**RULES REVIEW COMMISSION**

**November 17, 2011**

**MINUTES**

The Rules Review Commission met on Thursday, November 17, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Margaret Currin, George Lucier, Pete Osborne, Stephanie Simpson, Ralph Walker and Faylene Whitaker. Commissioner Venable joined via Skype.

Staff members present were: Joe Deluca and Bobby Bryan, Commission Counsel; Dana Vojtko, Julie Edwards and Tammara Chalmers.

**RULES REVIEW COMMISSION PUBLIC HEARING**

The meeting was called to order at 10:02 a.m. with Judge Walker presiding.

Chairman Walker immediately opened a portion of the meeting for a public hearing on the proposed amendment to Rule 26 NCAC 05 .0108 and the proposed adoption of Rule .0114. Chairman Walker called on anyone present who wished to comment on or object to the adoption of 26 NCAC 05 .0114 and the amendment of 26 NCAC 05 .0108 as they were noticed in the NC Register. Tom Miller, Carolyn Bakewell and Nick Fountain made their comments before the Commission. The Rules Review Commission has thus far received two written comments on Rule .0108. These comments will become part of the rulemaking record. The period to receive comments will expire at 5:00 p.m., January 3, 2012. The Commission may vote on the adoption of 26 NCAC 05 .0114 and the amendment of 26 NCAC 05 .0108 at its regularly scheduled meeting in January.

The public hearing portion of the meeting was closed about 10:15 a.m.

Chairman Walker then reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

**APPROVAL OF MINUTES**

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the October 20, 2011 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

04 NCAC 02R .1711 – Alcoholic Beverage Control Commission. The Commission approved the rewritten rule submitted by the agency.

04 NCAC 03C .0807, .1001; 16A .0101, .0105, .0201, .0202, .0401, .0402, .0403, .0405, .0407, .0409; 16C .0102, .0103, .0202, .0203, .0304, .0305; 16D .0103, .0301, .0407, .0901, .0902; 16E .0104, .0301, .0405, .0702; 16F .0105, .0108, .0109, .0111, .0112, .0113 – Office of the Commissioner of Banks. The Commission approved the rules submitted by the agency with the technical changes.

04 NCAC 16A .0301, .0302 – Office of Commissioner of Banks. The Commission approved the rewritten rules submitted by the agency.

10A NCAC 10 .0102, .0308, .0309, .0310, .0311, .0312, .0506 – Social Services Commission. The Commission approved the rewritten rules submitted by the agency. Kim Miller addressed the Commission.

10A NCAC 10 .0203 – Social Services Commission. No action was taken

21 NCAC 25 .0209 – Interpreter and Transliterator Licensing Board - The Commission approved the rewritten rule submitted by the agency.

21 NCAC 32R .0106 – Medical Board. The rule was returned to the agency at the agency's request.

2012 Fuel Gas Code – Sections 311.1 and 311.2  – Building Code Council.  The Commission objected to these rules based on lack of authority. There is no authority to require carbon monoxide alarms in all the new construction and existing dwellings covered by this rule. The scope or coverage of this rule is too broad. The statutory authority extends to only dwellings “having a fossil‑fuel burning heater, appliance, or fireplace, and in any dwelling unit having an attached garage” (G.S. 143-138(b2)). These two rules appear to extend that requirement to all dwellings covered under this portion of the building code, including those who do not have either a fossil-fuel burning heater, appliance, fireplace or an attached garage.

2012 Mechanical Code – Sections 313.1 and 313.2 – Building Code Council. The Commission objected to these rules for the same reasons it objected to the previous rule.

2012 Plumbing Code – Sections 315.1 and 315.2 – Building Code Council. The Commission objected to these rules for the same reasons it objected to the previous rules.

2009 Residential Code – Sections 313.1.1 and 313.1.2 – Building Code Council. The Commission objected to these rules for the same reasons it objected to the previous rules.

2012 Residential Code – Sections 311.1 and 311.2 – Building Code Council. The Commission objected to these rules for the same reasons it objected to the previous rules.

Barry Gupton with the Building Code Council addressed the Commission.

**LOG OF FILINGS**

Chairman Walker presided over the review of the log of permanent rules.

**Board of Agriculture**

02 NCAC 43H .0102 – The rule was approved unanimously.

Commissioner Osborne was not present during the vote.

**Plant Conservation Board**

02 NCAC 48F .0305 – The Commission approved the technical change to this rule in paragraph (c)(4) and took no action concerning the change to paragraph (d)(6) which was a legislatively mandated change and outside the scope of the Commission’s reviewing action. The rule is legislatively subject to legislative review with a delayed effective date. Ray Starling from Department of Agriculture addressed the Commission.

**Child Care Commission**

10A NCAC 09 .0102 - The Commission objected to this Rule based on ambiguity. In item (16)(b) page 2 line 35 it is unclear what constitutes “healthy air quality.” The rule refers to the “Air Quality Color Guide” found on the division’s web site. However it is not clear whether the agency means only weather color coded as “good” (green) in the far left hand column or would also include the category of “moderate” or even “unhealthy for certain groups.” In item (20) page 3 it is unclear what constitutes the “equivalent” of the N.C. Early Educator Certification. There are other rules, e.g. Rule .2819(b)(3)(A), that require having this certification “or its equivalent.” Since that equivalency occurs in more than one place it seems as if the standard(s) should be provided here. Note that in item (3) of this rule on page 1 at lines 15-16 the agency did define what would establish an equivalency standard for “’Basic School-Age Care’ training (BSAC training).” It seems they should do the same here. It is likewise unclear if there is any definition at all for the “N.C. Early Childhood Administration Credential” or the standard for “its equivalent,” both of which are referred to in Rule .2819(b)(1)(A); or for “early childhood” as referred to in Rule .2819(b)(1)(B).

10A NCAC 09 .2819 - The Commission objected to this Rule based on ambiguity. The rule is difficult to follow and unclear in determining the standards that set each “point level” apart. [The rule establishes seven “point levels” to distinguish the level to which the various child care centers can aspire.] The rule is especially difficult to follow in the last sub-sub-paragraphs and the requirements are unclear because they are formatted as lengthy run-on sentences with confusing semicolons and commas rather than formatted as lists. To cite one example: In (d)(5)(B) page 4 lines 20 – 31 it is not clear what the varying alternatives are for the program coordinator to satisfy, especially the hours of experience that are required to meet each alternative. As in the previous rule it is also unclear if there is any definition at all for the “N.C. Early Childhood Administration Credential” or the standard for “its equivalent,” both of which are referred to in Rule .2819(b)(1)(A); or for “early childhood” as referred to in Rule .2819(b)(1)(B).

10A NCAC 09 .2820 - The Commission objected to this Rule based on ambiguity for the same reasons as in the previous rule. The rule is difficult to follow and unclear in determining the standards that set each “point level” apart. As in the previous rule it is also unclear if there is any definition at all for the “N.C. Early Childhood Administration Credential” or the standard for “its equivalent,” as used throughout this rule beginning in (c)(1).

10A NCAC 09 .2822 - The Commission objected to this Rule based on ambiguity in that the rule is too difficult to follow because of the lack of lists further breaking down and making clear the requirements in the sub-sub- paragraphs. The rule is also ambiguous in paragraph (b)(3). It is not clear if the requirement in (b)(3) for “eight additional clock hours of annual in-service training” requires eight hours for each of the five years or a total of eight hours over the five years.

The Commission received more than 10 written letters of objection to the four rules. If they are approved these rules will be subject to legislative review and a delayed effective date.

**Environmental Management Commission**

15A NCAC 02B .0304 was approved unanimously.

**Board of Cosmetic Art Examiners**

The agency has withdrawn all the rules and plans to refile them for the December meeting.

**Board of Dietetics/Nutrition**

All rules were approved unanimously.

**Medical Board**

The agency has withdrawn all the rules and refiled them for the December meeting.

**Board of Examiners for Plumbing, Heating and Fire Sprinkler Contractors**

Nick Fountain attorney for the Board addressed the Commission.

All rules were approved unanimously with the following exceptions:

21 NCAC 50 .0107 – The Commission objected to this Rule based on lack of necessity. This rule deals only with the internal management of the agency and is not necessary to be included in the N.C. Administrative Code. G.S. 150B-2(8a)a. exempts from the definition of "rule" for purposes of the Administrative Procedure Act "[s]tatements concerning only the internal management of an agency...if the statement does not affect the procedural or substantive rights or duties of a person not employed by the agency..." This rule appears to affect only Board members and would be more appropriately included in a set of bylaws.

21 NCAC 50 .0301 – The Commission objected to this Rule based on lack of statutory authority and ambiguity. There does not appear to be authority for the provisions in Paragraphs (d), (f) and (i) that allow a person to obtain a license without passing an examination. G.S. 87-21(b)(3) requires the Board to give an examination and issue a license as a result of the examination. G.S. 87-21(b)(4) does make an exception and allows the Board to either provide an examination for fire sprinkler contracting or accept a current certification of the National Institute for Certification in Engineering Technologies for Fire Protection Engineering Technicians, Level III, subfield of Automatic Sprinkler System Layout. None of these paragraphs require that certification. In Paragraph (i), it is not clear what is mean by "an Authority Hearing Jurisdiction."

21 NCAC 50 .0306 – The Commission objected to this Rule based on lack of statutory authority. There does not appear to be authority for the provision in Paragraph (h) that applicants for licensure in the Residential Fire Sprinkler Installation Contractor classification must hold an active Plumbing Class I or Class II Contractor license for a minimum of three years. G.S. 87-21(b)(3) limits experience that can be required to two years.

21 NCAC 50 .0505 – The Commission objected to this Rule based on lack of statutory authority. In Paragraphs (e) and (f), there is no authority cited for this board to determine what a Licensed Professional Engineer is required to do.

21 NCAC 50 .0516 – The Commission objected to this Rule based on lack of statutory authority. There is no authority cited for this board to determine what a Licensed Professional Engineer is required to do.

21 NCAC 50 .1401 – The Commission objected to this Rule based on ambiguity. It is not clear what standards the Board will use in approving continuing education classes. There do not appear to be any standards in the rules. It is not clear what standards the Board will use in approving continuing education classes. There do not appear to be any standards in the rules.

The Commission received more than 10 written letters of objection to 21 NCAC 50 .1102, .1402, .1403, .1404, .1405, .1407, .1408, .1409, .1410. These rules are now subject to legislative review and a delayed effective date. The Commission also received more than 10 written letters of objection to Rules .0301, .0306, .0505 and .1401. If they are approved these rules will be subject to legislative review and delayed effective date.

**Psychology Board**

21 NCAC 54 .1605 was approved unanimously.

**Real Estate Commission**

Prior to the review of the rules from the Real Estate Commission, Commissioner Currin recused herself and did not participate in any discussion or vote concerning these rules because she possesses an (inactive) real estate license.

Tom Miller and Curtis Aldendifer from the Real Estate Commission addressed the Commission.

All rules were approved unanimously.

**TEMPORARY RULES**

Chairman Walker presided over the review of the log of temporary rules.

**Commission for Public Health**

10A NCAC 41A .0106 was approved unanimously.

Commissioner Simpson was not present during the vote.

Jim Hayes from the Division of Public Health addressed the Commission regarding 15A NCAC 18A .2528.

15A NCAC 18A .2528 was approved unanimously.

**COMMISSION PROCEDURES AND OTHER BUSINESS**

The meeting adjourned at 12:14 p.m.

The next scheduled meeting of the Commission is Thursday, December 15 at 10:00 a.m.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Judge Ralph A. Walker/Chair

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Date

