

## 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: Building Code Council

RULE CITATION: 2018 Residential Code, N1101.13(R401.2)

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 Send the Rule to OSBM for determination of substantial economic impact

COMMENT:

*Staff recommends the Commission refer this Rule to the Office of State Budget and Management (OSBM) for determination of substantial economic impact, as set forth in G.S. 150B-21.9(a).*

*The agency did not create a fiscal note for this Rule when it published the proposed amendment in the Register. Among the public comments received on this Rule, the Commission received a request that the Rule be sent to OSBM for fiscal analysis.*

*G.S. 150B-21.9(a) states in relevant part:*

### **§ 150B-21.9. Standards and timetable for review by Commission.**

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.**

*Staff believes that the statutory criteria for referral to OSBM has met and recommends doing making this referral.*

Amanda J. Reeder  
Commission Counsel

**§ 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.)

# Request for Fiscal Analysis

**Burgos, Alexander N**

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

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**From:** Ben Edwards <[ben@mathisconsulting.com](mailto:ben@mathisconsulting.com)>

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

**To:** Reeder, Amanda J <[amanda.reeder@oah.nc.gov](mailto: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

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**From:** Reeder, Amanda J <[amanda.reeder@oah.nc.gov](mailto:amanda.reeder@oah.nc.gov)>

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

## Request for Fiscal Analysis

To: Ben Edwards <[ben@mathisconsulting.com](mailto:ben@mathisconsulting.com)>

Cc: Martin, Carl <[Carl.Martin@ncdoi.gov](mailto:Carl.Martin@ncdoi.gov)>; Reeder, Amanda J <[amanda.reeder@oah.nc.gov](mailto: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**

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

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**From:** Ben Edwards <[ben@mathisconsulting.com](mailto:ben@mathisconsulting.com)>

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

**To:** rrc.comments <[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)>; Martin, Carl <[Carl.Martin@ncdoi.gov](mailto: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

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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](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

## Request for Fiscal Analysis

**2. Scope.** This standard is applicable to Dwelling Units and Sleeping Units in Residential or Commercial Buildings, excepting hotels and motels.<sup>1</sup> 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](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 3<sup>rd</sup> 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

# SUBMISSION FOR PERMANENT RULE

2018 NC Residential Code  
N1101.13 (R401.2) Compliance. (200714 Item B-23)

## IRC Chapter 11

**N1101.13 (R401.2) Compliance.** Projects shall comply with one of the following:

1. Sections N1101.14 through N1104.
2. Section N1105 and the provisions of Sections N1101.14 through N1104 labeled “Mandatory.”
3. An energy rating index (ERI) approach in Section N1106.
4. North Carolina specific REScheck™ shall be permitted to demonstrate compliance with this code. Envelope requirements may not be traded off against the use of high efficiency heating or cooling equipment. No trade-off calculations are needed for required termite inspection and treatment gaps.
5. Rated in accordance with ANSI/RESNET/ICC 301-2019 Standard for the Calculation and Labeling of the Energy Performance of Dwelling and Sleeping Units using an Energy Rating Index with a maximum energy rating index (ERI) less than or equal to the appropriate value indicated in one of the following tables as applicable, when compared to the ERI reference design:

**MAXIMUM ENERGY RATING INDEX**  
(without calculation of on-site renewable energy)

<u>CLIMATE ZONE</u>	<u>JAN. 1, 2019 – Dec. 31, 2022</u>	<u>JAN. 1, 2023 AND FORWARD</u>
<u>3</u>	<u>65</u>	<u>61</u>
<u>4</u>	<u>67</u>	<u>63</u>
<u>5</u>	<u>67</u>	<u>63</u>

**MAXIMUM ENERGY RATING INDEX**  
(including calculation of on-site renewable energy)

<u>CLIMATE ZONE</u>	<u>JAN. 1, 2019 – Dec. 31, 2022</u>	<u>JAN. 1, 2023 AND FORWARD</u>
<u>3</u>	<u>51</u>	<u>42</u>
<u>4</u>	<u>54</u>	<u>50</u>
<u>5</u>	<u>55</u>	<u>51</u>