

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 Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0509; 15A NCAC 07I .0702; 15 NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15A NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

DATE ISSUED: May 9, 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

X Return to agency

COMMENT:

Pursuant to G.S. 150B-21.1(b1), an agency has 30 days from receipt of notification of an objection from RRC to either supplement its statement of findings of need or submit a new statement. "If the agency fails to supplement its statement of need with additional findings or submit a new statement to the Commission within 30 days . . . the Commission . . . **shall immediately** return the rule to the agency." Sess. Law. 2023-134, s. 21.2.(a) (emphasis added).

The Commission objected to the above-captioned temporary rules at its April 2024 special meeting and notified the Coastal Resources Commission of the objection via letter dated and emailed to the head of the agency on April 8, 2024. The CRC's thirty-day period to respond

Brian Liebman
Commission Counsel

closed on May 8, 2024. As of the date of this opinion, the Commission has received no supplement to its statement of need or new statement of need with respect to the above captioned temporary rules.¹

Based on the foregoing, it is staff's opinion that the above-captioned temporary rules must be immediately returned to the agency.

¹The agency submitted a response to the objection to Rules 15A NCAC 07H .0507 and .0508 on May 7, 2024. The response was titled "Supplemental to Statements of Need for 15A N.C. Admin. Code 07H .0507 and .0508" and the content was restricted to the substance of these two rules. Moreover, staff contacted the rulemaking coordinator for the CRC and asked whether further responses for the other rules not addressed in the May 7, 2024 response would be forthcoming. Staff received no response. As such, it is staff's opinion that the response cannot be read to extend to any rule other than Rules 07H .0507 and .0508.

Brian Liebman
Commission Counsel

STATE PROPERTY AND LAND USE REGULATION

SECTION 20.5.(a) G.S. 160D-913 reads as rewritten:

"§ 160D-913. Public buildings.

(a) All Except as provided in G.S. 143-345.5 and this section, local government zoning and development regulations are applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

(b) Except as provided in G.S. 143-345.5, this Chapter shall not apply to the construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, demolition, or use of any building or property by the State of North Carolina, including The University of North Carolina or any of its constituent institutions, located in whole or in part in Wake County and the project is managed by the State Construction Office.

(c) Except as provided in G.S. 143-345.5, this Chapter shall not apply to the construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, demolition, or use of any building or property when the project is managed by the Legislative Services Commission.

(d) Notwithstanding the provisions of any general or local law or ordinance, except as provided in Part 4 of Article 9 of this Chapter, no land owned by the State of North Carolina may be included within an overlay district or a conditional zoning district without approval of the Council of State or its delegate.

(e) For properties exempt from this Chapter under subsection (b) or (c) of this section, the State Construction Office or the Legislative Services Commission shall consult with the appropriate county or city with jurisdiction with regard to all of the following:

(1) Water and sewer services to be provided to the project.

(2) Stormwater implications of the project.

(3) Impacts on traffic patterns and parking.

(4) Perimeter buffering, landscaping, tree protection, and riparian buffer requirements.

(5) Local environmental regulations adopted under Part 2 of Article 9 of this Chapter."

SECTION 20.5.(b) This section is effective when it becomes law and applies to any erection, construction, repair, or renovation in existence on or after that date.

PART XXI. ADMINISTRATIVE HEARINGS**INCREASE COMPENSATION FOR RULES REVIEW COMMISSION MEMBERS**

SECTION 21.1. G.S. 143B-30.1(d) reads as rewritten:

"(d) Members of the Commission who are not officers or employees of the State shall receive compensation of two hundred fifty dollars ~~(\$200.00)-(\$250.00)~~ for each day or part of a day of service plus reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6."

AMEND RULEMAKING PROCEDURES IN THE ADMINISTRATIVE PROCEDURE ACT

SECTION 21.2.(a) G.S. 150B-21.1 reads as rewritten:

"§ 150B-21.1. Procedure for adopting a temporary rule.

...

(b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new

~~statement.~~ statement within 30 days of the notification. If the agency fails to supplement its statement of need with additional findings or submit a new statement to the Commission within 30 days, or submits written notice within 30 days to the Commission that the agency does not intend to supplement its statement of need with additional findings or submit a new statement, the Commission or its designee shall immediately return the rule to the agency. If the agency provides additional findings or submits a new ~~statement,~~ statement within 30 days of the notification, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency and return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment within 30 days after notification of the return of the rule by the Commission in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. ~~Statutes within 30 days of the date the rule is returned to the agency.~~

(b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(b4) When the Commission returns to an agency a proposed permanent rule intended to replace a temporary rule, the holder of a permit from the agency may submit revised plans for a revised permit removing the impacts of the returned rule if all of the following conditions apply:

(1) The permit was conditioned upon adherence to the requirements of a temporary rule that the returned proposed permanent rule was intended to replace.

(2) The revised plans comply with all other applicable regulations.

The agency shall review the revised plans and approve or deny the revised permit within 45 days of the receipt of the revised plans. The agency may not impose an additional permit fee for review of a revised plan resulting from the expiration of a temporary rule.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

(c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

- (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.
- (6) Notwithstanding subdivision (5) of this subsection, 12 months after the effective date of the temporary rule.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register."

SECTION 21.2.(b) G.S. 150B-21.2 reads as rewritten:

"§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. – Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

...

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 but not later than 60 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

...."

SECTION 21.2.(c) G.S. 150B-21.3 reads as rewritten:

"§ 150B-21.3. Effective date of rules.

...

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons, no later than 5:00 P.M. of the day following the day the Commission approves the rule, clearly requesting review by the legislature in accordance with instructions posted on the agency's Web site pursuant to G.S. 150B-19.1(c)(4), and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. The Commission shall notify the agency that the rule is subject to legislative disapproval on the day following the day it receives 10 or more written objections. ~~When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.~~ If the Commission receives objections from 10 or more persons clearly requesting review by the legislature, and the rule objected to is one of a group of related rules adopted by the agency at the same time, the agency that adopted the rule may cause any of the other rules in the group to become effective as provided in subsection (b1) of this section by