



**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

April 30, 2024

David Rittlinger, Rulemaking Coordinator.  
North Carolina Building Code Council  
**Sent via email only to: [David.rittlinger@ncdoi.gov](mailto:David.rittlinger@ncdoi.gov)**

Re: Objection to Section R402 and Appendix R1.2.1 of the 2024 North Carolina Energy Conservation Code.

Dear Mr. Rittlinger:

At its meeting today, the Rules Review Commission (RRC) objected to the above-captioned Rules pursuant to G.S. 150B-21.9(a). Specifically, the RRC adopted the opinion of counsel attached hereto and incorporated by reference.

Please respond to this objection in accordance with the provisions of G.S. 150B-21.12.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Brian Liebman  
Commission Counsel

Enc: Staff opinion issued April 26, 2024.  
CC: Nathan Childs, NCDOJ via email to [nchilds@ncdoj.gov](mailto:nchilds@ncdoj.gov)

**Donald Robert van der Vaart**, Director  
Chief Administrative Law Judge

**John C. Evans**  
Senior Administrative Law Judge

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## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: North Carolina Building Code Council

RULE CITATION: North Carolina Energy Conservation Code, Section R402, Appendix R1.2.1

DATE ISSUED: April 26, 2024

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

Section R402 governs the thermal envelope for residential buildings falling outside the Residential Code, and Appendix R1.2.1 contains relevant illustrations. Among the provisions within this Section are requirements for insulation within walls and ceilings. Session Law 2023-108 became effective on August 16, 2023, requiring the Building Code Council to make specific amendments to Section R402. Section 6.(b) of the Session Law states that the Council “shall amend R402 Rules to include, as an optional alternative to residential ceiling insulation minimums, minimum insulation requirements for the use of air-impermeable insulation in the unvented attic and unvented enclosed rafter assemblies. In developing this amendment, the Council shall include . . . that where the R402 Rules require R-38 insulation in the ceiling, installing air-impermeable insulation, as follows, to the underside or directly above the roof deck shall be deemed to satisfy the R-38 requirements: (i) R-20 (equivalent U-factor 0.05) for

Brian Liebman  
Commission Counsel

climate zone 3; (ii) R-25 (equivalent U-factor 0.037) for climate zone 4; and (iii) R-25 (equivalent U-factor 0.037) for climate zone 5.” The session law then lays out 5 specific criteria for when these alternatives shall apply.

When asked whether the provisions of R402 of the NC Energy Conservation Code (NCECC) comply with Section 6.(b) of the Session Law, the Building Code Council responded that they were “developing a proposed rule to comply with Section 6’s directive . . . . A code change petition in development is anticipated to be considered at the June 11, 2024 NCBCC meeting.” Staff did not read the NCECC to include the requirements of Section 6.(b) of the Session Law, and staff interprets the BCC’s response as confirmation of that fact.

As a result, staff recommends objection to Section R402 and Appendix R1.2.1 pursuant to G.S. 150B-21.9(a)(1) for lack of statutory authority, given that these provisions are out of compliance with the explicit directions of the General Assembly to include specific alternative methods of compliance.

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**SECTION 5.(d)** Additional Rulemaking Authority. – The Council shall adopt rules to amend the Appendix B Rules and Appendix B to be consistent with subsection (c) of this section. Notwithstanding G.S. 150B-19(4), the rules adopted by the Council pursuant to this section shall be substantively identical to the provisions of subsection (c) of this section. Rules adopted pursuant to this section are not subject to Part 3 of Article 2A of Chapter 150B of the General Statutes. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1), as though 10 or more written objections had been received as provided in G.S. 150B-21.3(b2).

**SECTION 5.(e)** Sunset. – This section expires when permanent rules adopted as required by subsection (d) of this section become effective.

## **AMEND INSULATION REQUIREMENTS FOR UNVENTED ATTIC AND ENCLOSED RAFTER ASSEMBLIES**

**SECTION 6.(a)** Definitions. – As used in this section, "Code" means the current North Carolina State Building Code collection, and amendments to the Code, as adopted by the Council. For purposes of this section and its implementation, "R402 Rules" means provisions and tables within Section 402, Building Thermal Envelope, North Carolina – Residential Provisions, of the North Carolina Energy Conversation Code. As used in this section, "Council" means the Building Code Council. On or after January 1, 2025, "Council" means the Residential Code Council as created in Section 1 of this act.

**SECTION 6.(b)** R402 Rules Amendment. – The Council shall amend R402 Rules to include, as an optional alternative to residential ceiling insulation minimums, minimum insulation requirements for the use of air-impermeable insulation in unvented attic and unvented enclosed rafter assemblies. In developing this amendment, the Council shall include in that optional alternative that where R402 Rules require R-38 insulation in the ceiling, installing air-impermeable insulation, as follows, to the underside or directly above the roof deck shall be deemed to satisfy the R-38 requirements: (i) R-20 (equivalent U-factor 0.05) for climate zone 3; (ii) R-25 (equivalent U-factor 0.037) for climate zone 4; and (iii) R-25 (equivalent U-factor 0.037) for climate zone 5. These air-impermeable insulation alternative R-value minimums apply in residences meeting the following criteria:

- (1) The unvented attic or unvented enclosed rafter assemblies are constructed under Section R806.5 of the North Carolina Residential Code.
- (2) The residence contains a mechanical ventilation system that operates on a positive, balanced, or hybrid pressure strategy.
- (3) For residences with air-impermeable insulation installed below the roof deck, exposed portions of the roof rafters are wrapped by a minimum of R-3 insulation unless directly covered by drywall or finished ceiling material. For residences with air-impermeable insulation installed above the roof deck, roof rafters do not require insulation wrapping if air-impermeable insulation installed above the roof deck is continuous.
- (4) The residence obtains an ACH50 blower door test result of less than 3.0.
- (5) The residence contains heating, cooling, and ventilation equipment and ductwork within thermal envelope.

**SECTION 6.(c)** Sunset. – This section expires when permanent rules adopted as required by subsection (b) of this section become effective.

## **PROHIBIT FURTHER AMENDMENTS TO VARIOUS CHAPTERS WITHIN THE NORTH CAROLINA RESIDENTIAL CODE**

**SECTION 7.(a)** Definitions. – As used in this section, "Council" means the Building Code Council.

**EFFECTIVE DATE**

**SECTION 15.** Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28<sup>th</sup> day of June, 2023.

s/ Phil Berger  
President Pro Tempore of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

VETO Roy Cooper  
Governor

Became law notwithstanding the objections of the Governor at 6:21 p.m. this 16<sup>th</sup> day of August, 2023.

s/ Ms. Sarah Holland  
Senate Principal Clerk