large numbers, so that they can minimize any cost increases caused by the code.¹⁴³ These builders will be able to at least maintain their current volume of business, particularly if they specialize in remodeling work, and may even be able to increase their business as those builders who cannot qualify for a license are forced to seek out another line of work. These nonqualifying builders may even seek employment with a licensed contractor, allowing that contractor to expand his business even further.

Streamlining the plan approval process will provide a two-fold benefit. First, builders can reduce the prices of small projects by eliminating the cost of plan preparation and certification by an architect or engineer. Profit margins may then increase for those builders, and costs of the projects can decrease for the consumers. In addition, a small builder who takes on a single large project, such as building a new custom home, may also be able to avoid architect's fees, depending on where he (or the consumer who has hired him) has obtained his plans.¹⁴⁴ In these situations, the consumer is still protected by the building code because the plans must still comply with the code regardless of where those plans originated.¹⁴⁵

Second, the "do-it-yourself" consumer will benefit from this protection. Such a consumer can acquire plans through the local hardware store in order to complete his own projects without the added cost and time delay of seeking architectural certification.¹⁴⁶ The ability of this consumer

¹⁴² See FIELD & RIVKIN, *supra* note 10, at 47–49 (describing the disincentives for the position of building inspector), 133 (recommending improvements in training and benefits for building officials in order to improve code enforcement).

¹⁴³ Another benefit to the state government is that these license applications will generate additional revenue.

¹⁴⁴ See *supra* note 108 (describing the type of plan contemplated by this legislative protection).

¹⁴⁵ See OHIO REV. CODE ANN. §§ 307.40, 505.77 (West 2005 & Supp. 2005) (preventing the building of a residential building in a jurisdiction that has adopted the state residential building code unless the builder fully complies with the code).

¹⁴⁶ Plans of this type normally serve as basic samples so that the consumer will have a general idea of the layout of the building project. If the consumer chooses to use one of these sample plans, the hardware store can then acquire the actual plans needed by the
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to obtain acceptable plans and perform the necessary building tasks himself significantly reduces his cost on the construction project. This savings creates incentive for the consumer to attempt his own projects while at the same time causing the professional builder to moderate the charges for his services so that the builder does not drive himself out of business due to high prices.

The exception for "do-it-yourself" consumers benefits the materials industry as well. Members of that industry can produce a wide range of new materials that focus on ease of use and installation, thereby appealing to the consumer. Innovation is stimulated throughout the industry, as the producers of building materials seek to develop and advertise products to supply this niche of the market. In addition, some builders may also seek to incorporate such materials into their own projects to speed up the building process and therefore generate more income.

A performance-based code will encourage the materials industry to develop new products that meet with acceptable standards while reducing the costs to builders. Builders will be encouraged to expand their business as a result, providing an even larger market for new materials. Consumers will benefit from the immediate savings on their construction projects, and those projects will further increase the equity in their homes because the project will still create the same increase in value of the home while the cost of the project is reduced.

CONCLUSION

Ohio needs a statewide residential building code. More and more states are moving toward adopting such building codes, and Ohio should not allow itself to be left behind in this attempt to better ensure that its residents have safe, affordable housing available to them. However, Ohio should not adopt a building code that, while meeting the objective of providing safe, affordable housing to all, fails to protect the interests of the members of the homebuilding industry, particularly the small, independent builder. This article demonstrates that to do so may result in dire consequences for every aspect of the construction industry, from the builder to the supplier to the ultimate consumer, the homeowner. While H.B. 175 did an admirable job of attempting to fulfill the goals that it set out for itself, it still leaves much room for improvement in order to meet the needs and interests of the entire construction industry.

consumer to accurately complete the project. These plans are designed by an architect or engineer; regardless, the plans must still comply with the state building code.

Passage of H.B. 175 shows some promise toward protecting the interests of all aspects of the construction industry. The code that H.B. 175 mandates is a performance-based code, which should stimulate innovation in the development of building materials and construction processes. Passage of H.B. 175 provides for appropriate disciplinary measures for those individuals who fail to comply with the state residential building code. In addition, the law also provides limited exceptions that allow residential building plans to be approved under the building code even though those plans are not given a seal of approval by an architect or engineer. Each of these aspects of the law provides the small builder with some protection under the code while still providing safe, affordable housing.

Unfortunately, these protections are not enough to adequately safeguard the interests of the small builder or the other aspects of the construction industry. The greatest failure of the law and the residential building code it will promulgate is that adoption by a locality is voluntary. The possibility for numerous problems—such as irregular building standards from one jurisdiction to the next, limitations on innovation, and an overwhelming burden of enforcement on local government entities—are present in a voluntary code scheme. By simply making the state residential building code mandatory for all jurisdictions, a vast array of problems can be alleviated or even eliminated.

In addition, other alterations can be made to the law that will allow it to better protect small builders (and the construction industry as a whole), and at the same time provide consumers the safe, affordable housing they deserve. The creation of the “general contractor” license allows the smaller builder to tackle basic projects without fear of pricing himself out of work. An exception for the “do-it-yourself” consumer that bypasses certain procedural requirements provides the homeowner with additional options, forcing builders to provide quality services at affordable prices and eliminating from the industry those “builders” who decide one day to leave their jobs and start their own businesses despite having limited skills or business ability. Finally, expedition of the approval process, particularly through use of national agencies and their testing results, opens the construction market to innovative products and processes more quickly, providing the small builder with incentives to incorporate such products into his business to gain an advantage over his competition.

If building codes are not developed in a way to protect the small builders that make up a majority of the industry, then eventually the building industry will be controlled by a very few large companies, reducing the choices that consumers have regarding their building projects

as well as limiting the quality and innovation involved in those projects. By implementing the recommendations in this article, the state residential building code will better balance the interests of the small builder with the safety and health of the consumer.

