



THE COURT, after reviewing the Code Issue Motions, briefs in support of and in opposition to the motions, the record evidence filed by the parties, and other appropriate matters of record, concludes that the Code Issue Motions should be DENIED for the reasons below.

*Whitfield Bryson & Mason, LLP by Gary E. Mason, Esq., Scott C. Harris, Esq., Jason S. Rathod, Esq., and Daniel K. Bryson, Esq. for Plaintiffs.*

*Bradley Arant Boult Cummings LLP by Michael W. Knapp, Esq. and Brian M. Rowilson, Esq. for Defendant KB Home Raleigh-Durham, Inc.*

*Hunton & Williams LLP by A. Todd Brown, Esq. and Ryan G. Rich, Esq. for Third-Party Defendant Stock Building Supply, LLC.*

McGuire, Judge.

#### PROCEDURAL HISTORY

1. The long and complex procedural background of this matter is recited in previous Court orders, including the Opinion and Order on Motions to Stay, Motion to Voluntarily Dismiss, and Motion to Intervene entered on November 2, 2012 ("November 2 Order"). That procedural history is incorporated herein by reference, and the Court will recite only that procedural background since the November 2 Order that is relevant to determining the Code Issue Motions

2. On November 29, 2012, Defendant KB Home Raleigh-Durham, Inc. ("KB Home") filed its Notice of Appeal from the November 2 Order. On February 26, 2013, the Court entered an Order staying this action pending the exhaustion of that appeal. Following a lengthy appeal process and a telephonic status conference, on March 31, 2015, this Court entered an order requiring the parties to submit a letter containing, among other things, a statement of the parties' positions on whether early-filed summary judgment motions on the issue of whether a weather restrictive barrier was to be installed on Plaintiffs' homes

pursuant to the applicable North Carolina Building Codes would significantly narrow the issues in this case.

3. After receiving the letter and discussing the positions raised therein with counsel at a status conference held May 6, 2015, the Court ordered the parties to file dispositive motions "solely on the issue of whether a weather restrictive barrier was required to be installed on Plaintiffs' homes at the time those homes were constructed under the applicable North Carolina Building Codes" ("Code Issue Motions").<sup>2</sup> Pursuant to the Court's May 6, 2015 order, KB Home and Third-Party Defendant Stock Building Supply, LLC ("Stock") were to file a joint motion, a joint brief in support of that motion, and a joint brief in response to Plaintiffs' motion.

4. The Code Issue Motions have been fully briefed,<sup>3</sup> and are ripe for determination.

#### FACTUAL BACKGROUND

5. Between 2006 and 2008, KB Home built Plaintiffs' houses in the Twin Lakes and Wynbrooke subdivisions in Cary, North Carolina. The exterior siding on Plaintiffs' homes is a product manufactured by James Hardie Building Products, Inc. ("James Hardie") called HardiePlank ("HardiePlank"). HardiePlank is a "lap siding." HardiePlank is a composite siding board "made to mimic wood siding" and is made of fiber-cement, "a combination of cement and fibers and other ingredients that produce a hard siding board."<sup>4</sup> KB Home subcontracted the supply and installation of HardiePlank to Stock. Stock directly

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<sup>2</sup> Order and Briefing Schedule (May 6, 2015) ¶ 1.

<sup>3</sup> Given that the parties were ordered to file cross-motions and to shorten the time for resolving this issue, the Court's May 6 Order did not permit the parties to file reply briefs in further support of their motions.

<sup>4</sup> Cooper Dep. 12.

supplied the siding material for the homes and subcontracted the labor to Glenholme Holding Corporation whose crews physically installed the siding onto Plaintiffs' homes.

6. The HardiePlank was installed without a "weather resistant barrier" ("WRB") underneath the HardiePlank. A WRB is a protective wrap applied to a building envelope to protect the building from water infiltration.

7. The 2002 North Carolina State Residential Building Code ("NCRC" or "Residential Code") applied at the time that Plaintiffs' homes were built. Section R703 of the Residential Code addresses "Exterior Covering," and includes the following general provision concerning the weather-resistant quality of exterior walls:

Exterior walls shall provide the building with a weather-resistant exterior wall envelope. The exterior wall envelope shall include flashing as described in Section R703.8. The exterior wall envelope shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a water-resistive barrier behind the exterior veneer as required by Section R703.2.

Section R703.2 read as follows:

Weather-resistant sheathing paper. Asphalt-saturated felt free from holes and breaks, weighing not less than 14 pounds per 100 square feet (0.683 kg/m<sup>2</sup>) and complying with ASTM D 226 or other approved weather-resistant material shall be applied over studs or sheathing of all exterior walls as required by Table R703.4. Such felt or material shall be applied horizontally, with the upper layer lapped over the lower layer not less than 2 inches (51 mm). Where joints occur, felt shall be lapped not less than 6 inches (152 mm).

Exception: Such felt or material is permitted to be omitted in the following situations:

1. In detached accessory buildings
2. Under panel siding with shiplap joints or battens.
3. Under exterior wall finish materials as permitted in Table R703.4.
4. Under paperbacked stucco lath.

8. In the 2002 NCRC, Table R703.4 required that a WRB be installed underneath brick, concrete masonry, and stone exterior sidings. Table R703.4 did not contain reference to fiber-cement exterior coverings like HardiePlank, and did not expressly indicate whether

a WRB was required under fiber-cement products. A WRB was not required under hardboard lap siding, but it is undisputed that HardiePlank is not a hardboard lap siding. Nevertheless, it appears that, and Plaintiffs do not seem to argue otherwise, KB Home/Stock followed the directions in Table R703.4 for installation of hardboard lap siding which stated that "vertical end joints shall occur at studs and shall be covered with a joint cover or shall be caulked."

9. The 2002 Residential Code also provided for materials other than those expressly covered by the NCRC to be used in appropriate circumstance. Section 205.1 of the Administration and Enforcement Requirements Code (the "Administrative Code"), titled "Alternative Material, Design and Methods," provided as follows:

The provisions of this code are not intended to prevent the use of any alternate material, design, or method of construction, provided that the alternate has been reviewed and approved by the Code Enforcement Official at his sole discretion. The Code Enforcement Official may approve an alternate, provided that the alternate, for the purpose intended, is at least the equivalent of that prescribed in the technical codes in quality, strength, effectiveness, accessibility, fire resistance, durability and safety.

10. Section 205.2 of the Administrative Code provides that in determining whether to approve an alternative material "[t]he Code Enforcement Official may require tests, test reports or specific analysis as proof of compliance."

11. At the time relevant to this lawsuit, Doug Beninate ("Beninate") was the Chief Building Inspector for the Town of Cary. It is undisputed that Beninate was the Code Enforcement Official who would have reviewed and approved the use of alternative materials in the construction of Plaintiffs' homes under section 205.1.

12. KB Home and Stock did not formally seek approval from Beninate or the Town of Cary for the use of HardiePlank as an alternative material.<sup>5</sup> Beninate knew that KB Home was installing HardiePlank on homes in the Twin Lakes and Wynbrooke subdivisions

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<sup>5</sup> Beninate Dep. 112, 151-52. KB Home and Stock do not contend that they sought formal approval for the use of HardiePlank from any other appropriate North Carolina official.

without a WRB,<sup>6</sup> but the Town of Cary did not issue KB Homes or other builders citations for failing to install a WRB under the HardiePlank.<sup>7</sup> Beninate testified that he was aware that other jurisdictions were accepting HardiePlank as an exterior siding, he understood it to "durable," and that HardiePlank was generally considered to be a good product.<sup>8</sup> Beninate, however, also testified that at the time the construction at issue was taking place, his department did not inspect sidings, veneers or for whether WRBs were being used,<sup>9</sup> and that the use of WRBs "was not enforced because it was not inspected."<sup>10</sup> Beninate's "personal opinion" was that a WRB should have been installed under HardiePlank.<sup>11</sup>

13. As to whether WRB was actually required by the Code to be installed under HardiePlank, Beninate testified that, in his opinion, whether WRB was required under HardiePlank was a "gray area" in the NCRC that required interpretation.<sup>12</sup> Beninate believed that in the absence of specific guidance under the NCRC, the builder should follow the manufacturer's instructions regarding a product.<sup>13</sup> It is undisputed that from 2001 until December 2005, James Hardie's installation instructions stated that use of a WRB behind HardiePlank was "required."<sup>14</sup> In December 2005, James Hardie amended the instructions to provide that "[a] Weather-resistive barrier is required in accordance with local building code requirements." Plaintiffs do not dispute that all of the homes at issue in this action were built after January 1, 2006.

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<sup>6</sup> Beninate Dep. 128-29.

<sup>7</sup> *Id.* at 130.

<sup>8</sup> *Id.* at 163-64.

<sup>9</sup> *Id.* at 37, 39-40, 68-69, 130

<sup>10</sup> *Id.* at 68-69.

<sup>11</sup> *Id.* at 112.

<sup>12</sup> *Id.* at 38, 71, 77-78.

<sup>13</sup> *Id.* at 34-35, 45, 110, 153-54,

<sup>14</sup> *See* Pls.' Exhs. 4-8.

14. The parties have offered conflicting evidence from officials regarding whether the 2002 NCRC required that a WRB be installed behind HardiePlank. Plaintiffs submitted an affidavit from David Conner, former chief code consultant for the North Carolina Department of Insurance ("NCDOI").<sup>15</sup> Conner was responsible for the interpretation of the 2002 NCRC for NCDOI.<sup>16</sup> Conner's personal opinion was that the 2002 NCRC required the installation of a WRB behind HardiePlank.<sup>17</sup> KB Home and Stock submitted an affidavit from Dan Tingen, Chairman of the North Carolina Building Code Council ("NCBCC").<sup>18</sup> The NCBCC is responsible for adopting and amending the NCRC.<sup>19</sup> Tingen expressed the opinion that the 2002 NCRC did not require a WRB behind HardiePlank or other fiber-cement siding.<sup>20</sup>

15. In September 2006, the North Carolina Building Code Council adopted the new 2006 NCRC.<sup>21</sup> Builders were required to begin complying with the 2006 NCRC no later than January 1, 2008. The 2006 NCRC amended Table R703.4 to include fiber-cement lap siding.<sup>22</sup> Table R703.4 of the 2006 NCRC requires that a WRB be installed behind fiber-cement lap siding such as HardiePlank.

### ANALYSIS

16. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

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<sup>15</sup> Conner Aff. ¶¶ 3-5; Conner was retired at the time he provided the opinion and it is not an official interpretation or opinion of NCDOI.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶¶ 7-13; It is undisputed that the NCDOI did not issue an official interpretation or opinion on whether the NCRC required a WRB behind fiber-cement lap sidings during the time period relevant to this lawsuit.

<sup>18</sup> Tingen Aff. ¶ 3; Tingen admitted that the opinion he provided was not an official interpretation or opinion of NCBCC, but only his personal interpretation.

<sup>19</sup> *Id.* at ¶ 4.

<sup>20</sup> *Id.* at ¶¶ 8, 12.

<sup>21</sup> *Id.* at ¶ 5; KB Home/Stock Exh. H.

<sup>22</sup> *Id.* at ¶ 6.

is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012) (quoting Rule 56(c)). Any inference of fact should be drawn against the movant. *Forbis v. Neal*, 361 N.C. 519, 523-524 (2007) (citing *Caldwell v. Deese*, 288 N.C. 375, 378 (1975)). A genuine issue of material fact will require the court to preserve the issue for a finder of fact. *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81 (2013). Although the Court must view the record "in the light most favorable to the party opposing the motion," Rule 56(e) provides that summary judgment may not be defeated by "mere allegations or denials," but rather that the opposition must be supported by "specific facts showing that there is a genuine issue for trial." *Patterson v. Reid*, 10 N.C. App. 22, 28 (1970).

17. The NCRC is promulgated, and modified periodically, by the NCBC, pursuant to N.C. Gen. Stat. §143-138(a). The provisions of the Building Code as expressly ratified and adopted by the statute prescribe standards of conduct which have the force of law. *Pinnix v. Toomey*, 242 N.C. 358, 369 (1955). Accordingly, interpretation of a building code is a question of law for the Court to decide. *In re Appeal of Medical Center*, 82 N.C. App. 414, 417 (1986) ("*Medical Center*"); *Brown v. Flowe*, 349 N.C. 520, 523 (1998) ("A question of statutory interpretation is ultimately a question of law for the courts."). "It is . . . the responsibility of the Court to apply the Code as it is written." *Medical Center*, 82 N.C. App. at 417.

18. Statutory interpretation begins with an examination of the plain words of the statute. *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656 (1991). Thus, in interpreting statutes such as the Building Code, "courts first determine whether the statute is clear and unambiguous." *Parkdale Am., LLC v. Hinton*, 200 N.C. App. 275, 278 (2009). To do so, "the court applies the words in their plain and definite meaning." *Parkdale*, 200 N.C. App. at 278 (internal citations omitted). "When the language of a statute is clear and unambiguous,

there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276 (1988). Statutory provisions must be read in context. *Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 390 (2009). The rules of statutory construction direct the court to give significance and effect to "every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *Brown v. Chatham County Bd. of Educ.*, 187 N.C. App. 274, 278 (2007). Words of a statute are not to be deemed useless or redundant. *Stone v. State*, 191 N.C. App. 402, 409 (2008).

19. On the other hand, a statute is ambiguous where the language affords more than one reasonable construction. *State v. Johnson*, 170 N.C. 685, 691 (1915). *Accord Pritchard v. Elizabeth City*, 81 N.C. App. 542, 549 (1986) (an ordinance is ambiguous if it is "susceptible to different reasonable, constructions"). "[W]hen a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239 (1978) (internal citations omitted).

20. The Court must first decide whether the provisions of the NCRC at issue in this case are ambiguous. If they are unambiguous, the Court must determine if there are undisputed, dispositive facts that entitle one party to summary judgment in its favor. If the provisions are ambiguous, the Court must attempt to ascertain the legislative intent behind the provisions of the code.

21. In this case, Plaintiffs and KB Home/Stock contend that the applicable sections of the 2002 NCRC are unambiguous, but reach different conclusions as to what the unambiguous provisions require.

22. Plaintiffs argue that NCRC sections R703.1 and R703.2 unambiguously require that a WRB be installed behind fiber-cement lap siding such as HardiePlank.

Plaintiffs first appear to read the words "as required by Table 703.4" out of R703.2, and argue that the WRB is required unless HardiePlank falls under one of the provision contained in the "Exception" portion of R703.2.<sup>23</sup> Next, recognizing that the exceptions provide that a WRB is not required "[u]nder exterior wall finishes materials as permitted in Table R703.4," Plaintiffs contend that "fiber cement siding/HardiePlank is not identified as an exterior wall finishes materials in Table R703.4" for which a WRB is not required.<sup>24</sup> In other words, because fiber-cement siding is not one of the specific sidings contained in Table 703.4 for which a WRB was not required, Plaintiffs contend that it is "unambiguous" that the WRB was required.

23. KB Home/Stock's argument that the 2002 NCRC unambiguously did not require a WRB under HardiePlank is the "mirror-image" of Plaintiffs' argument. KB Home/Stock contend that sections R703.1 and R703.2 make it clear that a WRB is required only if it is expressly required by Table R703.4.<sup>25</sup> KB Home/Stock argue as follows:

Table R703.4 prescribes installation of a WRB only for certain veneers—i.e., stone, brick, and concrete masonry. In contrast, the Residential Code expressly provides that installation of a WRB is not required for any of the five different lap siding materials listed—aluminum, hardboard, steel, vinyl, and wood . . . . Thus KB Home and Stock, when not installing a WRB behind HardiePlank, complied with the plain language requirements of the Residential Code.<sup>26</sup>

24. Despite their respective positions that the 2002 NCRC requirements are "unambiguous," both parties offer other evidence allegedly supporting their interpretations. Plaintiffs argue that their interpretation of the 2002 NCRC requirements is further supported by the fact that James Hardie's installation instructions, the 2003 International

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<sup>23</sup> Pls.' Br. Supp. Mot. Summ. J. 8-9.

<sup>24</sup> *Id.* at 9.

<sup>25</sup> KB/Stock Br. Supp. Mot. Summ. J. 9-12.

<sup>26</sup> *Id.* at 11.

Residential Code, and various other sources required that a WRB be installed with HardiePlank, and by Conner's opinion that the Code required the WRB.<sup>27</sup> KB Home/Stock argue that their interpretation of the 2002 NCRC requirements is supported by the fact that most other residential builders were not installing a WRB behind HardiePlank before 2008, by the fact that the 2006 version of the NCRC for the first time explicitly required a WRB behind cement-fiber lap siding, and by Tingen's opinion that the WRB was not required.<sup>28</sup>

25. KB Home/Stock also contend that even if not expressly provided by the 2002 NCRC, Beninate approved the use of HardiePlank without installation of a WRB as an "alternative siding" in accordance with section 205.1 of the Administrative Code.<sup>29</sup> It is undisputed that KB Homes/Stock never made a formal request for approval of HardiePlank as an alternative material, and that Beninate never provided any such formal approval. Nevertheless, KB Homes/Stock argue that Beninate's acquiescence, as described above, in the use of HardiePlank constituted the approval of the Code Enforcement Official of the installation of HardiePlank without a WRB.

26. Plaintiffs argue that KB Home/Stock did not obtain approval as required by sections 205.1 and 205.2 of the Administrative Code.<sup>30</sup> Plaintiffs contend that in order to comply with 205.1 and 205.2, KB Home/Stock were required to make a formal request or proposal for approval and to submit the "test reports, manufacturers' installation instructions, industry documents, reports from engineers or architects, et cetera" necessary for the Code Enforcement Official to determine whether HardiePlank met the standards for

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<sup>27</sup> Pls.' Br. Supp. Mot. Summ. J. 3-5, 9-10, 12-16.

<sup>28</sup> KB/Stock Br. Supp. Mot. Summ. J. 2-3, 9, 14-15.

<sup>29</sup> *Id.* at 15-20.

<sup>30</sup> Pls.' Br. Supp. Mot. Summ. J. 10-16.

approval.<sup>31</sup> Had KB Homes/Stock done so, Plaintiffs argue, HardiePlank would not have been approved for use without installation of a WRB.<sup>32</sup>

27. In support of their position that Beninate approved the use of HardiePlank without a WRB, KB Home/Stock rely on *Faustin v. North Carolina Building Code Council*, 2014 N.C. App. LEXIS 1197 (N.C. Ct. App. 2014). Their reliance on *Faustin*, however, is misplaced. In *Faustin*, the petitioner sought a determination from NCDOI (the appropriate Code Enforcement Official) regarding whether certain features in a residential development were constructed in compliance with the North Carolina Building Code and other applicable codes. *Id.* at \*2. The Code Enforcement Official visited the development and conducted an investigation that included personal observations and examinations of the features at issue. *Id.* at \*4. The Code Enforcement Official later issued a formal order approving the use of certain alternative materials, designs and methods that were used in the construction of the features. *Id.* The Court of Appeals held that the investigation and inspector's findings supported the Code Enforcement Official's approval. *Id.* at \*\*6-10.

28. In this case, of course, no such formal approval order was requested from the Town of Cary or Beninate, no investigation was conducted, and no formal approval order was issued. While *Faustin* stands for the proposition that Code Enforcement Officials have reasonable discretion in authorizing the use of alternative material and designs, it does not establish that Beninate's informal acquiescence in the use of HardiePlank was the type of approval required by section 205.1.

29. The Court concludes that, read as a whole and giving purpose and meaning to each provision, the 2002 NCRC is unambiguous. Sections R703.1 and R703.2 unambiguously provide that a WRB must be installed behind an exterior wall covering if Table R703.4

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<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 12-16.

requires a WRB behind the exterior wall covering material.<sup>33</sup> It is equally unambiguous that the 2002 NCRC was "not intended to prevent the use of any alternate material, design, or method of construction" if that material, design or method was "reviewed and approved by the Code Enforcement Official." Admin. Code § 205.1. The Code Enforcement Official may, in their discretion, "approve any alternate, provided that the alternate, for the purpose intended, is at least the technical equivalent of that prescribed in . . . quality, strength, effectiveness, fire resistance, durability and safety." *Id.* Accordingly, rather than resulting in an ambiguity in the Residential Code as Plaintiffs appear to contend,<sup>34</sup> the use of an alternative wall covering material not provided for in Table R703.4 is governed by section 205.1 by the Administrative Code.

30. Here, Table R703.4 in the 2002 NCRC required that a WRB be installed behind brick, concrete masonry, and stone exterior wall coverings. Table R703.4 did not require a WRB behind horizontal lap sidings made of aluminum, hardboard, steel, vinyl, and wood. Fiber-cement lap siding, or HardiePlank, was not expressly included in Table R703.4. Accordingly, the unambiguous provisions of the 2002 NCRC required that the use of HardiePlank be "reviewed and approved by the Code Enforcement Official" pursuant to section 205.1.<sup>35</sup>

31. The record evidence in this case establishes that there is an issue of material fact regarding whether HardiePlank was "reviewed and approved" as an alternative exterior

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<sup>33</sup> As noted above, while Plaintiffs place great reliance on emphasized the language in R703.2 that states that a WRB "shall be applied over studs or sheathing *of all exterior walls* as required by Table R703.4," Plaintiffs' position that this creates a general rule that a WRB is always required unless specifically exempt ignores this incorporation of Table R703.4 and, effectively, reads "as required by Table R703.4" out of the Residential Code.

<sup>34</sup> Pls.' Br. Supp. Mot. Summ. J. 10.

<sup>35</sup> The use of HardiePlank as an alternative exterior covering arguably would involve the review and approval of both a material, the fiber-cement lap siding HardiePlank, and a "method of construction", the installation of HardiePlank without a WRB.

wall covering. As discussed *supra*, KB Home/Stock did not ask Beninate to review and approve the use of HardiePlank as an alternative material, and neither Beninate nor any other official issued a formal report or notification that HardiePlank had been approved as an alternative exterior wall covering under the 2002 NCRC. Beninate testified that when considering approval of an alternative material, he generally would defer to the manufacturer's recommendations for using the product. Beninate, however, admittedly did not request from KB Home/Stock, and did not review, the manufacturer's instructions or any other documents or records related the use of HardiePlank as an exterior covering. There also is no evidence to suggest that Beninate specifically investigated or reviewed the "quality, strength, effectiveness, fire resistance, durability and safety" of HardiePlank.

32. Nevertheless, KB/Stock argue that Beninate's acquiescence in the use of HardiePlank constituted approval to install HardiePlank without a WRB. Beninate knew that builders, including KB Home/Stock, were using HardiePlank as a siding in home construction taking place in Cary. Beninate testified that he understood other jurisdictions had permitted the use of HardiePlank and that he believed it to be durable and a "good product." Beninate also testified that neither he nor any other Town of Cary building inspector had cited a builder for failing to install a WRB with HardiePlank prior to January 1, 2008, but he repeatedly qualified that testimony by stating that the Town of Cary was not inspecting exterior wall coverings at that time. Beninate's own testimony, therefore, creates an issue of fact as to whether his contended acquiescence in the use of HardiePlank constituted an approval of its installation without a WRB, particularly given his position that builders should have complied with the manufacturer's instructions, and his personal opinion that a WRB should have been installed with HardiePlank.<sup>36</sup> Accordingly, questions of fact

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<sup>36</sup> *Id.* at 112. Beninate's testimony regarding whether a WRB was officially required by the 2002 NCRC is also unclear. *See id.* at 71 (testifying that in the 2005 to 2007 time period Beninate's understanding

exist as to whether the use of HardiePlank was approved under section 205.1 by Beninate or the Town of Cary such that summary judgment on this issue is inappropriate.

33. Ultimately, the Court concludes that the provisions of the 2002 NCRC were unambiguous. There is an issue of fact, however, as to whether Beninate's actions and conduct constituted an approval of the use of HardiePlank as an alternative exterior wall covering. That issue must be determined by a jury. Accordingly, Plaintiffs' Motion for Summary Judgment and KB Home/Stock's Motion for Summary Judgment should be DENIED.

NOW THEREFORE, based upon the foregoing, it hereby is ORDERED that:

34. Defendants' Motion for Partial Summary Judgment is DENIED.

35. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

This the 29th day of July, 2015.

/s/ Gregory P. McGuire  
Gregory P. McGuire  
Special Superior Court Judge  
for Complex Business Cases

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was that the code did not require a WRB); *id.* at 110 (testifying that the code requirement was unclear, and that resolution of the issue required looking to the manufacturer's instructions).