

**Note from the Codifier:** The OAH website includes notices and the text of proposed temporary rules as required by G.S. 150B-21.1(a1). Prior to the agency adopting the temporary rule, the agency must hold a public hearing no less than five days after the rule and notice have been published and must accept comments for at least 15 business days.  
For questions, you may contact the Office of Administrative Hearings at 984-236-1850 or email [oah.postmaster@oah.nc.gov](mailto:oah.postmaster@oah.nc.gov).

## TITLE 08 – STATE BOARD OF ELECTIONS

**Notice** is hereby given in accordance with G.S. 150B-21.1(a3) that the State Board of Elections intends to adopt the rule cited as 08 NCAC 17 .0109, amend the rule cited as 08 NCAC 17 .0101, and repeal the rules cited as 08 NCAC 17 .0102, .0103, .0105 and .0106.

**Codifier of Rules** received for publication the following notice and proposed temporary rule(s) on: June 2, 2023.

**Public Hearing:**

**Date:** June 19, 2023

**Time:** 11:00 a.m.

**Location:** Webex online hearing: <https://ncgov.webex.com/ncgov/j.php?MTID=me6b25c6aедbaa9c3950df359e7a35f54>

**Reason for Proposed Temporary Action:** A recent court order, cite: *Holmes v. Moore*, 886 S.E.2d 120 (N.C. 2023). Pursuant to G.S. 150B-21.1(a)(11), the need for the State Board of Elections to adopt a temporary rule upon any abbreviated notice or hearing the agency finds practical for the following: To implement provisions of state law for which the State Board of Elections has been authorized to adopt rules, and the need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process. The State Board of Elections finds that adherence to the notice and hearing requirements of permanent rulemaking would be contrary to the public interest and that the immediate adoption of these rules is required to ensure uniform implementation of photo identification requirements in the upcoming municipal elections, voting for which begins on August 11, 2023.

**Comment Procedures:** Comments from the public shall be directed to: Rulemaking Coordinator, PO Box 27255, Raleigh, NC 27611-7255; email [rulemaking.sboe@ncsbe.gov](mailto:rulemaking.sboe@ncsbe.gov) (Online comment portal: <https://www.ncsbe.gov/about-elections/legal-resources/rulemaking/comment-proposed-rules-implementation-photo-id-requirement-voting>). The comment period begins June 5, 2023 and ends June 23, 2023.

## CHAPTER 17 - PHOTO IDENTIFICATION

### 08 NCAC 17 .0101 ~~DETERMINATION OF REASONABLE RESEMBLANCE VERIFICATION OF PHOTO IDENTIFICATION DURING IN-PERSON VOTING AT CHECK IN~~

(a) ~~When a person presenting to vote checks in at a voting site, An election official shall check the registration status of all persons presenting to vote in person on election day or during one stop early voting pursuant to G.S. 163-166.7, and shall require that all persons presenting to vote provide an election official shall ask the voter to show photo identification in accordance with G.S. 163-166.16 and this Rule. one of the forms of photo identification listed in G.S. 163-166.13(e), subject to the exceptions outlined in Paragraph (b) of this Rule. If a person not satisfying the exceptions described in Paragraph (b) of this Rule does not provide any photo identification, the election official shall inform the person presenting to vote of applicable options specified in G.S. 163-166.13(e). If the person presenting to vote wishes to choose the option of voting a provisional ballot, the election official shall provide the person presenting to vote with information on the provisional voting process and the address of the county board of elections office.~~

~~(b) The election official shall not require photo identification of a person who has a sincerely held religious objection to being photographed and meets the requirements of G.S. 163-166.13(a)(2), or who is the victim of a natural disaster and meets the requirements of G.S. 163-166.13(a)(3). Persons falling within any exception listed in this Paragraph shall be allowed to proceed pursuant to G.S. 163-166.7.~~

~~(c) The election official shall inspect~~ examine any photo identification provided by the person presenting to vote and shall determine the following:

- ~~(1) That the~~ The photo identification is of the type acceptable for voting purposes pursuant to ~~G.S. 163-166.13(e); G.S. 163-166.16(a).~~ A valid United States passport book or ~~a valid United States~~ passport card is acceptable pursuant to ~~G.S. 163-166.13(e); G.S. 163-166.16(a)(1)c.~~
- ~~(2) That the~~ photo identification is ~~unexpired or is otherwise acceptable pursuant to G.S. 163-166.13(e);~~
- ~~(2)(3) That the~~ The photograph appearing on the photo identification ~~depicts~~ bears a reasonable resemblance to the person presenting to vote. The election official shall make this determination based on the totality of the circumstances, construing all evidence, along with any explanation or documentation voluntarily proffered by the person presenting to vote, in the light most favorable to that ~~person; person,~~ and bearing in mind that there are many reasons that a person's appearance could change (such as, for illustrative purposes only, changes in hair, facial hair, or weight; or the effects of medical conditions, aging, or medical treatment). ~~Pereceived differences of the following features shall not be grounds for the election official to find that the photograph appearing on the photo identification fails to depict the person presenting to vote:~~
  - ~~(A) weight;~~
  - ~~(B) hair features and styling, including changes in length, color, hairline, or use of a wig or other hairpiece;~~
  - ~~(C) facial hair;~~
  - ~~(D) complexion or skin tone;~~
  - ~~(E) cosmetics or tattooing;~~

- (F) ~~apparel, including the presence or absence of eyeglasses or contact lenses;~~
  - (G) ~~characteristics arising from a perceptible medical condition, disability, or aging;~~
  - (H) ~~photographic lighting conditions or printing quality; and~~
- (3)(4) That the The name appearing on the photo identification is the same as or substantially equivalent to the name contained in the voter's voter registration record. The election official shall make this determination based on the totality of the circumstances, construing all evidence, along with any explanation or documentation voluntarily proffered by the person presenting to vote, in the light most favorable to that person. The election official shall consider the name appearing on the photo identification shall to be considered substantially equivalent to the name contained in the registration record if differences are attributable to a reasonable explanation or one or more of the following reasons:
- (A) Omission of one or more parts of the name (such as, for illustrative purposes only, Mary Beth Smith versus Beth Smith, or Patrick Todd Jackson, Jr. versus Patrick Todd Jackson, or Maria Guzman-Santana versus Maria Guzman);
  - (B) Use of a variation or nickname rather than a formal name (such as, for illustrative purposes only, Bill versus William, or Sue versus Susanne);
  - (C) Use of an initial in place of one or more parts of a given name (such as, for illustrative purposes only, A.B. Sanchez versus Aaron B. Sanchez);
  - (D) Use of a former name, including maiden names (such as, for illustrative purposes only, Emily Jones versus Emily Gibson), or a variation that includes or omits a hyphenation (such as, for illustrative purposes only, Chantell D. Jacobson-Smith versus Chantell D. Jacobson);
  - (E) Ordering of names (such as, for illustrative purposes only, Maria Eva Garcia Lopez versus Maria E. Lopez-Garcia); or
  - (F) Variation in spelling or typographical errors (such as, for illustrative purposes only, Dennis McCarthy versus Denis McCarthy, or Aarav Robertson versus Aarav Robertsson).

~~(b)(4)~~ The election official examining photo identification provided by a person presenting to vote shall not require any additional evidence outside the four corners of the photo identification. The election official shall not require that any person remove apparel for the purposes of ~~rendering a determination~~ determining reasonable resemblance under ~~Paragraph (e); Subparagraph (a)(2) of this Rule.~~ If the face of the person presenting to vote is covered such that the election official cannot ~~render a determination under Subparagraph (e)(3);~~ determine reasonable resemblance, then the election official shall give the person the opportunity to remove the covering but shall not require that removal. If the person declines to remove the covering, the election official shall inform the person ~~presenting to vote~~ that he or she may cast a provisional ballot, which shall be counted in accordance with G.S. 163-182.1A, or, if applicable, may ~~complete a written request for an absentee ballot as set out in G.S. 163-166.13(e)(3), and shall inform the voting site's judges of election that the election official cannot affirmatively determine that the person bears any reasonable resemblance to the photo identification.~~ G.S. 163-166.16.

~~(c)(e)~~ Differences between the address appearing on the photo identification ~~of a person presenting to vote meeting the requirements of Subparagraph (e)(1) and the address contained in the registration record of that person~~ shall not be construed as evidence that the photographic identification ~~does not bear any reasonable resemblance pursuant to Subparagraphs (e)(3) and (e)(4) of this Rule, nor shall it be construed as evidence that the photographic identification does not otherwise~~ fails to meet the requirements of ~~any other provision of Paragraph (C); G.S. 163-166.16 or this Rule.~~

~~(d)(4)~~ The election official examining photo identification provided by a person presenting to vote shall construe all evidence, along with any explanation or documentation voluntarily ~~proffered~~ offered by the person presenting to vote, in the light most favorable to that ~~person.~~ person, and shall be guided by the purpose of the photo identification requirement, which is to confirm the person presenting to vote is the registered voter on the voter registration records. After examining the photo identification according to an examination performed in the manner set out in Paragraphs (a) through (c)(4) of this Rule, the election official shall proceed as follows:

- (1) If the election official determines that the photo identification meets all the requirements of Paragraph ~~(a)(e); of this Rule,~~ then the election official shall allow the person presenting to vote shall be allowed to proceed vote pursuant to G.S. 163-166.7 and 163-166.13(b); or G.S. 163-166.7.
- (2) If the election official determines that the photo identification is not an acceptable type of photo identification under does not meet all of the requirements of Subparagraphs (e)(1) and (e)(2); Subparagraph (a)(1) of this Rule, the election official shall inform the person presenting to vote of the reasons for ~~that such~~ determination (such as, for illustrative purposes only, that the photo identification is ~~expired~~ expired when that type of acceptable photo identification requires an expiration date) and shall invite the person to provide any other acceptable photo identification that he or she may have. If the person presenting to vote does not produce photo identification that meets all the requirements of Subparagraph (a)(1) of this Rule, (e)(1) and (e)(2), then the election official shall inform the person presenting to vote of applicable the options specified in Paragraph (e) of this Rule. G.S. 163-166.13(e). ~~If the person presenting to vote wishes to choose the option of voting a provisional ballot, the election official shall provide the person presenting to vote with information on the provisional voting process and the address of the county board of elections office.~~
- (3) If the election official determines that the photo or name on the photo identification do not satisfy Subparagraphs (a)(2) and (a)(3) of this Rule, does not meet all the requirements of Subparagraphs (e)(3) and (e)(4), the election official shall enter a challenge pursuant to G.S. 163-87 and notify the voting site's judges of election of the challenge. ~~that the person presenting to vote does not bear any reasonable resemblance to the photo identification. The judges of election shall then conduct a challenge hearing, in accordance with the procedures in G.S. 163-88. At the conclusion of the hearing, the judges of election shall vote on whether the photo identification of the person presenting to vote bears a reasonable resemblance to that person, and each judge shall record their findings on a challenge form provided by the State Board. In making this determination, the judges of election are subject to the requirements of this Rule in~~

the same manner as the election official initially examining the photo identification. Only if the judges of election unanimously find that the photo identification does not bear a reasonable resemblance to the person presenting to vote, the person shall vote with a provisional ballot in accordance with Paragraph (e) of this Rule. Absent such a unanimous finding, the person shall vote with a regular ballot pursuant to G.S. 163-166.7. For the purposes of this Subparagraph, "judges of election" includes a group of three one-stop officials designated by the county board to hear a challenge to a voter's reasonable resemblance, not all of whom are affiliated with the same political party.

(e) A person presenting to vote who does not present acceptable photo identification in accordance with this Rule shall be offered the following options:

- (1) To vote by provisional ballot with an affidavit claiming an exception to the identification requirement, pursuant to G.S. 163-166.16(d). If the voter has completed the affidavit and is otherwise eligible to vote, to help ensure impartiality, the county board may reject the provisional ballot only if the county board unanimously finds that the affidavit is false. The county board shall substantiate any finding of falsity with grounds recorded in a written decision. Before making a finding of falsity, the county board shall provide the voter notice and an opportunity to be heard on any grounds that the county board considers regarding the falsity of the affidavit.
- (2) To vote by provisional ballot and then bring to the office of the county board identification acceptable under G.S. 163-166.16 and this Rule before the end of business on the business day before county canvass. The county board shall count the provisional ballot of a voter who presents such identification to the office of the county board in a timely manner.

*Authority G.S. 163-22; 163-82.6A; 163-82.15; 163-166.7; NAACP v. McCrory, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); 163A-1145.1; S.L. 2018-144, s. 3.1(e); 163-166.11; 163-166.16.*

#### **08 NCAC 17 .0102 DETERMINATION OF REASONABLE RESEMBLANCE BY JUDGES OF ELECTION**

*Authority G.S. 163-166.7; 163-82.6A; 163-82.15; 163-88.1; 163-166.7; NAACP v. McCrory, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); 163A-1145.1; S.L. 2018-144, s. 3.1(e).*

#### **08 NCAC 17 .0103 IDENTIFICATION REQUIRED OF CURBSIDE VOTERS**

*Authority NAACP v. McCrory, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); S.L. 2018-144, s. 3.1(d).*

#### **08 NCAC 17 .0105 DECLARATION OF RELIGIOUS OBJECTION TO PHOTOGRAPH**

*Authority NAACP v. McCrory, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); S.L. 2018-144, s. 3.1.(a),(e), (h).*

#### **08 NCAC 17 .0106 SIGNAGE NOTIFYING ONE-STOP VOTERS OF THE OPTION TO REQUEST AN ABSENTEE BALLOT**

*Authority NAACP v. McCrory, 831 F.3d 204 (4<sup>th</sup> Cir. 2016); S.L. 2018-144, s. 3.1.(j).*

#### **08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE-BY-MAIL BALLOTS**

(a) Definitions. The following definitions apply to this Rule:

- (1) "Readable" means the name on the identification can be read and the photograph depicts a person, as opposed to displaying, for example, a mere shadow or outline of a person.
- (2) "Copy" means a duplicate of an original document, including a photographic copy of the original document.

(b) Identification Requirement for Absentee-by-Mail Ballots. Photo identification accompanying a voter's absentee ballot pursuant to G.S. 163-230.1(f1) is acceptable if it is of a type of photo identification acceptable for voting purposes under 08 NCAC 17 .0101(a)(1), is readable, and the name appearing on the identification is the same as or substantially equivalent to the name contained in the voter's voter registration record in accordance with 08 NCAC 17 .0101(a)(3). A photo identification shall not be rejected due to differences between the address appearing on an absentee voter's photo identification and any address contained in the voter's absentee request form, absentee ballot application, or registration record. A copy of photo identification that is acceptable under this Rule need include only the side of the identification (or, if the identification is a booklet, the page of the identification) where the person's name and photo appears.

(c) Initial Review by County Board Staff. County board staff shall, upon receipt of a voter's absentee ballot application, determine whether the application is accompanied by a copy of photo identification that is readable and is of a type of photo identification acceptable for voting purposes under 08 NCAC 17 .0101(a)(1), or, if the application is accompanied by an affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d), determine whether the affidavit is complete. If staff identify any deficiency, they shall send written notice of the deficiency to the voter within one business day of identifying the deficiency, informing the voter that the voter, the voter's verifiable legal guardian or near relative, or a person of the voter's choice if the voter needs assistance due to the voter's disability, may provide the voter's acceptable photo identification or a completed affidavit claiming an exception to the county board by the deadline specified in G.S. 163-166.16(c). Staff shall additionally notify the voter by telephone or email if the voter provided their telephone number or email address when registering to vote.

(d) Final Review by County Board. The county board shall, at the first meeting held pursuant to G.S. 163-230.1(f) after the application and ballot is received, proceed as follows:

- (1) If the voter has submitted a copy of their photo identification, the county board shall make its determination whether the identification is acceptable under Paragraph (b) of this Rule. To help ensure impartiality, a final determination that the copy of photo identification is not acceptable under Paragraph (b) of this Rule shall require a unanimous vote by the county board.
- (2) If the voter has completed an affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d), and is otherwise eligible to vote, to help ensure impartiality, the county board may reject that person's ballot only if the county board unanimously finds that the affidavit is false. The county board shall substantiate any finding of falsity with grounds recorded in a written decision. Before making a finding of falsity, the county board shall provide the voter notice and an opportunity to be heard on any grounds that the county board considers regarding the falsity of the affidavit.
- (3) If a voter's copy of photo identification or alternative affidavit is deemed deficient under Paragraph (c) of this Rule, the county board shall reserve its final decision on the approval of the absentee application until the next official meeting after the deficiency is cured or the county canvass, whichever occurs first.

(e) Exception for Military and Overseas Voters. A covered voter who is casting a ballot pursuant to G.S. 163, Article 21A, Part 1 is not required to submit a copy of acceptable photo identification under Paragraph (b) of this Rule or claim an exception under G.S. 163-166.16(d).

(f) Return of Original Form of Identification. If a voter sends their original form of photo identification in the container-return envelope, the county board shall make a photocopy of the identification, which shall serve as an acceptable photo identification accompanying the voter's absentee ballot, and mail the original form of identification back to the voter.

Authority G.S. 163-22; 163-166.7; 163-166.16; 163-229; 163-230.1.