

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 C101.2

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 C101.2 defines the scope of applicability for the commercial provisions of the 2024 North Carolina Energy Conservation Code (NCECC). Pursuant to this language¹, the commercial provisions of the NCECC apply to all commercial buildings, sites, associated systems and equipment, except certain farm structures and Group F, S, and U occupancy classifications. Section C101.2 omits reference to a broad exception for existing commercial buildings added to G.S. 143-138 by the General Assembly in July 2014. Pursuant to the statute, alterations to commercial buildings which received a certificate of occupancy prior to

¹ The Building Code Council (BCC) has elected to pursue changes to the language of Section C101.2 through separate rulemaking packages; the exceptions in the version of C101.2 currently before you for farm structures and Group F, S, and U occupancies were added pursuant to a code change petition adopted separately by the BCC on March 19, 2024. Once again, the BCC has elected to add language incorporating the statutory exemption in G.S. 143-138(b15) to the NCECC through a separate code change petition, which upon information and belief will be before the BCC for approval at their June 11, 2024 meeting. Staff cannot anticipate at this time when that code change would be filed for RRC review.

January 1, 2012 are subject to the energy conservation and efficiency rules in effect on December 31, 2011, “so long as the addition does not increase the building area of the existing commercial building or structure to more than one hundred and fifty percent (150%) of the building area . . . as it was in existence on December 31, 2011.”

The text of Section C101.2 states “[t]his code applies to commercial buildings and the buildings’ sites and associated systems and equipment.” As such, failure to include the statutory exemption here appears to extend the reach of the NCECC beyond the scope authorized by the General Assembly. As such, it is staff’s opinion that the BCC lacks statutory authority for this provision.

Additionally, although the BCC has added a reference to this statutory exemption in Chapter 5, which governs alterations to existing buildings, they have elected not to make a similar change to the global scope provision in C101.2 at this time. It is staff’s opinion that omission of the statutory exemption in C101.2 creates impermissible ambiguity, in that of the three locations where the regulated public could find this exemption—the statute, the global scope provisions of the NCECC in Chapter 1, and the specific code provisions in Chapter 5—it is mentioned only in two. Moreover, this creates a conflict between Chapters 1 and 5, which could lead to differing interpretations of the Code by the public, the Council, and the code officials charged with administering the Code.

Based on the foregoing, staff recommends objection to Section C101.2 for lack of statutory authority pursuant to G.S. 150B-21.9(a)(1), and for ambiguity and lack of clarity pursuant to G.S. 150B-21.9(a)(2).

§ 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.)

§ 143-138. (Effective until January 1, 2025) North Carolina State Building Code.

(a) Preparation and Adoption. – The Building Code Council may prepare and adopt, in accordance with the provisions of this Article, a North Carolina State Building Code. Before the adoption of the Code, or any part of the Code, the Council shall hold at least one public hearing. A notice of the public hearing shall be published in the North Carolina Register at least 15 days before the date of the hearing. Notwithstanding G.S. 150B-2(8a)h., the North Carolina State Building Code as adopted by the Building Code Council is a rule within the meaning of G.S. 150B-2(8a) and shall be adopted in accordance with the procedural requirements of Article 2A of Chapter 150B of the General Statutes.

(a1) Additional Adoption Requirements. –

- (1) The Council shall request the Office of State Budget and Management to prepare a fiscal note for a proposed Code change that has a substantial economic impact, as defined in G.S. 150B-21.4(b1), or that increases the cost of residential housing by eighty dollars (\$80.00) or more per housing unit. The change can become effective only in accordance with G.S. 143-138(d). Neither the Department of Insurance nor the Council shall be required to expend any monies to pay for the preparation of any fiscal note under this section by any person outside of the Department or Council unless the Department or Council contracts with a third-party vendor to prepare the fiscal note.
- (2) The Council shall conduct a cost-benefit analysis for all proposed changes considered after January 1, 2018, to the North Carolina Energy Conservation Code.

(b) Contents of the Code. – The North Carolina State Building Code, as adopted by the Building Code Council, may include reasonable and suitable classifications of buildings and structures, both as to use and occupancy; general building restrictions as to location, height, and floor areas; rules for the lighting and ventilation of buildings and structures; requirements concerning means of egress from buildings and structures; requirements concerning means of ingress in buildings and structures; rules governing construction and precautions to be taken during construction; rules as to permissible materials, loads, and stresses; rules governing chimneys, heating appliances, elevators, and other facilities connected with the buildings and structures; rules governing plumbing, heating, air conditioning for the purpose of comfort cooling by the lowering of temperature, and electrical systems; and such other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large.

(b1) Fire Protection; Smoke Detectors. – The Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety, subject to approval by the Council of more stringent provisions proposed by a municipality or county as provided in G.S. 143-138(e). These provisions may include regulations requiring the installation of either battery-operated or electrical smoke detectors in every dwelling unit used as rental property, regardless of the date of construction of the rental property. For dwelling units used as rental property constructed prior to 1975, smoke detectors shall have an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and shall be installed in accordance with either the standard of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the property owner shall retain or provide as proof of compliance.

(b13) Migrant Housing. – The Building Code Council shall provide for an exemption from any requirements in the North Carolina Fire Code for installation of an automatic sprinkler system applicable to buildings meeting all of the following:

- (1) Has one floor.
- (2) Meets all requirements of 29 C.F.R. § 1910.142, as amended.
- (3) Meets all requirements of Article 19 of Chapter 95 of the General Statutes and rules implementing that Article.

For purposes of this subsection, "migrant housing" and "migrant" shall be defined as in G.S. 95-223.

(b14) Exclusion for Routine Maintenance of Pumps and Dispensers. – No permit shall be required under the Code or any local variant approved under subsection (e) of this section for routine maintenance on fuel dispensing pumps and other dispensing devices. For purposes of this subsection, "routine maintenance" includes repair or replacement of hoses, O-rings, nozzles, or emergency breakaways.

(b15) Exclusion from Energy Conservation Code Requirements for Existing Commercial Buildings. – The alteration of commercial buildings and structures that received a certificate of occupancy prior to January 1, 2012, may be subject to the rules pertaining to energy efficiency and energy conservation that were in effect on December 31, 2011. The addition to commercial buildings and structures that received a certificate of occupancy prior to January 1, 2012, may be subject to the rules pertaining to energy efficiency and energy conservation that were in effect on December 31, 2011, so long as the addition does not increase the building area of the existing commercial building or structure to more than one hundred fifty percent (150%) of the building area of the commercial building or structure as it was in existence on December 31, 2011. For the purpose of this subsection, the term "commercial buildings and structures" shall include all structures and buildings that are not classified as a Group R occupancy by the Building Code Council.

(b16) Exclusion for Electrical Devices and Lighting Fixtures. – No permit shall be required under the Code or any local variant approved under subsection (e) of this section for the repair or replacement of dishwashers, disposals, water heaters, electrical devices, or lighting fixtures in residential or commercial structures, provided that all of the following apply:

- (1) The repair or replacement does not require the addition or relocation of electrical wiring.
- (2) The work is performed by a person or employee of a company licensed under G.S. 87-43.
- (3) The repair or replacement is performed in accordance with the current edition of the North Carolina State Building Code.

(b17) Exclusion for Private Drinking Water Well Installation, Construction, Maintenance, and Repair. – No permit shall be required under the Code or any local variant approved under subsection (e) of this section for the electrical and plumbing activities associated with the installation, construction, maintenance, or repair of a private drinking water well when all of the following apply:

- (1) The work is performed by a contractor certified under Article 7A of Chapter 87 of the General Statutes under the terms of a permit issued by the local health department pursuant to G.S. 87-97.
- (2) The scope of work includes only the connection or disconnection of a well system to either the plumbing served by the well system or the electrical service that serves the well system. For purposes of this subsection, a well system includes the well, the pressure tank, the pressure switch, and all plumbing and electrical equipment in the well and between the well, pressure tank, and pressure switch.