

Burgos, Alexander N

Subject: FW: [External] NC Building Code Council Rulemaking Dec 2020: Public access issues and a request for a fiscal note

From: Ben Edwards <ben@mathisconsulting.com>

Sent: Friday, January 29, 2021 9:41 AM

To: Reeder, Amanda J <amanda.reeder@oah.nc.gov>

Subject: RE: [External] NC Building Code Council Rulemaking Dec 2020: Public access issues and a request for a fiscal note

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Ms. Reeder,

I do not find an attachment, but the item in question is in NC Register 35:04, pg. 342:

11 **20. Request from Robert Privott representing the N.C. Home Builders Association to amend the 2018**
12 **N.C. Residential Code, Section N1101.13.**

In order of my perception of importance for Rules Review, this item (and perhaps others) must be considered in light of:

1. A high-risk environment for the public. At the summer meeting, I registered 103F at the security checkpoint, but was waved through. Observing insufficient social distancing, I determined it unsafe to return. At the winter meeting – under consideration – I have been informed that two councilmen could have attended after close contact with confirmed infected family members. A virtual meeting / hybrid option was offered to voting members, but the public was denied even listening. Members and staff were observed maskless and in intimate proximity by others in attendance. To be clear: I question whether (at least) the last meeting complied with open meetings law, considering Executive Orders, requiring all items to be re-noticed and re-heard. If Rules finds this non-persuasive, there is a concern about 35:04 #20, specifically.
2. Improper notice and adoption. As noted in the email thread below and in other correspondence, there was ongoing concern about the scope of the proposal, specifically that the intended referenced standard was unclear, at best. This concern was submitted in written comment, and the proposal subsequently was changed. This change was not editorial, and should have been re-noticed as intended for final vote. The language approved for rulemaking was never noticed and open for public comment.
3. No cost/benefit nor legitimate fiscal analysis was provided for this item. I believe I have gone into detail about why this proposed change cannot be evaluated – it is so poorly written that the extend of cost impact would be speculation. Though I do not believe OSBM can be expected to evaluate such careless disregard for rulemaking, I **formally request a fiscal analysis for item #20.** Please copy me or otherwise make me available to OSBM to explain the how the code functions around this standard, this proposal, and my extensive work in the codes development arena. Today I am submitting a functional proposal to update to the new standard that Mr. Privott desires, so the Council can consider it at their next meeting. I will assist in any other way possible.

I am sorry that I am forced to take your time in these matters. Other state agencies are being engaged to help improve the internal process at the Building Code Council, hopefully limiting future conflicts. As always, thank you for your service to North Carolina.

-Ben

From: Reeder, Amanda J <amanda.reeder@oah.nc.gov>

Sent: Friday, January 29, 2021 7:38 AM

To: Ben Edwards <ben@mathisconsulting.com>

Cc: Martin, Carl <Carl.Martin@ncdoi.gov>; Reeder, Amanda J <amanda.reeder@oah.nc.gov>

Subject: FW: [External] NC Building Code Council Rulemaking Dec 2020: Public access issues and a request for a fiscal note

Good morning, Mr. Edwards:

Thank you for your email. The BCC filed several rules for the RRC's February 18, 2021 meeting and I am currently reviewing them.

Regarding your comment below, I want to be sure that: 1) the attached rule is the rule that you are commenting upon; and 2) that you are requesting that RRC send the attached rule to OSBM to determine whether it creates a substantial economic impact.

Am I correct in my understanding of your comment?

Thank you! I hope you are well.

Amanda

Amanda J. Reeder

Counsel to the Rules Review Commission

NC Office of Administrative Hearings

New Telephone Number Effective May 1, 2020: 984-236-1939

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From: Ben Edwards <ben@mathisconsulting.com>

Sent: Monday, December 14, 2020 2:04 PM

To: rrc.comments <rrc.comments@oah.nc.gov>; Martin, Carl <Carl.Martin@ncdoi.gov>

Subject: [External] NC Building Code Council Rulemaking Dec 2020: Public access issues and a request for a fiscal note

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Ms. Reeder, or whom it may concern:

I regret to have to have to contact you yet again about the Building Code Council. The only item in question, for now, is D-23 Privott, creating a new energy code compliance path using an indeterminate version of the ANSI/RESNET/ICC Standard 301. Please note that in this letter I use Standard 301-2014 as shorthand for the 2014-second-publication-version NC already adopted, including Addendum B-2015, which incorporated non-substantive editorial changes and a title change (details in the "Special Note" of the 2019 version, linked below). I will attempt to list only the low-points of this rulemaking process; and I am requesting a fiscal note, since none was provided, though requested by the Council members. Greater detail below, but this rulemaking offers a compliance path with no enforceable minimum energy efficiency requirements, potentially adding an almost-inestimable energy cost for NC ratepayers.

- (1) Open meetings and APA challenges. (possibly out of scope, but to document context)

While it may be outside of Rules Review's scope – I'm not an attorney – it should be noted that the public were forced to risk their health and life-safety to participate in the last 3 meetings. While DOI staff attempted to mitigate risk, many Council members – including the chairman – actively defied executive orders regarding

public gatherings and distancing/masking. I attended the summer meeting, but had no access to testimony because the audio provided in the public attendance room was unintelligible (my recordings available upon request). BCC staff provided me an official recording and my requested cost/reason/edits documentation. I felt fully accommodated, but many others who did not share my familiarity/access did not. I socialized the information as I could, but public documents used in rulemaking should be quickly, easily accessible on the Website for all stakeholders, especially during a pandemic. For the fall meeting, I chose not to risk my health and the lives of my family for the possibility of no audio again. A request for a recording/documentation was denied, specifically deferred to the BCC/DOI Website, where it never obviously appeared. I feel this prevented me (and others, who reasonably complied with executive orders) from participating. Additional stakeholders are prepared to come forward, if needed. For the last, winter meeting, standing executive orders were explicitly and willfully violated by the chairman, demanding that, not only the public, but voting members be required to be exposed to individuals with documented COVID close-contacts in order to participate. The day before the meeting DOI was forced (by undetermined higher authority) to allow remote participation for voting members – timely, as 2 members would have attended, having recently been exposed to COVID-positive family members – but no public accommodation was made, even for basic call-in listening. The public were told that governmental meetings were exempt from the executive orders and that additional accommodations for access were illegal. I understand notice deadlines for official comment, but jurisdictions across the state are allowing simply listening to testimony as an emergency measure. I go into this detail because there is considerable public confusion about what happened to D-23 (and other items you’ll see in the spring) at the fall/winter meetings. I sympathize with staff, considering the unreasonable (illegal?) demands put on them by the chairman, but the functional limit to safe public participation remains.

- (2) The indeterminate reference standard. (probably partially out of scope, but to document context)
- B-23 was published for the public with no reason or cost statements, as is typical for B-items. Voting members get this additional information. Stakeholders require access to these public documents at least by the time of notice in the Register, but are provided it only by harassing staff, who are overburdened already. For energy/cost modeling, especially, a month or two is insufficient to verify the modeling assumptions and develop informed comment. Knowingly false modeling assumptions will be addressed below and likely again after the next BCC meeting. Because of my access to the summer recording, I know that the B-23 proponent, Mr. Privott, struggled to provide reason for changing the standard, especially for creating an entire, parallel compliance pathway, when a path using Standard 301 (R406/N1006) already and still exists. Critically, a reference standard was not submitted for the “new” standard, which would have added missing clarity (and code functionality). “New” is in quotations because the proponent cited a non-existent standard, a hybrid of the currently referenced 301-2014 edition and the new 301-2019 edition. There is substantial difference between the versions, as I’ll demonstrate below. In my public comments – and likely in those of others – clarifying which standard was intended was critical. The proposal was moved to a D-item with no clarification. Again, the Council discussed D-23 with “ANSI/RESNET/ICC 301-**2019** Standard for the Calculation and Labeling of Energy Performance of **Low-Rise Residential Buildings** using an Energy Rating Index” [emphasis added]. This language should have been clarified and re-noticed, so the public would know what was intended, especially since it was commented upon directly.

An example of why this confusion matters:

301-**2014** Standard for the Calculation and Labeling of the Energy Performance of **Low-Rise Residential Buildings** using an Energy Rating Index

2. Scope. This standard is applicable to all one- and two-family dwellings and to dwelling units in residential buildings not over three stories in height above grade containing multiple dwelling units.

http://www.resnet.us/wp-content/uploads/archive/resblog/2016/01/ANSI-RESNET-ICC_301-2014-Second-Edition-Publish-Version.pdf

301-**2019** Standard for the Calculation and Labeling of the Energy Performance of **Dwelling and Sleeping Units** using an Energy Rating Index

2. Scope. This standard is applicable to Dwelling Units and Sleeping Units in Residential or Commercial Buildings, excepting hotels and motels.¹ Energy Ratings determined in accordance with this standard are for individual Dwelling Units or Sleeping Units only. This standard does not provide procedures for determining Energy Ratings for whole buildings containing more than one unit.

http://www.resnet.us/wp-content/uploads/archive/resblog/2019/01/ANSIRESNETICC301-2019_vf1.23.19.pdf

I am unaware of any public discussion indicating that the proponent or staff intended to modify the language after it was approved by Council, but before submission to Rules Review.

(3) “Corrected” version provided to Rules Review? (if true, in scope)

It has been rumored that the version of the rulemaking being submitted to Rules Review has language different from what was noticed in the NC Register, and different from what was adopted by the Council at the winter meeting. I hope this rumor is untrue, but it must be addressed. Though I have no direct evidence, a 3rd party forwarded a copy of a memorandum with the corrected proposal language provided by Mr. Privott to only-in-person voting members and possibly others at the meeting. If documentation is desired, I have archived the Register, the various versions of the minutes/agenda, public comments, and communications with DOI. When the crux of the proposal is the standard referenced, and the public questions which standard is proposed, and no clarification is made *in public*, then stakeholders feel actively excluded. *Historically, staff changes to referenced standards in exiting, approved code language are not editorial, if the changes to the standard are substantive. Since D-23 is approved code language, a substantive standard reference change is not editorial and would require public notice.*

(4) This is a formal request for a fiscal note. (in scope)

Various fiscal “analysis” documents have been provided at different times to different parties. Originally, the proponent claimed no impact. This is patently false. I’ve seen another “analysis” claiming that the new compliance path is an option, so does not require an analysis. This would be true if the optional path provided equal or greater energy cost savings vs. the other compliance paths. The proponent has not demonstrated equal or better. In fact, because of the (intentional?) removal of multiple mandatory provisions in all other compliance pathways, the lack of clarity regarding the standard, the lack of software/calculations requirements, no definition of an Energy Rating Index, the lack of a baseline for proposed building comparison, and others, there *is no enforceable minimum energy efficiency*. An official “analysis” was provided by DOI communications, which cited the analysis conducted for the original compliance pathway using Standard 301-2014. Again, the confusion about the referenced standard is a common problem, which is why the public demanded clarity; see below from the “Special Note” of Standard 301-2019:

“... **incorporates a number of substantive changes**, the more significant of which are all addenda to the first edition and criteria specific to **Attached Dwelling and attached Sleeping Units** in buildings of all heights.”
[emphasis added]

This proposal functionally eliminates an energy efficiency floor in North Carolina. The current language likely prevents a cost analysis because there are many technical flaws that it is unusable. Feasible or not, I request a referral to the Office of State Budget and Management for the development of a fiscal note. If further information is needed, I am at the disposal of Council staff, Rules Review, and OSBM.

Many thanks for your time and consideration,

-Ben Edwards

Burgos, Alexander N

Subject: FW: [External] Concerns regarding rulemaking – NCBC D-23, Privott, New ERI Compliance

From: Sam Ruark-Eastes <sam@greenbuilt.org>

Sent: Thursday, January 14, 2021 2:47 PM

To: rrc.comments <rrc.comments@oah.nc.gov>; Martin, Carl <Carl.Martin@ncdoi.gov>

Subject: [External] Concerns regarding rulemaking – NCBC D-23, Privott, New ERI Compliance

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Dear Rules Review Commission,

At Green Built Alliance we have seen how energy efficiency saves money, creates jobs, and reduces greenhouse gas emissions. Based on years of experience in this field our 260+ members are highly concerned about the proposed changes to the NC State Building Code: Residential Energy Efficiency.

As we understand it the D-23 (Privott, December 2020) proposal circumvents the ERI (R406.N1106) section's envelope backstop and all of the mandatory minimum energy efficiency requirements. Additionally, there is no framing for the ERI calculation (calculations, definitions, reference building, and documentation, for example). Further, no cost analysis of the impact to residents of these homes was done, though required by policy and statute. These are significant changes to the code that will have detrimental impacts to our economy and environment.

We are concerned that the public are not being heard during rulemaking and that our state will suffer for it. At the very least, we would like to understand how the presenter and Council expect this substantial change to affect energy efficiency and energy cost for the many decades families will own these homes.

The energy code should be getting stronger not weaker. [Here is information and a study from the US DOE](#) about model energy codes and the savings they produce.

Also, incentives like Duke's New Residential construction program help builders cover costs of energy efficiency and pass along long term savings to occupants.

We ask that information be provided, demonstrating why this change is good for North Carolina.

Sincerely,

The Board, Staff and members of Green Built Alliance

www.greenbuilt.org

Asheville, NC

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Sam Ruark-Eastes
Executive Director
Green Built Alliance
828-301-0774
www.greenbuilt.org

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Burgos, Alexander N

Subject: FW: [External] Review Request for Building Code Change Proposal re: D-23 from December Meeting
Attachments: NC Building Code Council Rulemaking Dec 2020_ Public access issues and a request for a fiscal note.pdf; NCBPA Position on ERI No Backstop Item C23_082620.pdf

From: Ryan Miller <ryan@buildingnc.org>
Sent: Wednesday, December 16, 2020 1:15 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Martin, Carl <Carl.Martin@ncdoi.gov>; Ben Edwards <ben@mathisconsulting.com>
Subject: [External] Review Request for Building Code Change Proposal re: D-23 from December Meeting

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Dear North Carolina Rules Review Commission,

On behalf of North Carolina Building Performance Association (NCBPA) and its member companies, I am requesting your review of recent activity at the December 7, 2020 North Carolina Building Code Council (NCBCC) meeting that we believe has violated Council rules. We are in agreement with the assertions and concerns detailed in an email to you all on December 14, 2020 from Ben Edwards (attached) and request your attention on the same matters.

To summarize, our two greatest concerns include:

1. Rumor from informed meeting stakeholders that the D-23 code proposal language that will be submitted to the Rules Review Commission differs from the language that has been used in the past 9 months as this proposal made it through the process, including being voted on and approved by the Council last Tuesday. NCBPA and many other organizations provided written and public comment to the Council and members directly (see attachment, bottom of page 2, item 3) for months highlighting our concerns with improper citations of the technical standard in reference. Despite these concerns, which if corrected would have made the code change legitimate, they were ignored repeatedly. In its current format, the approved code change is illegitimate as it references the wrong standard and functionally cannot be followed or enforced in the building code. Accordingly, Council staff and members working together to "fix" the proposal language after the vote is a rules violation.
2. There is great confusion regarding the availability of an accurate fiscal analysis or note that accompanies this proposal. In our opinion, the documentation that was provided is both incorrect technically and insufficient legally. The need for a true fiscal analysis was requested during the D item discussion by Council member Humiston but was denied. We request your careful review of this information.

Thank you for your consideration and please contact me for any additional information.

Best,
Ryan

D. Ryan Miller

Founder & Executive Director

North Carolina Building Performance Association

O: 919-841-6207

M: 919-521-3385

www.BuildingNC.org

Ryan@BuildingNC.org

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From: [Ben Edwards](#)
To: ["rrc.comments@oah.nc.gov"](mailto:rrc.comments@oah.nc.gov); [Martin, Carl](#)
Subject: NC Building Code Council Rulemaking Dec 2020: Public access issues and a request for a fiscal note
Date: Monday, December 14, 2020 2:04:24 PM
Attachments: [image001.png](#)
[image002.png](#)

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proposal language provided by Mr. Privott to only-in-person voting members and possibly others at the meeting. If documentation is desired, I have archived the Register, the various versions of the minutes/agenda, public comments, and communications with DOI. When the crux of the proposal is the standard referenced, and the public questions which standard is proposed, and no clarification is made *in public*, then stakeholders feel actively excluded. *Historically, staff changes to referenced standards in exiting, approved code language are not editorial, if the changes to the standard are substantive. Since D-23 is approved code language, a substantive standard reference change is not editorial and would require public notice.*

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This proposal functionally eliminates an energy efficiency floor in North Carolina. The current language likely prevents a cost analysis because there are many technical flaws that it is unusable. Feasible or not, I request a referral to the Office of State Budget and Management for the development of a fiscal note. If further information is needed, I am at the disposal of Council staff, Rules Review, and OSBM.

Many thanks for your time and consideration,
-Ben Edwards

August 26, 2020

North Carolina Building Code Council
Office of State Fire Marshal
1202 Mail Service Center
Raleigh NC 27699-1202

Dear Members of the North Carolina Building Code Council,

On behalf of our member companies and partner organizations, North Carolina Building Performance Association (NCBPA) would like to inform you that we do not support item C-23 on the September meeting's agenda presented by Robert Privott of North Carolina Home Builders Association (NCHBA).

While this code change proposal is presented as a new optional and cost effective pathway for residential builders to use to meet minimum energy code compliance requirements, what the proposal actually does is gut all minimum energy code and "backstop" requirements that our code currently requires in all other performance-based energy code compliance pathways options. In addition to gutting minimum energy code requirements in favor of builder profits, the proposal is also incomplete and should be rejected on those merits alone.

There are four key reasons that this proposal should be rejected. I will review each one individually.

First, we fundamentally disagree with NCHBA's continued attempts to erode our state code's minimum energy code requirements. NCHBA favors and lobbies for up-front builder profits – no matter how small - over short and long-term energy and utility bill savings for homeowners and renters. NCHBA already weakened our current code from what NCDOH and many others had recommended. This proposal is yet another example of this strategy being implemented through another energy code attack.

At some point in time, NCHBA needs to accept the minimum requirements put into place for our 2018 code and move on from their efforts to erode these standards. The standards were developed, agreed to and put into place through a long and arduous process that NCHBA actively participated in. I have yet to hear any hard evidence of builders or anyone else struggling with energy code in such a way that necessitates this proposal. But, I do know that the Governor recommends improvements to energy code requirements, not rollbacks and further exemptions.

Second, the proposal removes but does not replace the very foundation that the ERI target numbers are based on. Known as the backstop requirements, these values were built into our ERI table as minimum prescriptive standards for building envelope measures such as insulation and air sealing that must be met no matter what else a builder does using a performance-based energy code compliance method. By removing these values, the formula used to create the ERI target – the marker that denotes a home as meeting energy code – needs to be rewritten entirely.

However, this proposal does not include the information that would result from that process, nor does it acknowledge that the process would need to be performed. The proposal simply strips the

foundation from the formula but keeps the target. These values are not a one-for-one swap whereby you can remove the minimum values but keep the target – that’s not how the ERI table was designed or codified here. This proposal is wholly contrary to how the ERI works at a national and state level. This change would cause issues in the performance-based compliance pathway that builders, contractors and code officials would all struggle to understand and verify.

Our code established this ERI pathway for a specific purpose – to allow builders trade-off flexibility to meet energy code compliance, so long as they meet some minimum backstop requirements AND yield a home that is rated at the minimum levels set by the state. This proposal throws away the minimum backstop values but keeps the ERI scores that would allow a home to pass.

Third, the proposal will allow builders to build in ways most likely everyone in the construction and codes industry would agree is essentially incomplete or just a bad way to build. Here are three real-world examples of what this proposal will allow residential builders to do:

- Build a home with no insulation or air sealing but covered in rooftop solar. So long as the home meets the minimum ERI number for the climate zone, it would pass for energy code.
- Build a home without attic or slab edge insulation but with a highly efficient geothermal HVAC system. So long as the home meets the minimum ERI number for the climate zone, it would pass for energy code.
- In an extreme but real example, exempting compliance to section R403.1 Controls would allow homes to be built with HVAC systems but without thermostats. While no builder would likely do this, why would we allow for it in our code?

Allowing builders to build new homes without any insulation or air sealing, with leaky windows and doors, or incandescent lightbulbs would mean rolling back our current code standards years into the past. And for what? NCDOT’s own reporting states that the majority of these requirements would cost a builder no more than \$600 in additional up-front cost but would save homeowners and renters \$8 - \$10 per month for the life of the home. And as a reminder, I am not arguing for an additional \$600 of cost on a home, I am arguing to keep the current cost of the home in place and prevent NCHBA from lobbying for increased builder profits that will be detrimental to homeowners and renters.

Our code does not allow for these types of homes to be built now, so why would we revert to allowing them, even if NCHBA itself argues that likely no builders will pursue them?

And fourth, the proposal is incomplete based on the lack of information it includes - no matter what it argues for. Not only is this proposal bad for our code, builders, homeowners, renters and code officials, it’s also incomplete and should be rejected on those grounds alone:

1. It does not have a sufficient reason statement.
2. It does not have a sufficient cost analysis.
3. It contains incorrect references to code standards – that means this proposal is incomplete and will cause confusion and requires further amendments.

4. It does not offer any evidence from builders, consumers or code officials that this proposal solves a code problem or provides a benefit that has been asked for by anyone.

Lastly, I'll address an issue that may seem counterintuitive coming from our association. As most know, NCBPA supports responsible, cost-effective and moderate increases to minimum energy efficiency codes and standards over time. While this proposal keeps the same energy efficient target – the ERI number – which should result in an energy efficient home no matter how a builder gets there, that's not actually how the formula works. The ERI table has two pathways – one for homes without renewable energy generation and another for homes with renewable energy generation. No matter which pathway a builder chooses, our code still requires them to meet minimum energy code standards that are mostly in the building envelope category. The reason for this is that we in the construction and codes community know that these minimum standards contribute to a healthy, safe and energy “responsible” home. They don't require a home to be energy efficient on their own, they just require a home to have a foundation that we set as a minimum standard.

The problem with this part of the proposal is that the ERI numbers would need to be lowered significantly – meaning they would need to be much more stringent – in order to be on par with the current numbers that include the minimum backstops. Without that, this code council would be allowing builders to exempt themselves from all foundational energy code requirements and choose one or two ways that they would take to meet the target, which could be done by renewable energy systems alone.

Consider the case for a home with no insulation but covered in rooftop solar – what will happen to that home after the solar panels are decommissioned after 25 years? It would be lacking all energy code requirements for 25 years – including insulation, air sealing and energy efficient windows – and would then be without its energy generation source. Do we want our code to allow for that? Why would a builder build that way? NCHBA will argue they won't – so why would we allow for it?

It is my understanding that one of the primary reasons we have minimum code requirements is to establish minimum requirements that protect health, safety and promote minimum construction values that our states deems important. So again, why would we allow for this proposal?

North Carolina already set and maintains a minimum bar for these requirements and this proposal seeks to remove that bar. Our state needs to maintain responsible minimum energy code requirements that ensure a reasonable level of energy efficiency is available to North Carolina homeowners and renters. Builder profits should not take precedent over these minimum energy efficiency requirements.

We ask that the Council reject this proposal.

Thank you for your consideration. Please let me know if you need any further information.

Sincerely,





Position Statement on Item C-23 Proposal

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