

Burgos, Alexander N

Subject: FW: [External] Dec. 14, 2023 RRC Meeting - Agenda Item 17 - Request for Extension of Period for Reviewing Rules

From: Childs, Nathan <nchilds@ncdoj.gov>

Sent: Monday, December 11, 2023 3:50 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Cc: Bridget Herring (herring.ncbcc@gmail.com) <herring.ncbcc@gmail.com>; mmatheny@ashevillenc.gov; Rittlinger, David B <david.rittlinger@ncdoi.gov>; Ethridge, Courtney H <cethridge@ncdoj.gov>

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Importance: High

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Good afternoon Brian:

Pursuant to our prior communications regarding the four final rules (2024 N.C. Administrative Code & Policies (Agenda Item #17(1)), 2024 NC Plumbing Code (Agenda Item #17(3)), 2024 NC Residential Code (Agenda Item #17(4)), and amendment to Appendix B in 2024 N.C. Administrative Code & Policies (Agenda Item #17(2))) appearing on the Commission's December 14, 2023 meeting agenda, the North Carolina Building Code Council requests, pursuant to N.C. Gen. Stat. § 150B-21.10 (3) and 26 N.C. Admin. Code 5.0115(a), an extension of the period for reviewing the rules to allow Council staff to provide the supplemental review aide and complete copies of the proposed 2024 North Carolina code volumes referenced in my December 4, 2023 letter to you (attached).

Thank you and happy holidays,

Nathan Childs



Nathan D. Childs

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al.

JOSH STEIN
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December 4, 2023

Brian Liebman, Esq.
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Rules Review Commission
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Via Email Only

RE: 2024 updates to North Carolina State Building Code volumes

Dear Mr. Liebman:

This letter will follow-up on and confirm our discussion and agreement on Tuesday November 21, 2023, when David Rittlinger and I met with you at your office.

As you know, I serve as counsel to the North Carolina Building Code Council (BCC) and David is Chief Code Consultant with the Office of the State Fire Marshal and serves as rulemaking coordinator for the BCC. David and I met with you on November 21 to discuss the three permanent rules that were objected to by the Rules Review Commission at the Commission's November 16, 2023 meeting (the 2024 edition of the North Carolina Building Code (221213 Item B-3), the 2024 edition of the North Carolina Fire Prevention Code (221213 Item B-4), and the 2024 edition of the North Carolina Existing Building Code (221213 Item B-5)), as well as the pending rules adopting the 2024 editions of the seven other volumes comprising the North Carolina State Building Code. As we discussed, these updates are based on the 2021 editions of model codes developed by the International Code Council (ICC) and the 2023 edition of the National Electrical Code developed by the National Fire Prevention Association, and would take effect January 1, 2025.

Timing is important because the BCC is subject to statutory time constraints to adopt certain portions of the 2024 edition of the State Building Code. As we have discussed, N.C. Gen. Stat. § 143-138(d) provides that the BCC may revise or amend

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the North Carolina Residential Code (as well as the provisions in the North Carolina Plumbing Code, North Carolina Electrical Code, North Carolina Energy Conservation Code, North Carolina Mechanical Code, and North Carolina Fuel-Gas Code applicable to one- and two-family dwellings) “only every six years” with the next six-year revision to take effect January 1, 2025. Further, Section 143-138(d) requires that the BCC adopt permanent rules revising these codes “with at least six months between adoption and effective date.”

In other words, the BCC must adopt the permanent rules updating these codes on or before June 30, 2024 or miss the statutory six-year window to revise or amend the Residential Code volume, as well as the provisions controlling the construction of one- or two-family dwellings found in the other five identified volumes. Accordingly, time is of the essence to address the Commission’s concerns and plot a path forward.

In its November 16, 2023 objections to the 2024 editions of the Building Code, Fire Code, and Existing Building Code, the Rules Review Commission adopted your November 11, 2023 RRC Staff Opinion, which objected to the adopted rules based on:

- (1) the BCC’s purported lack of statutory authority to incorporate the respective model codes by reference in the permanent rules, as allowed by N.C. Gen. Stat. § 150B-21.6;
- (2) the BCC’s purported failure to substantially comply with the 30-day submission requirement of N.C. Gen. Stat. § 150B-21.2(g);
- (3) the BCC’s purported failure to comply with the timing and notice requirements of N.C. Gen. Stat. § 150B-20 controlling petitions for rulemaking; and
- (4) that the formatting of the BCC’s submissions to the Commission purportedly prevent the Commission from satisfactorily completing its review of the rules for statutory authority as required by N.C. Gen. Stat. § 150B-21.9(a)(1).

See RRC Staff Opinion, pp. 2-5, Nov. 11, 2023.

While the BCC does not agree with the Staff Opinion's interpretation of N.C. Gen. Stat. § 150B-21.6, which the BCC will explain further under separate cover, we were able to come to agreements at the November 21 meeting addressing the other issues identified in your Staff Opinion, as detailed below.

Importantly, it is our understanding that compliance with these agreements will allow for the Commissions' consideration of the 2024 editions of the North Carolina Plumbing Code, North Carolina Residential Code, and North Carolina Administrative Code and Policies, which appear on the Commission's December 14, 2023 meeting agenda, as well as the 2024 editions of the North Carolina Mechanical Code, North Carolina Fuel-Gas Code, North Carolina Energy Conservation Code, and the 2023 North Carolina Electrical Code, which the BCC anticipates will be submitted to appear on the Commission's January 18, 2024 meeting agenda. We agreed that, so long as the BCC complies with the agreements, staff counsel will not recommend objection to the rules based on the grounds set out in the November 11, 2023 RRC Staff Opinion.

First, to address the Commission's concerns regarding the formatting of the BCC's submissions, we came to an agreement that the BCC will provide the Commission with three supplemental submissions for each code (except the 2023 North Carolina Electrical Code) that will allow Commission staff to more easily review the adopted permanent rules and compare them to the 2018 editions of the respective North Carolina codes, as amended by the BCC.

1. *Formatted Review Aide*

The first of the supplemental submissions will mirror the supplemental submission for the 2024 edition of the North Carolina Administrative Code and Policies, submitted to you by David Rittlinger on November 20, 2023. Like that submission, these supplements, in Microsoft Word format, will provide the Commission with an abridged copy of each proposed rule showing only those adoptions and amendments, by way of underlining and strikeouts, to the existing North Carolina 2018 code, as amended, by the proposed 2024 edition of the code. Per our agreement, these submissions will not address indexes and preliminary material in the codes, but rather will show differences to the substantive text provisions. Sections, tables, and appendices without changes will not be included in the submissions. We further agreed that submission of this supplemental aide will be sufficient for the Commission's consideration of post-publication changes to each code volume.

2. 2017-2023 Amendments to Code Volumes

So that the Commission can confirm (if it wishes) that the submission reflects all revisions made to the subject code by the BCC after the ICC's publication of the hard-copy 2018 North Carolina State Building Code, a PDF file containing all amendments to each respective code made by the BCC between December 2017 and March 2023, will also be provided.

3. Full Copy of 2024 North Carolina Edition of Code Volume

Finally, an electronic file containing a full copy of the 2024 edition of each respective code will be provided to Commission staff. Because the BCC grants the ICC the copyright to each code volume as part of its publishing agreement with ICC, the BCC asks that these electronic files not be published on the Commission's website.

Exception: 2023 North Carolina Electrical Code

We agreed that no such supplemental submissions are necessary for the 2023 edition of the North Carolina Electrical Code. As we discussed, due to the timing requirements of N.C. Gen. Stat. § 143-138(d), the 2017 North Carolina Electrical Code presently governs the construction of one- and two-family dwellings, while the 2020 North Carolina Electrical Code governs all other construction in the state. Instead, the BCC will provide the Commission with the document prepared by the BCC ad hoc committee that developed the 2023 North Carolina Electrical Code identifying those substantial changes between the 2020 North Carolina Electrical Code and the adopted 2023 North Carolina Electrical Code.¹ We agreed that this will be sufficient to complete the Commission's review. In addition, the BCC will adopt a rule repealing the 2017 and 2020 editions of the North Carolina Electrical Codes effective January 1, 2025. In return, staff counsel agreed not to recommend objection to the 2023 North Carolina Electrical Code based on the grounds identified in the November 11 RRC Staff Opinion.

Second, with regard to the objections based on the 30-day submission requirement of N.C. Gen. Stat. § 150B-21.2(g), we agreed that given the longstanding communications between Commission staff and the BCC² regarding the formatting of submissions to the Commission and other issues relating to the rules, staff

¹ OSBM approved a fiscal note for the 2023 North Carolina Electrical Code on August 14, 2023.

² Pursuant to N.C. Gen. Stat. § 143-137(c), personnel of the Division of Engineering of the Department of Insurance serve as staff to the BCC.

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counsel will not recommend objection to the 2024 North Carolina Residential Code, 2024 North Carolina Plumbing Code, and 2024 North Carolina Administrative Code and Policies, which were submitted to the Commission more than 30 days after their adoption, as the BCC has substantially complied with the requirement.

As both parties outlined to the Commission at the November 16 meeting, these submissions are voluminous, technically complex, and subject to different formatting requirements because the State Building Code is not published in the North Carolina Administrative Code and is published by the BCC, rather than the Codifier of Rules. Accordingly, communications with RRC Staff regarding the Building Code updates began in late 2022 regarding a schedule for submission of the rules and intensified in July 2023, when the first updated code volume was submitted to the Commission by David Rittlinger. With the input of Commission staff, the BCC adopted the rules in groups and began submitting the adopted rules to the Commission. Correspondence regarding the format, content, prior code update submissions, and appropriate terminology regarding the adoption of the updates continued throughout the late summer and fall.

A rule is valid so long as it is adopted “in substantial compliance” with APA procedures. N.C. Gen. Stat. § 150B-18. In the BCC’s view, the purpose of the 30-day submission deadline in Section 150B-21.2(g) is to prevent rulemaking agencies from abandoning final rules through inaction. None of the communications from the BCC to Commission staff indicated that the BCC intended to withdraw or abandon the final rules. Rather, the continued interaction with the Commission demonstrates the BCC’s continued efforts to submit the rules in a format acceptable to the Commission and shows the BCC’s substantial compliance with the requirement. To the extent that the BCC deviated from the proscribed procedures, it was for the purpose of working with Commission staff to address their concerns. Importantly, any delay in the submission of the rules to the Commission did not violate the due process rights of the regulated public, and the North Carolina construction industry is well-aware that the code updates are scheduled to take effect January 1, 2025.

Accordingly, it is our understanding, per our November 21 agreement, that staff will not recommend that the Commission object to the final rules appearing on the December 14, 2023 meeting agenda on the grounds that the BCC did not substantially comply with N.C. Gen. Stat. § 150B-21.2(g)’s 30-day submission deadline. If this is not the case, please let me know immediately.

Third, as we discussed at the November 21 meeting, the boxes for “petition for rule-making” in section 9A of the “Submission for Permanent Rule” forms for the 2024 editions of the North Carolina Building Code, the North Carolina Fire Prevention Code, and the North Carolina Existing Buildings Code were checked in error. These permanent rules were proposed by the respective ad hoc code revision committees and standing committees appointed by the BCC expressly for this purpose, pursuant to N.C. Gen. Stat. § 143-137(a) and Section 202.8.2 of the North Carolina Administrative Code & Policies, 2018 North Carolina State Building Code.

Accordingly, these permanent rules are prompted by “agency” action, rather than a petition for rule-making, and are not subject to the timing, action, and notice requirements of N.C. Gen. Stat. § 150B-20. Accordingly, to the extent necessary, the BCC will submit corrected “Submission of Permanent Rule” forms for these three rules and all pending code revision rules, checking the “Agency” box in section 9A.³ Per our November 21 agreement, we understand that staff will not recommend that the Commission object to code revision rules based on the BCC’s purported failure to comply with the requirements of N.C. Gen. Stat. § 150B-20.

I want to thank you for meeting with us and for working with us to find agreement on how the BCC can address the Commission’s objections, especially given the tight statutory deadlines here.

If your understanding regarding our agreements is different than mine, please let me know immediately, as significant resources are being devoted to ensure compliance with the BCC’s obligations. We need to hear from you no later than Wednesday, December 6, 2023. If you are aware of any other concerns that we did not address and resolve in our November 21 meeting, please let me know now so that I can respond.

If you have any questions or would like to discuss, please do not hesitate to contact me.

³ As we also discussed at the November 21 meeting, N.C. Gen. Stat. § 150B-20 is codified in *Part 1* of Article 2A of Chapter 150B, whereas the scope of the Commission’s authority to review rules for APA compliance is limited to ensuring that they were “adopted in accordance with *Part 2* of this Article.” N.C. Gen. Stat. § 150B-21.9(a)(4) (emphasis added).

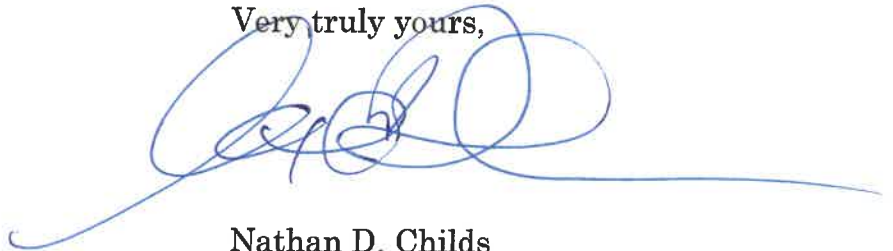
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With best regards, I am

Very truly yours,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Nathan D. Childs

Assistant Attorney General

cc: Bridget Herring, Chair of North Carolina Building Code Council (*via email*)
David Rittlinger, Chief Code Consultant, Division of Engineering, Office of
the State Fire Marshal (*via email*)
Joseph D. Starling, P.E., Chief State Electrical Engineer & Inspector (*via
email*)