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Sequence Number: 10-21-17
Rule ID(s): 6627
File Date: 10/19/17
Effective Date: 1/17/18

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Tennessee Historical Commission
Division:	
Contact Person:	Patrick McIntyre
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0400-70-01	Tennessee Historical Commission
Rule Number	Rule Title
0400-70-01-.01	Waivers

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to http://sos.tn.gov/sites/default/files/forms/Rulemaking_Guidelines_August2014.pdf)

Chapter 0400-70-01
Tennessee Historical Commission

New Rule

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Rule 0400-70-01-.01 Waivers

0400-70-01-.01 Waivers.

- (1) When an entity petitions the Tennessee Historical Commission for a waiver relative to Tennessee heritage protection the Tennessee Historical Commission shall evaluate the following considerations when rendering a decision:
 - (a) Whether the proposed change serves the public interest;
 - (b) Whether the proposed change has any commercial overtones;
 - (c) Whether the proposed change has a reasonable relationship to the site;
 - (d) Whether the proposed change has demonstrated support or opposition from local residents;
 - (e) If a change in name or rededication is proposed, whether the change is in conformance with the character of the existing names or dedications in the area;
 - (f) If a change in name or rededication is proposed, whether the change is duplicative of other nearby site names or dedications;
 - (g) Whether the proposed change is offensive or has derogatory or defamatory implications;
 - (h) Whether the proposed change detracts from or enhances the commemoration of the conflict, event, entity, figure, or organization previously commemorated;
 - (i) Whether the proposed change is expected to have a significant positive or negative economic impact;
 - (j) Whether the proposed change could cause confusion for visitors interested in the site;
 - (k) Whether the proposed change diminishes or enhances the historic integrity of the site;
 - (l) Whether the proposed change is relative to a historic site or memorial on the National Register of Historic Places or a national historic landmark; and
 - (m) If a relocation is proposed, whether the new location is appropriate.
- (2) The enumeration of the considerations in paragraph (1) of this rule does not prevent the Tennessee Historical Commission from taking into account other considerations.

Authority: T.C.A. §§ 4-11-101 et seq.

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

Board Member		Aye	No	Abstain	Absent	Signature (if required)
Ernie Bacon	Middle Tennessee	✓				
David "Ray" Smith	East Tennessee	✓				
Dr. Douglas Cupples	West Tennessee	✓				
Elizabeth A. Campbell	Middle Tennessee	✓				
Allen F. Carter	East Tennessee	✓				
Dr. Kent Dollar	Middle Tennessee	✓				
Sam D. Elliott	East Tennessee	✓				
Ex Officio Don Johnson	Governor	✓				
Jeremy S. Harrell	Middle Tennessee	✓				
Yolanda (Loni) Harris	West Tennessee	✓				
Toye Heape	Middle Tennessee	✓				
Alpha B. (Tiny) Jones	Middle Tennessee	✓				
Bill Landry	East Tennessee	✓				
Lucy W. Lee	Middle Tennessee	✓				
William Lyons	East Tennessee	✓				
Ex Officio	TDEC Commissioner	✓				
Linda Moss Mines	East Tennessee	✓				
Dr. Reavis L. Mitchell, Jr	Middle Tennessee	✓				
Joanne Cullom Moore	West Tennessee	✓				
Mike Moore	State Archaeologist	✓				
Keith Norman	West Tennessee	✓				
Beverly C. Robertson	West Tennessee	✓				
Don Roe	West Tennessee	✓				
Chuck Sherrill	State Librarian and Archivist	✓				
Joe Swann	East Tennessee	✓				
Judge David Tipton	East Tennessee	✓				
Dr. Carroll Van West	State Historian	✓				
Ronald A. Walter	West Tennessee	✓				RESIGNED
Derita Coleman Williams	West Tennessee	✓				

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Historical Commission on 10/13/2017, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: (04/13/17)

Rulemaking Hearing(s) Conducted on: (add more dates). (06/13/17)



Date: 10/16/2017

Signature: E. Patrick Miller

Name of Officer: E. Patrick Miller, Jr.

Title of Officer: Executive Director

Subscribed and sworn to before me on: October 16, 2017

Notary Public Signature: Carol L. Grice

My commission expires on: March 3, 2020

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Herbert H. Slatery III
Herbert H. Slatery III
Attorney General and Reporter

10/19/2017
Date

Department of State Use Only

Filed with the Department of State on: 10/19/17

Effective on: 1/17/18

Lee Hargett
Lee Hargett
Secretary of State

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PUBLICATIONS

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment: Commenters stated that Tennessee Heritage Protection Act of 2016 ("2016 Act") contains five pages of rules regarding waivers that clearly define what is required by a public entity in seeking a waiver and what is required by the Tennessee Historical Commission ("Commission") in granting or rejecting a waiver. The commenters noted that the burden to prove the necessity for a waiver lies strictly with the public entity. The commenters stated that the Commission should not attempt to dilute and/or amend the 2016 Act to coddle the public entity seeking a waiver. When rendering a decision regarding waivers to the 2016 Act, the Commission should only consider what has been set forth in the 2016 Act.

Response: The Commission agrees that the 2016 Act provides for a detailed waiver process. The Commission also agrees that under both the Tennessee Heritage Protection Act of 2013 ("2013 Act") and the 2016 Act, the public entity petitioner bears the burden of demonstrating to the Commission that a waiver is warranted. The Commission does not agree that establishing its evaluation criteria through rulemaking dilutes or amends the 2016 Act, nor does it add to or take away from the Commission's statutory mandates. The Commission must apply the criteria in accordance with the applicable statutes. The rules establishing the Commission's evaluation criteria replace an existing evaluation policy previously adopted by the Commission. The rules are not intended to substantively change the existing evaluation criteria. However, the Commission has been advised by legal counsel that the existing evaluation criteria cannot be applied because the evaluation criteria were not promulgated through the rulemaking process.

Comment: Commenters suggested that subparagraph (1)(I) of Rule 0400-70-01-.01, be stated as "A historic site on the National Register of Historic Places or a national historic landmark is not subject to a waiver."

Response: Neither the 2013 Act nor the 2016 Act authorize the Commission to refuse to evaluate a petition if a site in question is on the National Register of Historic Places or designated as a national historic landmark. If a public entity follows the appropriate steps, then the Commission must vote to approve or deny the request. However, the 2016 Act does mandate a presumption in favor of preservation of listed or designated memorials.

Comment: Commenters maintained that the original evaluation criteria approved by the Commission at the October 2015 meeting are being "watered down" and may affect the original intent of the 2016 Act.

Response: The Commission did not intend to "water down" the evaluation criteria. However, the Commission has been advised by legal counsel that the existing evaluation criteria cannot be applied because the evaluation criteria did not go through the rulemaking process. The rules are not intended to substantively change the existing evaluation criteria. The criteria must be applied consistently with the applicable act. The substantive amendment to the criterion addressing the National Register of Historic Places was intended to ensure that the criterion was within the scope of the acts.

Comment: Commenters believe that the drafter of the proposed rules was dwelling on 'compelling public interest' instead of being 'in favor of preservation of the memorial.' As the latter is repeated in the 2016 Act, the commenters felt preservation of the memorial is the heart of the 2016 Act.

Response: The criteria established by the Commission are a minimum, non-exclusive list of considerations that must be applied consistently with the applicable act. For instance, the 2016 Act requires a public entity to demonstrate that a material or substantial need for a waiver based on historical or

other compelling public interest exists. The 2016 Act also provides that it shall be liberally construed in favor of historic preservation. The Commission will consider the criteria and any other considerations deemed appropriate when evaluating a petition for waiver consistent with these provisions of the 2016 Act. Under the 2016 Act, the Commission must document in writing the grounds upon which the petition has been granted or denied. The Commission expects that this documentation will demonstrate that the criteria have been applied consistently with the 2016 Act.

Comment: Commenters maintained that subparagraphs (1)(b), (d), (g), (h), and (i) of Rule 0400-70-01-.01, all appear to be outside bounds of the 2016 Act. The Commission is empowered by the 2016 Act. The Commission is not empowered to promote a commercial enterprise.

Response: The Commission agrees that any authority the Commission has relative to petitions for waiver is derived from the 2013 Act relative to petitions filed prior to March 11, 2016 and the 2016 Act. The Commission does not agree that the criteria necessarily result in the Commission promoting a commercial enterprise. The Commission does not agree that the criteria are beyond the Commission's statutory authority. The Commission believes that the criteria established by Rule 0400-70-01-.01 are important considerations to address when evaluating any petition for waiver and will apply the considerations consistently with the applicable act.

Comment: Commenters maintain that under subparagraphs (1)(e) and (f) of Rule 0400-70-01-.01, a public entity could petition that an area has too many references to a particular part of history. This brings factors outside the 2016 Act's bounds into the decision making. Especially when combined with the economic factors described in proposed subparagraphs (1)(a), (b), and (d) of Rule 0400-70-01-.01.

Response: The Commission does not agree that subparagraphs (1)(e) and (f) would necessarily support a petition based on an assertion that an area has too many references to a particular part of history. The criteria are intended to be applied to an evaluation of a proposed change to a name or dedication and not to be the basis for a proposed change. A petition for waiver to change a name or dedication could be filed by a public entity based on the assertion that an area has too many references to a particular part of history. In that instance, the Commission would consider whether the new name or dedication is duplicative and whether it conforms to the character of the area.

Comment: Commenters maintain that subparagraph (1)(k) of Rule 0400-70-01-.01, concerns existing memorials and is outside the authority of the 2016 Act to move, remove, or modify an existing memorial based on modern interpretation.

Response: Pursuant to subparagraph (1)(k), the Commission will consider whether a proposed change detracts from or enhances a commemoration. Whether commemoration is appropriate is not implicated by this criterion, but may be considered under another criterion or as an additional consideration included in the Commission's evaluation of the petition for waiver. The 2016 Act and the rule do not address "modern interpretation". Information regarding historical scholarship from any historical period can be presented to and considered by the Commission as it deems appropriate under the terms of the applicable act.

Comment: Some commenters expressed concerns about notification prior to the rulemaking hearing.

Response: The formal rulemaking hearing notice was published on the Secretary of State's website in compliance with Tenn. Code Ann. § 4-5-203 and on the Tennessee Historical Commission website. Because the Commission is interested in full public participation, videoconferencing was expanded from the Tennessee Tower in Nashville and the Environmental Field Office in Memphis to additional TDEC Environmental Field Offices in Chattanooga, Knoxville, and Johnson City as a result of interest expressed after the notice was posted.

Comment: Commenters believe that the criteria of subparagraph (1)(d) of Rule 0400-70-01-.01, should be modified to reflect the preservation support of all of Tennessee's residents and should read "whether the proposed change has demonstrated support or opposition from Tennessee

residents.”

Response: The criteria listed in paragraph (1) of Rule 0400-70-01-.01, including subparagraph (1)(d), is the minimum the Commission is required to consider. If the circumstances of a specific petition for waiver are deemed to warrant consideration of demonstrated support or opposition from Tennessee residents, the Commission may do so. Paragraph (2) of Rule 0400-70-01-.01, makes clear that the Commission may take other considerations into account as it determines appropriate on a case-by-case basis.

Comment: Commenters believe subparagraph (1)(l) of Rule 0400-70-01-.01, should state “whether the proposed change is relative to the National Register...but the presumption as stated in the statute still applies.”

Response: The Commission does not believe this change is necessary in order for the Commission to comply with its statutory responsibility toward a memorial designated as a national historic landmark or listed on the National Register of Historic Places. The purpose of all the criteria in paragraph (1) of Rule 0400-70-01-.01 is to ensure that the Commission consistently considers the minimum, non-exclusive criteria when evaluating a petition for waiver. The Commission must apply the criteria consistently with the applicable act. The Commission agrees that a specific reference to a memorial should be added so that petitioners and interested persons will be aware that the status of the memorial is a consideration, in addition to the status of a site.

Comment: A commenter pointed out that there is a big difference in “should” and “whether” between the Commission’s existing criteria and the proposed rules, when referring to the criteria the Commission developed in 2015.

Response: The Commission agrees there is a difference in “should” as used in the 2015 criteria and “whether” as used in the proposed rule. The Commission will apply all of the criteria based on its expertise and experience and as governed by the applicable statutory law. The criteria are a minimum, non-exclusive, enumeration of considerations to be utilized when evaluating a petition for waiver. In some instances, the Commission will be required to weigh competing considerations. The Commission maintains that the term “whether” is appropriate for the rule.

Comment: A commenter believes the introductory paragraph in Rule 0400-70-01-.01, is ambiguous because it appears to apply the proposed rule to requests filed under the 2013 Act and the 2016 Act. The 2013 Act and the 2016 Act address different subject matters, and applying the proposed criteria to the 2013 Act would exceed the statutory authority of the Commission.

Response: The Commission does not agree that the paragraph is ambiguous. Rule 0400-70-01-.01, does apply to all petitions for waiver, including those filed before March 11, 2016. The basis of the rule is criteria adopted to implement the 2013 Act. The Commission has determined that although there are substantive differences between the 2013 Act and the 2016 Act, those differences can be accommodated through the Commission’s implementation of the rule. The applicable act will govern the Commission’s application of the criteria to a petition for waiver. For instance, there is no presumption under the 2013 Act. If considering a petition governed by the 2013 Act, no presumption would apply, but the Commission can still include the status of a site or a memorial in its evaluation.

Comment: A commenter maintains that the proposed subparagraph (1)(l) of Rule 0400-70-01-.01, is in conflict with Tenn. Code Ann. § 4-1-412(c)(8)(A), which states that there is a presumption in favor of the preservation of a memorial if it is designated a national historic landmark or listed on the National Register of Historic Places. The proposed criterion impermissibly allows the Commission to deny a waiver even when a memorial itself is not designated as a national historic landmark or listed on the national register of historic places.

Response: The Commission does not fully agree with the commenter. The purpose of Rule 0400-70-01-.01, is to ensure that the Commission consistently considers established minimum, non-exclusive criteria before rendering a decision on a waiver petition. The 2016 Act requires that a presumption in favor of preservation be applied to a memorial designated as a historic landmark

or listed on the National Register of Historic Places regarding petitions made on or after March 11, 2016. Under the 2013 Act, the Commission may also consider whether a site is designated or listed even if the presumption does not apply. However, the Commission agrees that a specific reference to a memorial should be added so that petitioners and interested persons will be aware that the status of a memorial is also a consideration.

Comment: A commenter believes that the rules appear to ignore or make irrelevant whether the historical marker or memorial currently provides a distorted or unfair view of history, or to properly take into account whether the marker or memorial was originally erected for a nefarious, improper, or otherwise inappropriate purpose.

Response: Rule 0400-70-01-.01, ensures that the Commission consistently considers the minimum criteria before rendering a decision on a waiver petition. The rule does not prohibit the Commission from taking other considerations into account, nor does it direct the Commission to make any specific decision. The Commission would expect any specific concern of this type that an entity, group, or individual may have regarding a petition for waiver be brought to the Commission's attention so the Commission can address the issue when evaluating a petition for waiver.

Comment: A commenter pointed out that "offensive, derogatory, or defamatory implication" is confusing at best as used in subparagraph (1)(g) of Rule 0400-70-01-.01.

Response: The Commission will consider whether a proposed change is offensive or has derogatory or defamatory implications in its evaluation of a petition for waiver. The Commission does not agree that the criterion is confusing.

Comment: A commenter maintains that subparagraph (1)(h) of Rule 0400-70-01-.01, which reads: "whether the proposed change detracts from or enhances the commemoration of the conflict..." gives higher priority to maintaining the status quo regardless of whether the status quo misrepresents a person or event.

Response: The Commission does not believe subparagraph (1)(h) necessarily fails to address potential misrepresentation of a person or event caused either by a proposed change or by maintaining the status quo. The Commission will consider whether the proposed change detracts from or enhances a commemoration. Whether commemoration is appropriate is not implicated by this criterion but may be considered under another criterion or as an additional consideration included in the Commission's evaluation of the petition for waiver.

Comment: A commenter believes that subparagraph (1)(j) of Rule 0700-70-01-.01, which reads: "Whether the proposed change could cause confusion for visitors interested in the site" should not be a consideration without also considering if the display would cause confusion in light of current peer-reviewed scholarship.

Response: The Commission will consider whether a proposed change will cause any confusion for visitors interested in the site affected by the petition for waiver. Interested entities, groups, or individuals are encouraged to communicate information relative to current peer-reviewed scholarship to the Commission.

Comment: A commenter believes it is unclear what is meant by "whether the proposed change has any commercial overtones" as used in subparagraph (1)(b) of Rule 0400-70-01-.01.

Response: The Commission will consider whether a proposed change has any commercial secondary effects, qualities, or meanings when evaluating a petition for waiver. The Commission does not agree that the language is unclear.

Comment: Commenters provided information about historic individuals and provided arguments for or against specific historic monuments during the comment period.

Response: The scope of the rulemaking is to establish the criteria that will be applied to petitions for waiver by the Commission. The Commission appreciates the commenters' participation in this

rulemaking process; however, comments about historic individuals and arguments for or against specific historic memorials are beyond the scope of this rulemaking. The Commission encourages the commenters to provide information and arguments of this type when the Commission is considering a petition for waiver.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

The proposed rule does not impact small businesses.

- (2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

The proposed rule does not impact small businesses.

- (3) A statement of the probable effect on impacted small businesses and consumers.

The proposed rule does not impact small businesses or consumers.

- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

The proposed rule does not impact small businesses.

- (5) A comparison of the proposed rule with any federal or state counterparts.

The proposed rule does not impact small businesses.

- (6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

The proposed rule does not impact small businesses.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The Tennessee Historical Commission anticipates that this rulemaking will not result in an increase or decrease in expenditures or revenue for local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The Tennessee Heritage Protection Acts of 2013 and 2016 established a prohibition against public entities taking specified actions to affect historic places and monuments unless a waiver is granted by the Tennessee Historical Commission ("THC"). To evaluate petitions for a waiver under the Tennessee Heritage Protection Act of 2013, the THC developed its considerations by policy. After a petition for declaratory order was filed by the City of Memphis regarding this policy, a determination was made by the THC to adopt the waiver consideration criteria as a rule to apply to petitions under both acts.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

This rulemaking is being promulgated under the authority granted to the THC under Tenn. Code Ann. § 4-11-103 to implement the THC's responsibility under the Tennessee Heritage Protection Acts of 2013 and 2016.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

Any person requesting a waiver under the Tennessee Heritage Protection Acts of 2013 or 2016.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

The Tennessee Historical Commission is not aware of any opinions that directly relate to the rulemaking.

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

No change in state and local government revenue and expenditures is expected to result from this rulemaking.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Patrick McIntyre
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Nashville, Tennessee 37214
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- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Emily Urban
Assistant General Counsel
Office of General Counsel

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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Tennessee Department of Environment and Conservation
William R. Snodgrass Tennessee Tower
312 Rosa L. Parks Avenue, 2nd Floor
Nashville, Tennessee 37243
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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

The Tennessee Historical Commission is not aware of any additional relevant information.