**RULES REVIEW COMMISSION**

**March 17, 2011**

**MINUTES**

The Rules Review Commission met on Thursday, March 17, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jennie Hayman, George Lucier, Dan McLawhorn, Ann Reed, David Twiddy and Ralph Walker.

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

The following people were among those attending the meeting:

John Leskovec Office of State Budget and Management

Bob Hamilton ABC Commission

Mary Boone Department of Cultural Resources

Barry Gupton Building Code Council

Anna Baird Choi Allen & Pinnix

Nancy Pate Department of Environment and Natural Resources

Deborah Gore DENR/Division of Water Quality

Sarah Morrison DENR/Division of Water Quality

Laura O'Donoghue Department of Cultural Resources

Dana Folley DENR/Division of Water Quality

Bill Scoggin Troutman Sanders

Robert Privott North Carolina Homebuilders Association

Joanne Rutkofske DENR/Well Contractors Certification Commission

Anca Grozav Office of State Budget and Management

Mark Selph Licensing Board for General Contractors

Ellen Lorscheider DENR/Division of Waste Management

Sue Kornegay State Board of Opticians

Christina Apperson Medical Board

Paul Stock North Carolina Bankers Association

Ann Christian Substance Abuse Professional Practice Board

Bert Bennett Substance Abuse Professional Practice Board

David McGowan NC Realtors

Jessica Delaney Office of Administrative Hearings/Intern

Zack Moore DHHS/Division of Public Health

Barden Culbreth Substance Abuse Professional Practice Board

Roberta Ouellette Appraisal Board

Nancy Scott Solid Waste Management/Attorney General's Office

Q. Shanté Martin Community Colleges

Bob Martin DHHS/Division of Public Health

Jean Stanley Board of Nursing

Chris Hoke Department of Health and Human Services

Joshua Davis Department of Cultural Resources

Michael Hill Department of Cultural Resources

Whitney Waldenberg Troutman Sanders

The meeting was called to order at 9:03 a.m. with Ms. Hayman presiding. She 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 Hayman asked for any discussion, comments, or corrections concerning the minutes of the February 17, 2011 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

15A NCAC 02H .0903, .0907, .0908, .0922 – Environmental Management Commission. The Commission approved the rewritten rules submitted by the agency.

21 NCAC 32F .0103 – Medical Board. No rewritten rule was submitted by the agency and no action was taken.

21 NCAC 32X .0104 – Medical Board.  Christina Apperson from the Medical Board who had been unable to attend the February meeting explained the justification for the language in the rule.  The Commission approved the rule as originally submitted with technical changes.  Commissioners Crisp, Funderburk, Walker, Reed and Lucier voted for the motion to approve the rule. Commissioners Twiddy and McLawhorn voted against the motion.

21 NCAC 42B .0302 – Board of Optometry. The Commission approved the rewritten rule submitted by the agency.

Building Code Council – 2012 NC Energy Conservation Code 103.11, 105.1. The Commission approved the rewritten rules submitted by the agency.

Building Code Council – 2012 NC Energy Conservation Code 503.2.9. The agency withdrew the Section included in the 2012 NC Energy Conservation Code and replaced it with the separate version of the Section.  The Commission approved the rule since there was no longer conflicting language.

Building Code Council – NC Residential Code R302.2, R313.1. The Commission approved the rules with the requested technical changes. The Commission also determined based on communications from the agency that these rules are intended to be NC amendments to the 2012 Residential Code as well.

Building Code Council – 2012 NC Residential Code – 2009 IRC with NC Amendments. The Commission approved the 2012 Residential Code with the NC amendments and technical changes.

The Commission received more than 10 written letters of objection to the 2012 Energy Conservation Code and the 2012 Residential Code. These are now subject to legislative review and a delayed effective date.

**LOG OF FILINGS**

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

**Alcoholic Beverage Control Commission**

All permanent rules were approved unanimously with the following exceptions:

04 NCAC 02S .0512 – The Commission objected to this rule based on lack of statutory authority. There was no authority cited for much of what was in the rule.  The agency cited general authority to adopt rules to implement G.S. Chapter 18B, authority to inspect licensed premises, and authority to approve a hotel's policies and procedures for dispersing alcoholic beverages from a guest room cabinet.  There was no authority cited to adopt rules about storage of spirituous liquor containers.

04 NCAC 02T .0713 – The Commission objected to this rule based on ambiguity.  In (c), it was not clear what would constitute "substantial" advertising matter.

The Commission granted the Agency’s Request for Waiver of Rule 26 NCAC 05 .0108(a) and approved re-written rules 04 NCAC 02S .0512 and 02T .0713.

**Department of Cultural Resources,**

The rules being repealed in 07 NCAC 02A, 02B, 02C, 02D and 02E were approved unanimously.

The rules in 07 NCAC 02F were withdrawn by the agency.

The rules in 07 NCAC 02H and 02I were approved with the following exceptions:

07 NCAC 02H .0102 – 07 NCAC 02H .0102 –The Commission objected to this rule based on lack of statutory authority and ambiguity.  In (a), it is not clear what are the "Library collection management procedures."  There is no authority cited to require compliance with procedures that have not been adopted as rules.

07 NCAC 02H .0203 – The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards are in the State Library's *Handbook for State Agencies*. There is no authority cited to set requirements outside rulemaking.

07 NCAC 02H .0305 – The Commission objected to this rule based on lack of statutory authority and ambiguity. In (a) and (b), it is not clear what the Library's circulation procedures and policy are. There is no authority cited for establishing procedures and policy affecting the public outside rulemaking.

The rules in 07 NCAC 02J were withdrawn by the agency.

**Department of Cultural Resources and Historical Commission**

The rules being repealed in 07 NCAC 04R were withdrawn by the agency.

07 NCAC 04S .0103 was approved unanimously.

The rules in 07 NCAC 13 were withdrawn by the agency.

**Commission for Public Health**

10A NCAC 41A .0101 was approved unanimously.

**Commission for Public Health**

Prior to the review of the rules from the Commission for Public Health, Commissioner McLawhorn recused himself and did not participate in any discussion or vote concerning these rules because of the financial interest of his employer, City of Raleigh as an owner of a closed, regulated landfill.

All permanent rules were approved unanimously with the following exceptions:

15A NCAC 13B .1604 was withdrawn by the agency and refiled for next month's meeting.

15A NCAC 13B .1626 was withdrawn by the agency and refiled for next month's meeting.

15A NCAC 13B .1635 – The Commission objected to this rule based on lack of statutory authority and ambiguity. In (a), it is not clear what standards the Division will use in approving an alternative timeline. This is a modification provision without specific guidelines as prohibited by G.S. 150B-19(6).

**Well Contractors Certification Commission**

All permanent rules were approved unanimously with the following exceptions:

15A NCAC 27 .0301 – The Commission objected to this rule based on lack of statutory authority and ambiguity. (1) There is no authority cited for the provision in (a) line 5 that requires that a person be a citizen or legal resident in order to be licensed as a well contractor. The authority that is cited (G.S. 87-98.6) is limited to establishing “minimum requirements of education, experience, and knowledge” for the type of certification the applicant is seeking.

It may be that there is other state or federal authority to deny licensure to a person who is not a citizen or legal resident but that is not cited. There may also be other state or federal law which would deny someone, whether or not licensed, the legal authority to work. At the same time that authority is not be sufficient for this state agency to deny licensure to such a person.

It is also interesting to note that while a person might be a legal resident of the United States, that does not mean that they are necessarily entitled to work in the United States. For example a person holding a student visa is not automatically entitled to engage in work as well.

(2) It is unclear what constitutes the “level specific” well contractor activities referred to in (d) lines 30 and 31 of this rule. There are four levels of well certification provided for in these rules, Levels A through D. Paragraph (d) of this rule requires the applicant to meet “the requirements specified in Rule .0702 … in level specific well contractor activities.” However that Rule .0702 in each of the paragraphs applicable to each of the levels requires the applicant to “submit proof of … experience in [the appropriate] level specific well contractor activities specified in Rule .0301” thus setting up a circular situation that never does specify what the level specific activities or requirements actually are.

15A NCAC 27 .0702 – The Commission objected to this rule based on ambiguity. It is unclear what constitutes the “level specific well contractor activities as specified in Rule .0301” referred to in (d) lines 30 and 31 of this rule. There are four levels of well certification provided for in these rules, Levels A through D in (a) through (d). Each paragraph of this rule requires the applicant to meet “level specific well contractor activities specified in Rule .0301 of this Chapter….” However that Rule ..0301 in each of the paragraphs applicable to each of the levels requires the applicant to submit “proof of … experience meeting the requirements specified in Rule .0702” thus setting up a circular situation that never does specify what the level specific activities or requirements actually are.

**Licensing Board for General Contractors**

All permanent rules were approved unanimously.

**Board of Cosmetic Art Examiners**

All permanent rules were approved unanimously with the following exceptions:

21 NCAC 14N .0113 – The Commission objected to this rule based on ambiguity. It is unclear what this rule requires now that “reapplication for“ in (a) line 7 is being deleted.

Prior to this proposed change an applicant who had failed either portion of the examination had to reapply for the examination. Presumably in reapplying to take the examination the applicant would be reapplying to take the entire examination. And it was the “reapplication” that required the additional study in order for it to be accepted by the board. Now it is simply “examination” that “shall be accepted by the Board” and it is unclear what that (the examination? an examination? permission to retake examination? successfully completed portion of an/the examination?) is.

**Interpreter and Transliterator Licensing Board**

All permanent rules were approved unanimously.

**Medical Board**

21 NCAC 32M .0109 was approved unanimously.

**Board of Nursing**

21 NCAC 36 .0809 was approved unanimously.

**State Board of Opticians**

All permanent rules were approved with the following exception:

21 NCAC 40 .0214 – The Commission objected to this rule based on ambiguity. This rule is poorly written. It is not in chronological order and lacks cohesiveness and clarity. There are four different times and circumstances when the rule refers to dismissing a complaint as “unfounded or trivial.” It would seem that at some point early in the process after a complaint has survived one or even two of the times when it could be dismissed as “unfounded or trivial” that it would or could no longer be considered and dismissed as “unfounded or trivial.” The RRC objected to the rule on the basis of ambiguity and the agency should rewrite the rule in its entirety.

The Commission received more than 10 written letters of objection to 21 NCAC 40 .0104, 0109, .0206-.0207, .0209, .0214, .0302-.0303, .0323, .0422. These rules are now subject to legislative review and a delayed effective date.

**Appraisal Board**

21 NCAC 57D .0402 – The Commission objected to this rule based on lack of statutory authority and ambiguity. There is no authority cited that allows the Appraisal Board to require an appraisal management company to pay appraisers a certain compensation, in this case compensation “at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised” as set in (a). There also is no authority cited for the provision in (b) that allows the board to prohibit an appraisal company from charging a fee that would “exceed what is customary and reasonable … in the market area.” There is nothing in the cited authority that authorizes the Appraisal Board to be involved in the compensation between an appraiser and a management company other than requiring the management company to make a “timely payment.” Even if there were authority to require a certain level of payment as in (a) or forbid fees above a certain amount as in (b) it is not clear how the “customary and reasonable” level of payment or fee is determined. The agency cites as the reason for this rule that “[s]ome management companies will not pay sufficient fees to appraisers, and as a result, more experienced … appraisers will not accept these assignments.” Presumably whatever payments are accepted or fees agreed to would be determined by the marketplace, which would seem to make those less “sufficient fees” “customary and reasonable” at least for less experienced appraisers. If the problem is that management companies are hiring incompetent appraisers then it seems the solution is to prohibit the companies from using incompetent appraisers and revoking their licenses when they do. They could also discipline appraisers from accepting assignments that exceed their competencies.

**Substance Abuse Professional Practice Board**

All permanent rules were approved unanimously.

**Board of Community Colleges**

Prior to the review of the rules from the Board of Community Colleges, Commissioner Lucier recused himself and did not participate in any discussion or vote concerning these rules because he is a member of the Central Carolina Community College Board of Trustees.

All permanent rules were approved unanimously.

The Commission received more than 10 written letters of objection to 23 NCAC 02C .0301. This rule is now subject to legislative review and a delayed effective date.

**TEMPORARY RULES**

There were no temporary rules filed for review.

**COMMISSION PROCEDURES AND OTHER BUSINESS**

The staff informed the Commission about the status of Senate Bills 22 and 284.

The meeting adjourned at 10:28 a.m.

The next scheduled meeting of the Commission is Thursday, April 21 at 9:00 a.m.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Jennie J. Hayman/Chair

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Date