

Burgos, Alexander N

Subject: FW: Building Code Submissions for November 2023 RRC Review

Importance: High

From: Rittlinger, David B <david.rittlinger@ncdoi.gov>

Sent: Wednesday, October 25, 2023 1:20 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Childs, Nathan D <nchilds@NCDOJ.GOV>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: Building Code Submissions for November 2023 RRC Review

Importance: High

Brian,

Nathan and I are available to meet at your office at 2pm tomorrow.

We think it is best to discuss in person.

Is that okay? If so, I can send a calendar invitation.

Thank you for your work on this.

David B. Rittlinger, PE, LEED AP
Code Interpretations Supervisor
Chief Code Consultant
Engineering Division



N.C. Department of Insurance
Office of State Fire Marshal
1429 Rock Quarry Road, Suite 105
Raleigh, NC 27610
919.647.0008

david.rittlinger@ncdoi.gov

Link to free view of 2018 NC Codes

<https://codes.iccsafe.org/codes/north-carolina>

Burgos, Alexander N

Subject: FW: Building Code Submissions for November 2023 RRC Review

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, October 25, 2023 10:25 AM
To: Rittlinger, David B <david.rittlinger@ncdoi.gov>; Childs, Nathan D <nchilds@NCDOJ.GOV>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Re: Building Code Submissions for November 2023 RRC Review

That's fine by me.

Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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From: Rittlinger, David B <david.rittlinger@ncdoi.gov>
Sent: Wednesday, October 25, 2023 10:20:22 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Childs, Nathan D <nchilds@NCDOJ.GOV>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Building Code Submissions for November 2023 RRC Review

Brian,
Good morning.
As I have no clear direction as to what I am supposed to do at this point, I would like for Nathan Childs to be a part of this conversation.
Thank you

David B. Rittlinger, PE, LEED AP
Code Interpretations Supervisor
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Engineering Division



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Raleigh, NC 27610
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Link to free view of 2018 NC Codes

<https://codes.iccsafe.org/codes/north-carolina>

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Wednesday, October 25, 2023 9:55 AM

To: Rittlinger, David B <david.rittlinger@ncdoi.gov>; Childs, Nathan D <nchilds@NCDOJ.GOV>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: Re: Building Code Submissions for November 2023 RRC Review

David,

I am out of the office today but could speak by phone sometime after 11, if that works for you.

Brian

Brian Liebman

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Burgos, Alexander N

From: Rittlinger, David B
Sent: Tuesday, October 24, 2023 7:52 PM
To: Liebman, Brian R; Childs, Nathan D
Cc: Burgos, Alexander N
Subject: Re: Building Code Submissions for November 2023 RRC Review

Let's discuss tomorrow morning

David Rittlinger
..... Sent from my iPhone

On Oct 24, 2023, at 4:24 PM, Liebman, Brian R <brian.liebman@oah.nc.gov> wrote:

Hi David,

As I understand what the Council has elected to do here, you are adopting the entirety of each Code under G.S. 150B-21.6 in order to replace the existing 2018 Code. There are several major issues with this approach.

Statutory Authority

In the Submission for Permanent Rule Form (using the Existing Building Code as an example, this applies to all three Codes), the Council states that "the 2018 North Carolina Existing Building Code is replaced by the 2021 International Existing Building Code by reference citing the application [of] North Carolina General Statutes 150B-21.6." Even assuming *arguendo* that the Council may adopt the entire Code by reference and has done so within the Code itself, there is no mechanism to "replace" existing rules by reference within the Administrative Procedures Act. The APA allows only three actions; an agency may adopt a rule, amend a rule, or repeal a rule. See G.S. 150B-2(1b) ("'Adopt' means to take final action to create, amend, or repeal a rule."). Thus, where there is an existing rule that the agency seeks to replace, its options are to repeal the existing rule and adopt a new rule, or to amend the existing rule and show the public and the Commission the changes made by following OAH's formatting rules. The Council has done neither. To the extent that the Council has acted to adopt new Codes, it has done only that. These submissions do not repeal the 2018 Codes.

More importantly, the Council does not, to my reading, have the authority to maintain two separate, coexisting codes. In fact, I do not believe the Council has the authority to completely repeal an existing Code and replace it.

Rather, G.S. 143-138(d) states only that the council may "revise" the Code. Black's Law Dictionary defines a "revision" as "a reexamination or careful review for correction or improvement", or alternatively as "a general and thorough rewriting of a governing document, in which the entire document is open to amendment". Black's Law Dictionary, 11th Ed. "Revision". Contrast this with the definition of "amendment" which is the other action the Council is authorized to take: "to correct or make usually small changes to (something written or spoken); to rectify or make right, or alternatively "to change the wording of; specifically, to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words." Black's Law Dictionary, 11th ed. "Amend". Both relevant definitions indicate that the

Council may make changes to the existing code, but may not completely repeal and replace any of the Codes that constitute the Building Code.

Even if the Council has the authority to completely repeal and replace the existing building code, I do not think it *may* be done pursuant to G.S. 150B-21.6, and I do not believe the Council *has* even properly done so here.

Under G.S. 143-138(a), the Building Code “shall be adopted in accordance with the *procedural requirements* of Article 2A of Chapter 150B of the General Statutes” (emphasis added). While G.S. 150B-21.6 is within Article 2A, it is not a procedural requirement; rather it controls the *content* of the North Carolina Administrative Code, of which the Building Code is not a part. Moreover, G.S. 143-138(b7) appears to separately govern the process by which the Council may incorporate material by reference into the Building Code. As the more specific statute always governs over a more general one, it appears that 150B-21.6 has no application to the Building Code. *See Trustees of Rowan Technical College v. J. Hyatt Associates, Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)

Even assuming *arguendo* that the Council could adopt the entire code by reference, it has not done so here by the terms of the statute. G.S. 150B-21.6 states that the agency may incorporate material “*in a rule*” and must designate “*in the rule* whether or not the incorporation includes subsequent amendments and editions of the referenced material.” The agency must specify “*in the rule* both where copies of the material can be obtained and the cost on the date *the rule* is adopted of a copy of the material” (emphasis added). Here, the Council has merely stated in its Submission for Permanent Rule Form its *intention* to adopt the entire code by reference; it has not made the adoption in any part of the Code itself. Therefore, there has been no incorporation by reference cognizable under the APA.

Finally, even assuming *arguendo* that the Council could adopt an entire Code by reference under G.S. 150B-21.6, the Council may lack authority to do so under its own statutes. G.S. 143-138(c) states that the Council “may use as guidance, but is not required to adopt, the requirements of the International Building Code of the International Code Council” It would appear that the legislature has contemplated and rejected the idea of merely wholesale adopting the ICC, which is precisely what the Council has stated it intends to do on its Submission of Permanent Rule form.

Failure to Comply with the APA

These filings also present several issues with respect to compliance with the Administrative Procedure Act. First, under G.S. 150B-21.2(g), an agency “must submit an adopted rule to the Rules Review Commission within 30 days of the agency’s adoption of the rule.” Here, the forms indicate that these Codes were adopted on June 13, 2023, meaning that they needed to be submitted for review no later than July 13, 2023. While I acknowledge that the agency originally *intended* to file these Codes in July 2023, they did not do so. We received a copy of the Administrative Code, which is not included here, but no copies of the Existing Building Code, Building Code, or Fire Code.

Thus, we return to the reason that the original attempt to file these Codes was rejected. The Council has failed to properly format the Codes in a way that allows the Commission to review for the statutory requirements of G.S. 143-138 (i.e. to allow us to determine whether the agency has statutory authority) or that allows us to determine whether the Council has made changes to the Code following publication and public hearing (i.e. to allow us to determine whether there are substantial changes under G.S. 150B-21.2(g)). If I cannot evaluate the submitted Codes for these issues, *I cannot recommend approval* to the Commission, and will have to recommend objection for failure to comply with the APA and for lack of statutory authority (on top of the reasons expressed above).

As an independent issue, I noted on your Submission for Permanent Rule Form that in Box 9A, you checked “petition for rulemaking” as the reason for rulemaking. Was this rulemaking actually pursuant

to a petition? If so, did the Council follow the procedural requirements of G.S. 150B-20 with respect to the petition? G.S. 150B-20 would be one of the procedural requirements of Article 2A that the Council has to comply with under G.S. 143-138(a).

Please submit any responses you may have to these arguments no later than 5:00 p.m. on November 7, 2023.

Thanks,
Brian

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Burgos, Alexander N

From: Snyder, Ashley B
Sent: Monday, October 23, 2023 10:31 AM
To: Burgos, Alexander N
Subject: FW: NC Building Code Council - NC Building Code Approved Rules (Code Amendments) from June 13, 2023 and September 12, 2023 -email #1

Ashley Snyder

Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

From: Snyder, Ashley B
Sent: Monday, October 23, 2023 10:06 AM
To: Rittlinger, David B <david.rittlinger@ncdoi.gov>
Cc: McGhee, Dana <dana.McGhee@oah.nc.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: RE: NC Building Code Council - NC Building Code Approved Rules (Code Amendments) from June 13, 2023 and September 12, 2023 -email #1

Good morning, David,

I hope you're doing well. We received both electronic filings and hard copy filings from you on Friday. It looks like the electronic filings are exactly the same as the paper filings. Can you please confirm? If we upload the electronic filings to the RRC agenda, I need to know we aren't missing anything that was submitted in hard copy only.

Thanks,

Ashley Snyder

Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

From: Rittlinger, David B <david.rittlinger@ncdoi.gov>
Sent: Friday, October 20, 2023 3:25 PM
To: Rules, Oah <oah.rules@oah.nc.gov>
Cc: McGhee, Dana <dana.McGhee@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>; Holder, Karen <Karen.Holder@ncdoi.gov>
Subject: NC Building Code Council - NC Building Code Approved Rules (Code Amendments) from June 13, 2023 and September 12, 2023 -email #1

Good afternoon RRC,

Attached are the two NC Building Code Council code amendments that were approved on June 13, 2023 and September 12, 2023 for the 2024 NC Building Code
I have attached a separate pdf and MS Word copy of each of the two amendments to be considered by the RRC as permanent rules.
I will be delivering hard copies by 4pm today.

It is my understanding that these rules will be included in the 11/17/23 RRC agenda for consideration.
Let me know if you have any questions or comments.

Thank you for your work on this.
Have a great day.

David B. Rittlinger, PE, LEED AP
Chief Code Consultant
Code Interpretations Supervisor
Engineering Division



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