

## SUBCHAPTER 42K - RULEMAKING PROCEDURES

### SECTION .0100 - GENERAL INFORMATION

#### 21 NCAC 42K .0101 PURPOSE

This Subchapter establishes basic minimum procedures for the adoption, amendment, or repeal of administrative rules. These procedures ensure the participation of the public in the regulatory and policy-making activities of the Board.

*History Note:* Authority G.S. 150B-21.1; 150B-21.2;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### 21 NCAC 42K .0102 ORGANIZATION OF SUBCHAPTER

- (a) Sections .0200 through .0600 of this Subchapter pertain to the agency's procedures for adopting, amending, or repealing rules pursuant to the requirements of Chapter 150B, Article 2A.
- (b) Section .0700 of this Subchapter deals with the issuance of declaratory rulings under the authority of G.S. 150B-4.

*History Note:* Authority G.S. 150B-4; 150B-21.1; 150B-21.2;  
Eff. June 1, 1989;  
Amended Eff. March 1, 1993;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

### SECTION .0200 - PETITION FOR RULE-MAKING

#### 21 NCAC 42K .0201 NATURE OF THE PETITION

A petition for rule-making is a method by which a person may focus the agency's attention upon areas under the agency's rule-making authority where a need for new or changed procedures exists. A petition for rule-making may request action to adopt new rules or to amend or repeal existing rules.

*History Note:* Authority G.S. 150B-20;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### 21 NCAC 42K .0202 SUBMITTING THE PETITION

Any person wishing to request the Board to adopt, amend, or repeal a rule shall address a petition to the Board. The envelope containing the petition should clearly bear the notation: RULE-MAKING PETITION RE: and the subject area.

*History Note:* Authority G.S. 150B-20;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### 21 NCAC 42K .0203 CONTENTS OF THE PETITION

There is no particular form required for a rule-making petition. However, the petitioner should include the following:

- (1) an indication of the subject area to which the petition is directed [for example: "This is a petition to conduct rule-making to amend (rule number)"];
- (2) either a draft of the proposed rule or a summary of its contents, or an identification of the rule to be amended or repealed;
- (3) reasons for the proposal;
- (4) the effect of the proposal on existing rules and practices;
- (5) any data supporting the proposal; and
- (6) the name and address of each petitioner.

*History Note:* Authority G.S. 150B-20;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### 21 NCAC 42K .0204 AGENCY RESPONSE TO A RULE-MAKING PETITION

(a) The President of the Board may designate one or more board members to determine whether the public interest will be served by granting a rule-making petition. Prior to making this determination, the Board may request additional information from the petitioner, may contact interested persons or persons likely to be affected by the proposal and request their comments, or may use any other appropriate method for obtaining information upon which to base the determination of public interest.

(b) The designated Board member or members will recommend to the Board either the institution of rule-making proceedings or the denial of the petition, as the total information obtained suggests to be proper and in the public interest.

(c) The Board will decide whether to grant or deny the petition within the time limits set in G.S. 150B-20. If the decision is to deny the petition, the Board shall notify each petitioner in writing, stating the reasons for the denial. If the decision is to grant the petition, the Board shall immediately initiate a rule-making proceeding as described in these rules and in G.S. 150B-21.1 or G.S. 150B-21.2.

*History Note:* Authority G.S. 150B-20; 150B-21.1; 150B-21.2;  
Eff. June 1, 1989;  
Amended Eff. March 1, 1993;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### **21 NCAC 42K .0205 RECOURSE TO DENIAL OF THE PETITION**

If the Board denies a petition for rule-making, the petitioner may seek judicial review of the denial to determine whether the Board abused its discretion. This action requires that the petitioner file a civil suit against the Board in the Superior Court of Wake County.

*History Note:* Authority G.S. 150B-20; 150B-45;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

### **SECTION .0300 - NOTICE AND ADVICE ON POTENTIAL RULE-MAKING TOPICS**

#### **21 NCAC 42K .0301 SOLICITING PUBLIC COMMENT**

In addition to seeking information by other methods, the Board may solicit comments from the public on a subject matter of possible rule-making under active consideration by the Board. Should public comment be desired at this preliminary stage of rule-making, the Board may give notice in any manner it determines to be appropriate.

*History Note:* Authority G.S. 150B-21.2;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

### **SECTION .0400 - NOTICE OF RULE-MAKING**

#### **21 NCAC 42K .0401 TIMING AND MANNER OF NOTICE**

When the Board decides to conduct a rule-making proceeding, either in response to a petition or otherwise, the Board shall give notice as required by G.S. 150B-21.2.

*History Note:* Authority G.S. 150B-21.2;  
Eff. June 1, 1989;  
Amended Eff. March 1, 1993;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

#### **21 NCAC 42K .0402 OBTAINING ADDITIONAL INFORMATION ON PROPOSED RULES**

Persons desiring information in addition to that provided in a published notice of rule-making proceedings may contact the Board in writing at its address. The envelope containing the request should clearly bear the notation: "REQUEST FOR INFORMATION ON PROPOSED RULES". The request should clearly indicate the rule-making proceeding which is the subject of the inquiry. The sender should enclose a self-addressed stamped envelope for the Board's use in providing such information.

*History Note:* Authority G.S. 150B-21.2;

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

## **SECTION .0500 - RULE-MAKING HEARINGS**

### **21 NCAC 42K .0501 REQUEST TO PARTICIPATE IN HEARING**

(a) Any person desiring to present oral data, views, or arguments at the rule-making hearing on a proposed rule should file a request to participate with the Board at least three full business days prior to the hearing.

(b) The request to participate should contain a clear reference to the proposed rule, a brief summary of the person's views with respect thereto, and how long the person desires to speak. The envelope containing the request should clearly bear the notation: "REQUEST TO PARTICIPATE IN RULE-MAKING HEARING RE&gml" and the subject matter of the proposed rule.

*History Note: Authority G.S. 150B-21.2;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

### **21 NCAC 42K .0502 RESPONSE TO THE REQUEST TO PARTICIPATE**

Upon receipt of a request to participate in a rule-making hearing, the Board will acknowledge receipt of the request and inform the person in writing or by telephone of any limitations on oral presentations deemed necessary for a full and effective public proceeding on the proposed rule, including denial of the request and the reasons therefor. Failure by the Board to acknowledge a request shall not constitute approval of any request to participate. In general, each presentation will be limited to 15 minutes unless some other time limit is prescribed by the hearing officer for the rule-making hearing.

*History Note: Authority G.S. 150B-21.2;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

### **21 NCAC 42K .0503 PRESENTATION OF ORAL COMMENT**

(a) The hearing officer at a rule-making hearing shall create an agenda of members of the public whose requests to participate in the hearing have been approved.

(b) If time allows, the hearing officer shall permit limited comment by attending members of the public who have not submitted requests to participate.

(c) Any person making an oral presentation is encouraged to submit a written copy of the presentation to the hearing officer or the Board prior to or during the rule-making hearing.

*History Note: Authority G.S. 150B-21.2;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

### **21 NCAC 42K .0504 POWERS AND DUTIES OF THE HEARING OFFICER**

(a) The hearing officer at a rule-making hearing shall have complete control of the proceedings, including:

- (1) extending any time limitations;
- (2) recognizing speakers;
- (3) setting time allotments for presentations;
- (4) questioning speakers;
- (5) directing the discussion; and
- (6) otherwise managing the hearing.

(b) The hearing officer, at all times, will take care that each person participating in the hearing is given a fair opportunity to present views, data, and comments.

*History Note: Authority G.S. 150B-21.2;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

## SECTION .0600 - PUBLIC ACCESS TO RULE-MAKING

### 21 NCAC 42K .0601 FILING WRITTEN COMMENTS ON PROPOSED RULES

- (a) Any person may file with the Board a written submission containing data, comments, or arguments for or against a rule, after publication of a Notice of Rule-making by the Board. Written comments must be received not later than 30 days after the notice is issued, unless a different period has been prescribed in the notice or granted upon request.
- (b) The envelope containing the written submission should bear the notation "WRITTEN COMMENT RE:" and clearly state the rule or rules commented upon.
- (c) Upon receipt of written comments, the Board will acknowledge the receipt in writing with an assurance that the comments therein will be considered fully.

*History Note:* Authority G.S. 150B-21.2;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

### 21 NCAC 42K .0602 STATEMENT OF REASONS FOR THE BOARD'S DECISION

- (a) Upon request by an interested person, the Board shall provide a concise statement of the principal reasons for and against the adoption of a rule and the factors that led to overruling the considerations urged against its adoption.
- (b) The request must be made in writing and received by the Board prior to adoption of the rule or within 30 days thereafter. The envelope containing the request should clearly bear the notation "REQUEST FOR STATEMENT OF REASONING RE:" and clearly state the rule or rules in question.

*History Note:* Authority G.S. 150B-21.2;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

### 21 NCAC 42K .0603 PUBLIC ACCESS TO THE RULE-MAKING RECORD

- (a) A record of each rule-making proceeding will be maintained by the Board for as long as the rule is in effect and for two years thereafter.
- (b) The record will contain:
  - (1) the original petition for rule-making, if any;
  - (2) the Notice of Rule-making;
  - (3) all written memoranda and information submitted by the public;
  - (4) a record or summary of oral presentations, if any;
  - (5) all requests for a Statement of Reasons with the Board's response thereto.
- (c) The record of rule-making proceedings will be available for public inspection during the regular office hours of the Board.

*History Note:* Authority G.S. 132-6; 150B-21.2;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

## SECTION .0700 - DECLARATORY RULINGS

### 21 NCAC 42K .0701 NATURE OF THE DECLARATORY RULING

- (a) A declaratory ruling is a quasi-judicial order of the Board, by which it addresses issues raised by an interested person regarding:
  - (1) the manner in which a statute administered by the Board applies to a given fact situation;
  - (2) the manner in which a rule adopted by the Board applies to a given fact situation; or
  - (3) whether a particular rule of the Board is valid.
- (b) A declaratory ruling issued by the Board:
  - (1) is binding upon the Board and upon the person requesting it;
  - (2) may be reviewed by the courts in the same manner as the final agency decision in a contested case; and
  - (3) may be altered by a subsequent declaratory ruling of the Board, but may not be altered retroactively.

*History Note:* Authority G.S. 150B-4;

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

#### **21 NCAC 42K .0702 SUBMITTING A REQUEST FOR DECLARATORY RULING**

(a) All requests for declaratory rulings shall be written and mailed to the Board. The envelope containing the request should clearly bear the notation: "REQUEST FOR DECLARATORY RULING".

(b) Each Request for Declaratory Ruling must include the following information:

- (1) the name and address of the person requesting the ruling;
- (2) the statute or rule to which the request relates;
- (3) a concise statement of the manner in which the requesting person is affected by the statute or rule or its potential application to that person;
- (4) a statement whether an oral hearing is desired and, if so, the reason therefor.

*History Note: Authority G.S. 150B-4;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

#### **21 NCAC 42K .0703 RESPONSE TO THE REQUEST**

(a) Upon receipt of a Request for Declaratory Ruling, the Board shall determine whether a ruling is appropriate under the facts stated.

(b) The Board shall proceed to issue a declaratory ruling where the person requesting the ruling shows that, with regard to the facts presented:

- (1) the statute or rule in question is unclear on its face;
- (2) circumstances are so changed since the adoption of the statute or rule that a declaratory ruling is warranted;
- (3) the factors specified in the request were not given appropriate consideration by the Board at the time the rule was adopted;
- (4) the statute administered by the Board is unclear in its application to the requesting person's facts; or
- (5) a fair question exists regarding the validity of the rule due to:
  - (A) an absence of statutory authority to adopt the rule;
  - (B) irregularities in the rule-making proceedings; or
  - (C) improper filing or distribution of the rule after the Board's adoption thereof.

(c) When the Board determines for good cause that the issuance of a declaratory ruling is undesirable, the Board shall notify, in writing, the person requesting the ruling, stating the reasons for the denial of the request. The Board will ordinarily decline to issue a declaratory ruling where:

- (1) there has been a similar controlling factual determination made by the Board in a contested case;
- (2) the rule-making record shows that the factual issues raised by the request were specifically considered prior to adoption of the rule; or
- (3) the subject-matter of the request is involved in pending litigation in any state or federal court in North Carolina.

(d) Prior to issuing a declaratory ruling, the Board may give notice of the declaratory proceedings to any person it deems appropriate and may direct that fact-finding proceedings appropriate to the circumstances of the particular request be conducted. The proceedings may consist of written submissions, an oral hearing, or other appropriate procedures. Any proceedings conducted by the Board shall be scheduled to provide the desired facts to the Board so that a decision on the declaratory ruling request may be issued within 60 days after receipt of the request.

(e) If the Board finds evidence that the factors listed in Subparagraphs (b)(1), (2), or (3) of this Rule exist or potentially exist despite a lack of evidence of the existence of such factors presented in a particular petition for a declaratory ruling, the Board shall consider rule-making proceedings on the rule.

*History Note: Authority G.S. 150B-4;*

*Eff. June 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.*

#### **21 NCAC 42K .0704 RECORD OF DECLARATORY RULING**

(a) A record of each declaratory ruling and the proceedings held in connection with such ruling will be maintained by the Board at least until:

- (1) the statute or rule interpreted by the declaratory ruling is amended or repealed;
  - (2) the Board prospectively changes the declaratory ruling;
  - (3) any court sets aside the ruling in litigation between the Board and the party requesting the ruling; or
  - (4) any court of the Appellate Division of the General Court of Justice construes the statute or rule that is the subject of the declaratory ruling in a manner plainly irreconcilable with the declaratory ruling.
- (b) The record will contain:
- (1) the Request for Declaratory Ruling;
  - (2) all written submissions filed in the request, whether filed by the person requesting the ruling or by any other person;
  - (3) a record or summary of oral presentation, if any; and
  - (4) a copy of the declaratory ruling.
- (c) Records of declaratory rulings will be available for public inspection during the regular office hours of the Board.

*History Note:* Authority G.S. 132-6; 150B-4;  
Eff. June 1, 1989;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.