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Legislative Committee on Administrative Rules
Vermont State House
Montpelier, VT 05633-5301

Re: Response to Correspondence Received by LCAR

Dear Committee Members,

Thank you for the opportunity to provide the Department of Public Service's ("Department") response to a letter from the Vermont Builders and Remodelers Association and the American Institute of Architects Vermont, dated June 6, 2024 (the "VBRA/AIA Letter"). The Department appreciates the Committee's consideration and hopes this response will be helpful.

The VBRA/AIA Letter raises concerns regarding the Vermont Residential Building Energy Standards ("RBES") and asks that LCAR take action to bar or otherwise prevent the latest version, referred to as the "2024 RBES," from taking effect. The Department recognizes that the RBES requirements have a direct impact on the work carried out by builders and architects across Vermont every day. Each revision to the RBES rule carries with it new responsibilities for these professionals, and each revision has the potential to affect their livelihood. Builders and architects have expressed a wide range of concerns, some of which relate to the RBES rule itself, and some of which are tied to broader, more systemic challenges beyond the scope of the rule. These broader issues have been recognized by the Legislature, leading to statutory amendments and the establishment of working groups – including the Building Energy Code Working Group established under Act 151 of 2024.

Whether directly relevant to the 2024 RBES rule or not, the Department has heard the concerns put forward and understands that builders and architects must navigate a difficult environment. For purposes of this response, the Department is focused on the specific context at hand: the 2024 RBES rule, its requirements, and its impacts. The VBRA/AIA Letter makes four specific statements, and the Department will address each in turn. As a preliminary matter, however, it is important to clarify the current status of the 2024 RBES rule and the history behind it. As explained below, the 2024 RBES rule was formally adopted in 2023, and therefore the Department is not able to modify the effective date without initiating the rulemaking process.

In accordance with 30 V.S.A. § 51(c), the Department amends and updates the RBES through administrative rules. Historically, the Department has updated the RBES on a three-year cycle, in step with relevant updates to the International



Energy Conservation Code. The 2024 RBES is an administrative rule containing amendments to the prior version of the RBES, and was adopted by the Department on June 21, 2023, with an effective date of July 1, 2024. The formal rulemaking process began in September of 2022 when the Department filed its proposed rule with the Interagency Committee on Administrative Rules (ICAR). The proposed rule was filed with the Secretary of State in October of 2022, and the final proposed rule was filed with the Secretary of State and LCAR in April of 2023. LCAR considered the rule at two meetings, in May and June of 2023, where the Committee heard from stakeholders and Department staff. Throughout the process, the rule was referred to as the “2023 RBES.” As the Department explained in correspondence with LCAR at the time, the planned effective date had been December 31, 2023.

After considering stakeholder feedback and discussing with LCAR at its meeting on June 8, 2023, the Department changed the proposed effective date of the rule to July 1, 2024. With that modification, LCAR approved the rule. Enclosed with this response is the approval memo from LCAR, dated June 8, 2023. The Department then completed the rulemaking process, filing the adopted rule with the Secretary of State and LCAR on June 21, 2023. The rule has since been referred to as the 2024 RBES, because of the effective date: July 1, 2024.

The history above is significant because the Department perceives a misunderstanding in the VBRA/AIA Letter as to the current status of the 2024 RBES rule. The first paragraph of the Letter suggests that the rule was not finalized but instead was delayed. While it is true that the effective date was changed after consultation with LCAR, and the practical result of this was a “delay” in the effect of the rule, the rulemaking process continued after LCAR’s approval and the rule itself was formally adopted.

After reviewing the relevant provisions of the Vermont Administrative Procedure Act (“APA”), found at Title 3, Chapter 25, the Department has concluded that the 2024 RBES rule is duly adopted and has “the force of law unless amended or revised.” *See* 3 V.S.A. § 845 (Effect of rules). The rule has not been modified since its adoption, and given that the rule is already in place, the Department would need to initiate a new rulemaking process to implement any changes *See* 3 V.S.A. §§ 817–848 (APA); Secretary of State’s Rule on Rulemaking, CVR 04-000-001 at Sections 1–2 (stating that “[f]or the purpose of the Rule on Rulemaking, the filing of any new rule, amendment, or repeal of an existing rule shall be described as a rule,” and “[t]he APA requires agencies to make filings of every new, amended, or repealed rule at least four times during the rule making process”). In the absence of a new rulemaking to amend the rule, the Department has not identified any authority or mechanism which would enable the Department or LCAR to modify the existing effective date of July 1, 2024.

Representatives from the VBRA and AIA Vermont participated throughout the rulemaking process in 2022-2023 and voiced their concerns to the Department and LCAR. The Department took these concerns into consideration and made significant responsive changes to certain aspects of the final proposed rule. The Department described the changes in correspondence with LCAR in 2023, before the rule was adopted. The Department



will also highlight those changes here, where relevant. With the understanding that the 2024 RBES is a final, adopted rule under the APA, the Department now turns to the four issues raised in the VBRA/AIA Letter.

1. The 2024 RBES is inconsistent with State energy and housing policy because without administration and education, a growing number of newly constructed homes are failing. It was not the intention of State policy to create buildings that theoretically meet energy goals but in reality deteriorate, causing financial and physical hardship to occupants and owners.

This statement suggests that the 2024 RBES is not accompanied by appropriate administrative support or education, and appears to draw a causal link between the 2024 RBES and an increasing number of failures in newly constructed homes. While these concerns should be taken seriously, the Department asks that the Committee consider the scope of the rule and the context surrounding it. The 2024 RBES rule consists of a set of requirements which establish a minimum standard for energy efficiency in residential new construction and renovation. The rule regulates the design and construction of residential buildings to require adequate thermal insulation, low air leakage, and effective and efficient mechanical, electrical, ventilation, service water-heating, and illumination systems. Simply put: the administrative and educational support that the authors refer to is outside the scope of the rule itself.

Recognizing that the authors are raising a broader concern, it may be helpful to describe the administrative and educational support that the Department provides and will continue to provide in connection with the 2024 RBES. The Department, in conjunction with the Energy Efficiency Utilities, has consistently provided trainings and new construction incentive programs to give builders access to the information they need to build safe, durable structures that comply with the RBES. These trainings are free to attend, and recordings are provided for builders to view online if they cannot attend the trainings. The next training for the 2024 RBES will be hosted by Efficiency Vermont, on June 28, 2024. More information, including how to attend, is available on the Department's website (<https://publicservice.vermont.gov/efficiency/building-energy-standards/residential-building-energy-standards>), Efficiency Vermont's website (<https://www.encyvermont.com/events/2024/06/28/vermont-residential-building-energy-standards-rbes-training-series>), and AIA Vermont's website (<https://www.aiavt.org/news-events/event-details/post/vermont-residential-building-energy-standards-rbe-20240412-150403>).

When LCAR reviewed the final proposed rule in 2023, the Committee heard testimony describing a lack of available training and technical assistance. The Department explained that both the Department and Efficiency Vermont conduct trainings following the adoption of the new rule. Additionally, the Department has designated \$875,000 of SEP IJA funding for builder/contractor training, including BPI certification. Beyond specific trainings, the Department is available as a resource and regularly assists with questions about the RBES, interpretation of the standards, and other technical considerations. The Energy Code Assistance Center,



housed at Efficiency Vermont, also answers questions and provides basic technical assistance.

As to building failures: the authors imply that the 2024 RBES rule has contributed to a growing problem, yet the requirements of the rule are not currently in effect. More importantly, the rule is not a building code, nor does it prescribe specific methods of construction. During LCAR's review of the final proposed rule, the Committee heard concerns about the potential for negative consequences from poorly constructed wall assemblies, with some suggesting that these problematic assemblies were required by the 2024 RBES. As the Department explained at the time, the 2024 RBES rule does not require any particular wall assembly and does not require specific materials to be used in an assembly. Instead, there is a requirement for certain R-values which can be met in a variety of ways. It is important to note that any wall assembly, regardless of whether it meets the 2024 RBES requirements, can be built incorrectly resulting in negative consequences.

In other words, homes are subject to failure if they are not designed and constructed using proper materials and techniques based in sound building science – regardless of whether they are compliant with the 2024 RBES. With that said, the Department heard these concerns during the rulemaking process and made changes to the final proposed rule, including reduced wall insulation requirements. The Department also committed to adding a chapter to the RBES Handbook that addresses the primary causes of moisture damage and building failures and demonstrates ways that builders can comply with the code while building durable, high-performance buildings.

2. Building energy codes, as depicted in the RBES as well as its handbook, must be cohesive and technically sound to preserve Vermonters' health, safety, and welfare. The 2024 RBES update went through a rigorous process with its Energy Code Advisory Group plus public hearing at LCAR. Both the RBES and the handbook have been further developed with little or no input from experts and the public. The changes we are aware of could harm Vermonters.

The Department agrees with the authors that the 2024 RBES rule is the result of a rigorous process. As previously described during LCAR's review, the rule is the final product of an extensive and iterative process which began long before the rule was proposed. After initial preparation work, the Department undertook broad-based public engagement efforts to develop the rule. Between April and May of 2022, the Department hosted two public meetings to present proposed language and gather input for modifications to the draft. These meetings included builders, architects, multi-family housing developers, low-income housing advocates, electric and gas utilities, energy efficiency utilities, staff from other state agencies, modular home manufacturers, and log home industry representatives.

The Department also convened an RBES Advisory Committee to delve deeper into the technical aspects of the energy standards. The full Advisory Committee met in March and June of 2022. The Department then modified the draft 2024 RBES to



incorporate changes recommended by stakeholders and the Advisory Committee. Before filing a proposed rule, the Department encouraged public meeting participants, Advisory Committee members, and other stakeholders to comment on the latest draft. The Department accepted comments for over a month before presenting a proposed rule to ICAR in September of 2022, as the first step in the formal rulemaking process.

During rulemaking, the Department continued to scrutinize its proposal for the 2024 RBES and make modifications as it evaluated public comments and feedback. Perhaps most significantly, the Department recognized certain concerns raised by members of the VBRA and others, related to the cost of meeting the new requirements and the stringency of the requirements themselves. The final proposal presented to LCAR in 2023 included changes which, among other things (1) reduced the estimated additional upfront cost (over the prior RBES rule), from \$12,081 to \$1,018 (2) rolled back proposed requirements for wall insulation and window values, leaving the prior standards in place, and (3) recognized the importance of building science principles in all design and construction.¹

The authors appear to suggest that the 2024 RBES rule has changed since the final proposed rule was approved by LCAR on June 8, 2023. This is not accurate. The rule was adopted with no further changes to the requirements. As noted above, the rule does not prescribe specific methods of construction, but rather sets certain values (R-values, for example) which can be met in a variety of ways. With respect to the RBES Handbook: this supporting resource is not part of the rule. The Handbook provides examples of how the required values can be met, for instance: examples of RBES-compliant wall assemblies which can be achieved using cavity only insulation when paired with other steps. The Department has been developing the Handbook to accompany the rule, incorporating the extensive feedback received from both the RBES Advisory Committee and the public. As discussed above, the Department is adding a chapter to the Handbook addressing building science and moisture management.

3. The 2024 RBES is not cost-effective or affordable.

The enabling statute for the RBES, 30 V.S.A. § 51, requires that any updates to the rule are cost-effective and affordable from the consumer's perspective. The Department undertook a comprehensive economic analysis during the rule's development and provided its analysis as part of the rulemaking process, demonstrating that the 2024 RBES will result in a home with lower monthly costs to the homeowner, even in a high mortgage interest rate and high materials-cost environment. In addition, as noted above, the Department made changes to the final proposed rule

¹ Specific changes included (1) window U-factor requirements reverting from 0.27 back to the former value of 0.30 (see Chapter 4, Table R402.1.2.1); (2) wall U-factor requirements reverting from the value of 0.033 back to the former value of 0.044 (see Chapter 4, Table R402.1.2.1); and (3) removing "solar ready" from the base requirements.



which reduced the estimated upfront cost of compliance (over the prior RBES rule) from \$12,081 to \$1,018. While the authors of the VBRA/AIA Letter may not agree, the Department is confident in its economic analysis and continues to find that the 2024 RBES rule is cost-effective and affordable from the consumer's perspective.

4. The Department of Public Service is not required to notify builders and architects about the code change, nor to describe new code details in a timely way, nor even to provide sufficient information to incorporate the code into our upcoming projects (both technically and financially). However, builders and architects are held accountable for 2024 RBES compliance. Specifically, any project that starts construction after July 1, 2024, must comply with 2024 RBES, yet as of 6/6/24, only a redline version of 2024 RBES is available on the PSD website, no paper copies of the code or the handbook are available, and no online version is posted on International Code Council's digital code website. We note that most buildings breaking ground soon were designed – and contracts with pricing were signed- long ago.

As described above, the 2024 RBES rule was adopted in June of 2023, after significant public engagement and a full rulemaking process. Builders and architects participated in every phase of the rule's development, from the initial drafts through the final proposed rule. Builders and architects provided extensive feedback to the Department and LCAR as to the requirements and impacts of the final proposed rule. The full 2024 RBES rule text is available on the Department's website and has been available since the rule was adopted. The 2024 RBES Handbook is in development and will be available electronically by July 1, with hard copies available shortly thereafter.

The authors' references to the "code," the "digital code website," and the International Code Council ("ICC") require some additional context. The RBES is often referred to as a "code," because practically speaking it is an energy code. Nomenclature aside, the RBES requirements have always been established by means of administrative rules as required by statute. As specified under 30 V.S.A. § 51(c), the RBES rules have always been closely related to the International Energy Conservation Code published by the ICC. Historically, each time the RBES is amended via administrative rulemaking, the Department coordinates with the ICC to publish the RBES requirements, inclusive of the new amendments, in a "code" format which is more user-friendly for those needing to reference specific provisions. This publication from the ICC has been available in print as a codebook and on the ICC code website in electronic form. For the 2024 RBES, the Department is continuing to work with the ICC to develop these additional references. Once published, the physical codebook and the online reference will be available free of charge.

The Department recognizes that these resources are helpful for builders and architects and is working to make them available as soon as possible. However, it is important to be very clear: these references are an alternative means of viewing the requirements in the 2024 RBES rule and do not contain any standards that are not already incorporated in the rule. The Department is not required to produce these references but is committed



to doing so for the benefit of all parties affected by the RBES. The 2024 RBES rule itself is already adopted and available.

Thank you for your consideration. The Department looks forward to attending the Committee's next meeting to answer any questions you may have.

Sincerely,

/s/ Ben Civiletti

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