

NORTH CAROLINA REGISTER

VOLUME 26 • ISSUE 06 • Pages 440 - 549

September 15, 2011

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PUBLISHED BY

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Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

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NORTH CAROLINA REGISTER
Publication Schedule for January 2011 – December 2011

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 th day from publication in the Register
25:13	01/03/11	12/08/10	01/18/11	03/04/11	03/21/11	05/01/11	05/2012	09/30/11
25:14	01/18/11	12/22/10	02/02/11	03/21/11	03/21/11	05/01/11	05/2012	10/15/11
25:15	02/01/11	01/10/11	02/16/11	04/04/11	04/20/11	06/01/11	05/2012	10/29/11
25:16	02/15/11	01/25/11	03/02/11	04/18/11	04/20/11	06/01/11	05/2012	11/12/11
25:17	03/01/11	02/08/11	03/16/11	05/02/11	05/20/11	07/01/11	05/2012	11/26/11
25:18	03/15/11	02/22/11	03/30/11	05/16/11	05/20/11	07/01/11	05/2012	12/10/11
25:19	04/01/11	03/11/11	04/16/11	05/31/11	06/20/11	08/01/11	05/2012	12/27/11
25:20	04/15/11	03/25/11	04/30/11	06/14/11	06/20/11	08/01/11	05/2012	01/10/12
25:21	05/02/11	04/08/11	05/17/11	07/01/11	07/20/11	09/01/11	05/2012	01/27/12
25:22	05/16/11	04/25/11	05/31/11	07/15/11	07/20/11	09/01/11	05/2012	02/10/12
25:23	06/01/11	05/10/11	06/16/11	08/01/11	08/22/11	10/01/11	05/2012	02/26/12
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26:01	07/01/11	06/10/11	07/16/11	08/30/11	09/20/11	11/01/11	05/2012	03/27/12
26:02	07/15/11	06/23/11	07/30/11	09/13/11	09/20/11	11/01/11	05/2012	04/10/12
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26:07	10/03/11	09/12/11	10/18/11	12/02/11	12/20/11	02/01/12	05/2012	06/29/12
26:08	10/17/11	09/26/11	11/01/11	12/16/11	12/20/11	02/01/12	05/2012	07/13/12
26:09	11/01/11	10/11/11	11/16/11	01/03/12	01/20/12	03/01/12	05/2012	07/28/12
26:10	11/15/11	10/24/11	11/30/11	01/17/12	01/20/12	03/01/12	05/2012	08/11/12
26:11	12/01/11	11/07/11	12/16/11	01/30/12	02/20/12	04/01/12	05/2012	08/27/12
26:12	12/15/11	11/22/11	12/30/11	02/13/12	02/20/12	04/01/12	05/2012	09/10/12

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.



BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 102

**PROCLAMATION OF A STATE OF DISASTER
FOR MECKLENBURG COUNTY**

WHEREAS, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes, N.C.G.S. § 166A-6, authorizes the issuance of a proclamation defining an area subject to a state of disaster and categorizing the disaster as a Type I, Type II or Type III disaster; and

WHEREAS, on August 5, 2011, Mecklenburg County, North Carolina was impacted by severe weather and flooding; and

WHEREAS, a joint preliminary damage assessment was done by local, state and federal emergency management officials on August 11, 2011; and

WHEREAS, as a result of the severe weather and flooding, the City of Charlotte in Mecklenburg County proclaimed a local state of emergency on August 12, 2011; and

WHEREAS, I have determined that a State of a Disaster, as defined in G.S. §166A-6, exists in the State of North Carolina specifically in the City of Charlotte and Mecklenburg County; and

WHEREAS, pursuant to N.C.G.S. § 166A-6, the criteria for a Type I disaster are met if: (1) the Secretary of Crime Control and Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) the City of Charlotte, located in Mecklenburg County declared a local state of emergency pursuant to N.C.G.S. § 166A-8; (3) the preliminary damage assessment has met or exceeded the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. Part 123; and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

WHEREAS, pursuant to N.C.G.S. § 166A-6.01, if a State of Disaster is proclaimed, the Governor may make State funds available for disaster assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the disaster area.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED:**

Section 1. Pursuant to N.C.G.S. § 166A-6, a Type I State of Disaster is hereby declared for Mecklenburg County.

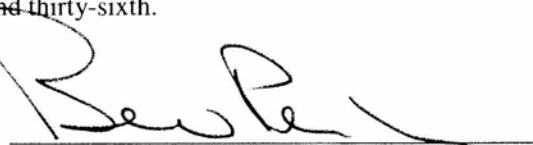
Section 2. I authorize state disaster assistance in the form of individual assistance grants to eligible entities located within the disaster area that meet the terms and conditions under N.C.G.S. § 166A-6.01(b)(1).

Section 3. I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to ensure proper implementation of this proclamation.

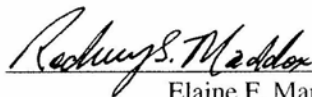
Section 4. This Type I Disaster Declaration shall expire 30 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this sixteenth day of August in the year of our Lord two thousand and eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.




Beverly Eaves Perdue
Governor

ATTEST:


Elaine F. Marshall
Chief Deputy Secretary of State



STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

August 16, 2011

Mr. Marlowe Foster
1908 Garden City Ct.
Raleigh, NC 27604

Re: Request for Advisory Opinion

Dear Mr. Foster:

I write in response to your request for an advisory opinion pursuant to N.C. Gen. Stat. § 163-278.23. By email on July 1, 2011, and in subsequent communications you requested guidance on several matters related to your intent to seek public office while being a registered lobbyist. More specifically, you pose three questions. I will address each question separately below.

1. *Jason Schrader has indicated that once I file a candidate committee, I am allowed to raise money. However, until I file a formal candidacy, I am not allowed to contribute to my own committee. Is that correct?*

Answer: Yes. Based on your Statement of Organization received in our office on July 13, 2011, you are seeking the statewide office of Commissioner of Labor. Pursuant to N.C.G.S. § 163-278.13C, a lobbyist is prohibited from making a contribution to a candidate or candidate campaign committee if that candidate is seeking a legislative office or seeking to be a member of the Council of State. Additionally, a lobbyist may not collect contributions from multiple contributors and transfer those contributions to a candidate or candidate campaign committee when the candidate is a legislator or candidate for a legislative seat or member of the Council of State or candidate seeking to be a member of the Council of State.

N.C.G.S. § 163-278.13C(c) provides that the prohibition against the lobbyist making a contribution does not apply to his/her own candidate campaign committee if the lobbyist has filed a notice of candidacy for office under N.C.G.S. § 163-106 or Article 11 of Chapter 163 of the General Statutes or has been nominated under N.C.G.S. § 163-114 or N.C.G.S. § 163-98. Since you have only organized your candidate committee and not met the other requirements of N.C.G.S. § 163-278.13C(c), then you may not make any contribution, including in-kind contributions, to your candidate campaign committee.

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

2. *As a registered lobbyist and a member of the State Banking Commission, are there any limitations on my ability to solicit contributions during legislative session? If so, what are they specifically? In addition, is there any difference between normally scheduled legislative sessions or special sessions that are being scheduled (i.e. the special session that begins on September 13, 2011)?*

Answer: This response only addresses your questions as they relate to campaign finance issues. You will need to contact the State Ethics Commission to receive guidance on any limitations resulting from your position on the State Banking Commission and any additional lobbyist restrictions under their jurisdiction. You may also wish to consult with the Secretary of State's Office with respect to any lobbyist restrictions they may administer.

Pursuant to N.C.G.S. § 163-278.13B, a registered lobbyist is considered a "limited contributor." A "limited contributee" is by statutory definition a member or candidate for the General Assembly or a member or candidate for the Council of State. Since you are a candidate for the Council of State and a registered lobbyist, you meet both statutory definitions.¹ Therefore, during regular sessions of the General Assembly, as a "limited contributee" you would be prohibited from soliciting contributions from any "limited contributors" and soliciting any third parties to solicit contributions from "limited contributors." In more general terms this means that as a lobbyist you are prohibited during regular sessions of the General Assembly from not only making contributions to candidates and members of the General Assembly and Council of State, including your own committee, but also soliciting contributions from any individual or political committee on behalf of your committee or any other candidate or member of the General Assembly or Council of State. As a candidate for the Council of State, during regular legislative sessions, you are further prohibited from soliciting a contribution from a PAC that employs a lobbyist or soliciting a third party to make that solicitation on your behalf.

You also request guidance on the differences between regular and special sessions of the General Assembly. As defined in N.C.G.S. § 163-278.13B(a)(3), "The General Assembly is in 'regular session' from the date set by law or resolution that the General Assembly convenes until the General Assembly either adjourns sine die or recesses or adjourns for more than 10 days." Other than a lobbyist making or bundling contributions to candidates or members of the General Assembly or Council of State, the other prohibitions discussed above only apply during regular sessions of the General Assembly.

¹ "The term 'candidate' means any individual who, with respect to a public office listed in G.S. 163-278.6(18), has taken positive action for the purpose of bringing about that individual's nomination or election to public office.

Examples of positive action include:

- a. Filing a notice of candidacy or a petition requesting to be a candidate,
 - b. Being certified as a nominee of a political party for a vacancy,
 - c. Otherwise qualifying as a candidate in a manner authorized by law,
 - d. Making a public announcement of a definite intent to run for public office in a particular election, or
 - e. Receiving funds or making payments or giving the consent for anyone else to receive funds or transfer anything of value for the purpose of bringing about that individual's nomination or election to office.
- Transferring anything of value includes incurring an obligation to transfer anything of value." N.C.G.S. § 163-278.6(4)

I have included a copy of an advisory opinion that I provided to Jason Kay, General Counsel to Speaker Thom Tillis, regarding fundraising after the General Assembly has recessed until a date certain to convene the regular session.

3. *My employment includes a company car which can be used for both work and personal. What limitations are there on the use of the vehicle from a State Board of Elections perspective and what must I do to ensure compliance with all campaign finance laws?*

Answer: As you are aware, business contributions to candidate committees are prohibited. This prohibition includes in-kind business contributions. In order to determine if the use of your company car for campaign purposes would be considered a business contribution, your company's policy regarding personal vehicle use was reviewed. According to the policy and your email responses, as part of your compensation package you are permitted to utilize the company vehicle for personal purposes. You are required to pay \$115 per month for this use and are required to report personal mileage "through an on-line system for tax purposes." You further state that "The gas, maintenance and insurance is included with employment and is covered by the employer through Wheels which manages the fleet." The policy does not address and you have advised that the company does not have a personal mileage cap but the costs for excessive personal mileage are deducted from employees pay checks in November or December. Therefore, since the use of the vehicle is part of your personal compensation and because personal mileage outside of that personal compensation would be deducted from your compensation, I do not believe the use of the vehicle constitutes an impermissible corporate contribution.

However, as provided in question one of this opinion, until you file a notice of candidacy for Commissioner of Labor you are prohibited from making contributions to your Committee. This prohibition includes making in-kind contributions. Therefore, during this time period, campaign travel cannot be paid through your compensation or by you personally. Use of the company vehicle for campaign purposes would need to be paid for by the Committee. As we discussed, the Committee may wish to rent a vehicle or a contributor could provide an in-kind contribution of the use of a vehicle as long as the fair market value of the vehicle, gas, etc. did not exceed the contributor's contribution limitation. Your spouse, parents and siblings can make unlimited contributions to your Committee.

At a meeting in this office on August 10th, you asked about any issues regarding your work schedule and campaigning. You stated that you do not have a set work schedule and therefore could be campaigning during the normal business day. I advised you at that time to keep a log of the hours you campaign during the work week so that you can ensure your campaign work does not overlap with time you are being paid by Pfizer. Additionally, you asked about the permissibility of utilizing email addresses you have obtained through your professional work. These email addresses were not provided by Pfizer but you personally have maintained a list of your contacts. The use of these email addresses is not a violation of any campaign finance statute.

This opinion is based upon the information provided in your July 1, 2011, request for advisory opinion, additional emails and the meeting on August 10, 2011. If any information in that request should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

If you have any further questions, please contact me or Kim Strach, Deputy Director-Campaign Finance.

Sincerely,



Gary O. Bartlett
Executive Director

cc: Julian Mann, Codifier of Rules

**The 2012 Low-Income Housing Tax Credit Qualified Allocation Plan
For the State of North Carolina**

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I. INTRODUCTION

The 2012 Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term "Agency" shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

The Plan was reviewed in one public hearing and met the other legal requirements prior to final adoption by the Committee. The staff of the Agency was present at the hearing to take comments and answer questions.

The Agency will only allocate low-income housing tax credits in compliance with the Plan. The Code requires that the Plan contain certain elements. These elements, and others added by the Committee, are listed below.

- A. Selection criteria to be used in determining the allocation of federal low-income housing tax credits:
 - 1. Project location and site suitability.
 - 2. Market demand and local housing needs.
 - 3. Serving the lowest income tenants.
 - 4. Serving qualified tenants for the longest periods.
 - 5. Design and quality of construction.
 - 6. Financial structure and long-term viability.
 - 7. Use of federal project-based rental assistance.
 - 8. Use of mortgage subsidies.
 - 9. Experience of development team and management agent(s).
 - 10. Serving persons with disabilities and the homeless.
 - 11. Willingness to solicit referrals from public housing waiting lists.
 - 12. Tenant populations of individuals with children.
 - 13. Projects intended for eventual tenant ownership.
 - 14. Projects that are part of a Community Revitalization Plan.
 - 15. Energy efficiency.
 - 16. Historic nature of the buildings.
- B. Threshold, underwriting and process requirements for project applications and tax credit awards.
- C. Description of the Agency's compliance monitoring program, including procedures to notify the Internal Revenue Service of noncompliance with the requirements of the program.

In the process of administering the low-income housing tax credit and Rental Production Program (RPP), the Agency will make decisions and interpretations regarding project applications and the Plan. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations. The Agency reserves the right to amend, modify, or withdraw provisions contained in the Plan that are inconsistent or in conflict with state or federal laws or regulations. In the event of a major:

- natural disaster,
- disruption in the financial markets, or
- reduction in subsidy resources available,

the Agency may disregard any section of the Plan, including point scoring and evaluation criteria, that interferes with an appropriate response.

II. SET-ASIDES, AWARD LIMITATIONS AND COUNTY DESIGNATIONS

The Agency will determine whether applications are eligible under Section II(B) or II(C). This Section II only applies to 9% tax credit applications. Projects will be counted towards the limitations in the order awarded under the Plan (rehabilitation, higher-scoring new construction applications, and tie-breakers).

A. [reserved]

B. REHABILITATION SET-ASIDE

The Agency will award up to ten percent (10% of tax credits available after forward commitments to projects proposing rehabilitation of existing housing. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

1. The following will be considered new construction under Section II(C) below:
 - (a) adaptive reuse projects,
 - (b) entirely vacant residential buildings,
 - (c) proposals to increase and/or substantially re-configure residential units.
2. Up to \$750,000 of the rehabilitation set-aside will be awarded to projects identified by the U.S. Department of Agriculture, Rural Development (RD) state office as a priority. The maximum award to any one Principal will be one project. Other projects with RD financing will be considered under the regular rehabilitation set-aside.

C. NEW CONSTRUCTION SET-ASIDES

The Agency will award tax credits remaining after awards described above and any under Section II(G)(2) to other new construction projects, starting with those earning the highest scoring totals within each of the following four geographic set-asides and continuing in descending score order through the last project that can be fully funded. The Agency reserves the right to revise the available credits in each set-aside.

WEST 17%		CENTRAL 24%		METRO 36%	EAST 23%	
Alexander	Jackson	Alamance	Montgomery	Buncombe	Beaufort	Johnston
Alleghany	Lincoln	Anson	Moore	Cumberland	Bertie	Jones
Ashe	Macon	Cabarrus	Orange	Durham	Bladen	Lenoir
Avery	Madison	Caswell	Person	Forsyth	Brunswick	Martin
Burke	McDowell	Chatham	Randolph	Guilford	Camden	Nash
Caldwell	Mitchell	Davidson	Richmond	Mecklenburg	Carteret	New Hanover
Catawba	Polk	Davie	Rockingham	Wake	Chowan	Northampton
Cherokee	Rutherford	Franklin	Rowan		Columbus	Onslow
Clay	Surry	Granville	Scotland		Craven	Pamlico
Cleveland	Swain	Harnett	Stanly		Currituck	Pasquotank
Gaston	Transylvania	Hoke	Stokes		Dare	Pender
Graham	Watauga	Iredell	Union		Duplin	Perquimans
Haywood	Wilkes	Lee	Vance		Edgecombe	Pitt
Henderson	Yadkin		Warren		Gates	Robeson
	Yancey				Greene	Sampson
					Halifax	Tyrrell
					Hertford	Washington
					Hyde	Wayne
						Wilson

D. NONPROFIT AND CHDO SET-ASIDES

If necessary, the Agency will adjust the awards under the Plan to ensure that the overall allocation results in

- ten percent (10%) of the state's federal tax credit ceiling being awarded to projects involving tax exempt organizations (nonprofits) and
- fifteen percent (15%) of the Agency's HOME funds being awarded to projects involving Community Housing Development Organizations certified by the Agency (CHDOs).

Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not fall into one of these categories will be awarded to the next highest ranking project(s) that do(es) until the overall allocation(s) reach(es) the necessary percentage(s). The Agency may make such adjustment(s) in any set-aside.

1. NONPROFIT SET-ASIDE

In order to qualify as a nonprofit application, the proposed project must either:

- (a) not involve any for-profit Principals or
- (b) comply with the material participation requirements of the Code, applicable federal regulations and Section VI(A)(2).

2. CHDO SET-ASIDE

In order to qualify as a CHDO application,

- (a) the proposed project must meet the requirements of subsection (D)(1) above, 24 CFR 92.300(a)(1),
- (b) as of the full application deadline, the applicant, any Principal, or any affiliate must not undertake any choice-limiting activity prior to successful completion of the U.S. Department of Housing and Urban Development (HUD) environmental clearance review, and
- (c) the project and owner must comply with regulations regarding the federal CHDO set-aside.

The Agency may determine that the requirements of the federal CHDO set-aside have been or will be met without implementing subsection (D)(2).

E. PRINCIPAL AND PROJECT AWARD LIMITS

1. PRINCIPAL LIMITS

- (a) The maximum awards to any one Principal will be two projects or a total of \$1,500,000 in tax credits, including all set-asides. Principals involved in more than one project awarded in 2011 will be limited to one award in 2012. In future cycles the limit will be three projects over two years.
- (b) The Agency may further limit awards based on unforeseen circumstances.
- (c) For purposes of the maximum allowed in this subsection (E)(1), the Agency may determine that a person or entity not included in an application is a Principal for the proposed project. Such determination would include consideration of relationships between the parties in previously awarded projects and other common interests. Standard fee for service contract relationships (such as accountants or attorneys) will not be considered.

2. PROJECT LIMIT

The maximum award to any one project will be \$900,000.

3. PHR AND JV PROJECTS

Public housing redevelopment (PHR) and joint venture (JV) projects:

- (a) The Agency may determine that fifty percent (50%) of the tax credits awarded to PHR or JV projects do not count against some or all of the Principals involved for the purpose of subsection (E)(1) above. This determination will be based on the Principal's role in the project(s) and overall development capacity. The allowance in this subsection (E)(3)(a) will apply to a maximum of one (1) project per Principal. In the event a Principal is involved in multiple PHR or JV projects, this exemption will apply to the one with the smallest award of 9% tax credits.
- (b) PHR includes:
 - (i) buildings to be located on the site of former public housing,
 - (ii) constructing replacement public housing units, or
 - (iii) rehabilitation of existing public housing.
- (c) JV includes projects that involve nonprofit Principal(s) with limited development experience or capacity and the Project would qualify under Section II(D)(1) (the nonprofit set-aside).

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

- (a) No county will be awarded tax credits for new construction exceeding
 - \$2,000,000 in the Metro region, and
 - \$1,000,000 in the East, Central, and West regions,
 unless doing so is necessary to meet another set-aside requirement of this Plan. No county will be awarded more than one project under the rehabilitation set-aside. The Agency may further limit awards based on unforeseen circumstances. The Agency may waive the county-based limits for revitalization efforts characterized by a high degree of committed public subsidies.
- (b) The Agency will not accept applications in the following counties: Alexander, Avery, Bladen, Brunswick, Lincoln, Moore, Orange, Pasquotank, Pitt, Randolph, Rockingham, Scotland, Stanly, Transylvania, and Wayne.

2. INCOME DESIGNATIONS

Pursuant to N.C.G.S. § 105-129.42(c) the Agency is responsible for designating each county as High, Moderate or Low Income. Five criteria were used for making this determination: (a) county median income; (b) poverty rate; (c) percent of population in rural areas; (d) regional growth patterns; (e) N.C. Department of Commerce tier (one, two or three).

Each county was considered as a whole and evaluated relative to others in the state. Based on this process, the Agency designates counties as follows:

HIGH	MODERATE		LOW		
Alamance	Alexander	Lincoln	Alleghany	Graham	Pasquotank
Buncombe	Brunswick	Moore	Anson	Greene	Pender
Cabarrus	Burke	Nash	Ashe	Halifax	Perquimans
Catawba	Carteret	Onslow	Avery	Hertford	Richmond
Chatham	Cleveland	Person	Beaufort	Hoke	Robeson
Durham	Craven	Pitt	Bertie	Hyde	Rutherford
Forsyth	Cumberland	Polk	Bladen	Jackson	Sampson
Gaston	Dare	Randolph	Caldwell	Jones	Scotland
Guilford	Davidson	Rockingham	Camden	Lenoir	Surry
Iredell	Davie	Rowan	Caswell	Macon	Swain
Johnston	Franklin	Stanly	Cherokee	Madison	Transylvania

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Mecklenburg	Granville	Stokes	Chowan	Martin	Tyrrell
New Hanover	Harnett	Watauga	Clay	McDowell	Vance
Orange	Haywood	Wayne	Columbus	Mitchell	Warren
Union	Henderson	Wilson	Currituck	Montgomery	Washington
Wake	Lee	Yadkin	Duplin	Northampton	Wilkes
			Edgecombe	Pamlico	Yancey
			Gates		

G. OTHER AWARDS AND EXCEEDING LIMITATIONS

1. The Agency may award tax credits remaining from the four geographic set-asides to the next highest scoring (excluding mortgage subsidy) eligible new construction application(s) statewide and/or one or more eligible rehabilitation applications. The Agency may also carry forward any amount of tax credits to the next year.
2. The Agency may award 2012 tax credits outside of the normal process to projects that: a) allow the Agency to comply with HUD regulations regarding timely commitment of funds, b) prevent the loss of state or federal investment, c) provide housing for underserved populations or d) are part of a settlement agreement of legal action brought against a local government. The total amount of such awards(s) shall not exceed \$1,000,000.
3. The Agency may also make a forward commitment of the next year's tax credits in an amount necessary to fully fund project(s) with a partial award or to any project application that was submitted in a prior year if such application meets all the minimum requirements of the Plan. In the event that credits are returned or the state receives credits from the national pool, the Agency may elect to carry such credits forward, make an award to any project application (subject only to the nonprofit set aside), or a combination of both.
4. The Agency may exceed the limitations on awards contained in Sections II(B), II(F)(1) and this Section II(G) in order to completely fund a project request.

III. DEADLINES, APPLICATION AND FEES

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2012 application process for 9% tax credits and the first round of bond volume and 4% tax credits. The Agency will announce the application schedule for a second round of bond volume and 4% tax credits at a later time.

January 13	Deadline for submission of preliminary applications (12:00 noon)
March 5	Market analysts will mail studies to the Agency and applicants
March 16	Notification of final site scores
March 26	Deadline for market-related project revisions
April 2	Deadline for the Agency and applicant to receive a hard copy of the revised market study, if applicable
May 11	Deadline for full applications (12:00 noon)
August	Notification of tax credit awards

The Agency reserves the right to change the schedule as necessary.

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All applicants are required to pay a nonrefundable fee of \$5,520 at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a \$1,220 preliminary application processing fee (which will be assessed for every electronic application submitted). The Agency may charge additional fee(s) to cover the cost of direct contracting with other providers (such as appraisers).
2. All applicants are required to pay a nonrefundable processing fee of \$1, 220 upon submission of the full application.
3. Entities receiving tax credit awards, including those involving tax exempt bond volume, are required to pay a nonrefundable allocation fee equal to 0.68% of the project's total qualified basis.
4. The allocation fee will be due at the time of either the carryover allocation or bond volume award. Failure to return the required documentation and fee by the date specified may result in cancellation of the allocation. The Agency may assess other fees for additional monitoring responsibilities.
5. Owners must pay a monitoring fee of \$760 per unit (includes all units, qualified, unrestricted and employee) prior to issuance of the project's IRS Form 8609.
6. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Agency or the Committee.
7. The Agency may assess applicants or owners a fee of up to \$2,000 for each instance of failure to comply with a written requirement, whether or not such requirement is in the Plan. The Agency will not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed; such a delay in processing may result in disqualification of application(s).
8. The Agency will assess \$1,500 for closing a state tax credit loan and \$2,000 for an RPP closing.

C. APPLICATION PROCESS AND REQUIREMENTS

1. The Agency may require applicants to submit any information, letter or representation relating to Plan requirements or point scoring as part of the application process. Unless otherwise noted, the Agency may elect to not consider information submitted after the relevant deadline.
2. Any failure to comply with an Agency request under subsection (C)(1) above or any misrepresentation, false information or omission in any application document may result in disqualification of that application and any other involving the same owner(s), Principal(s), consultant(s) and/or application preparer(s). Any misrepresentation, false information or omission in the application document may also result in a revocation of a tax credit allocation.
3. The Agency may elect to treat applications involving more than one site, population type (family/elderly) or activity (new/rehabilitation) as separate for purposes of the Agency's application process. Each application would require a separate initial application fee. The Agency may allow such applications to be considered as one for the full application underwriting if all sites are secured by one permanent mortgage and are not intended for separation and sale after the tax credit allocation.
4. The Agency will notify the appropriate unit of government about the project after submission of the full application. The Agency reserves the right to reject applications opposed in writing by the chief elected official (supported by the council or board), but is not obligated to do so.
5. For each application one individual or validly existing entity must be identified as the applicant and execute the preliminary and full applications. An entity may be one of the following:
 - (a) corporation, including nonprofits,
 - (b) limited partnership, or
 - (c) limited liability company.

Only the identified applicant will have the ability to make decisions with regard to that application. The applicant may enter into joint venture or other agreements but the Agency will not be responsible for evaluating those documents to determine the relative rights of the parties. If the application receives an award the applicant must become a managing member or general partner of the ownership entity.

IV. SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

New construction applications must meet all threshold requirements and receive 110 points to be considered for award and funding. Rehabilitation applications will not receive point scores but instead will be evaluated using the criteria listed in Section IV(H)(3) (thus all references to receipt of points only apply to new construction projects). All threshold requirements also apply to rehabilitation projects unless otherwise noted. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2012 cycle. Penalties and limitations for market-rate units will not apply for applications with a commitment for a grant or no-payment financing equal to at least the amount of foregone federal tax credit equity and state tax credits.

A. SITE AND MARKET EVALUATION

The Agency will not accept a full application where the preliminary application does not meet all site and market threshold requirements.

1. SITE EVALUATION (MAXIMUM 100 POINTS)

(a) General Site Requirements:

- (i) Sites must be sized to accommodate the number and type of units proposed. The applicant or a Principal must have site control by the preliminary application deadline, which may be evidenced by an option, contract or deed. The documentation of site control must include a plot plan.
- (ii) Required zoning must be in place by the full application submission date, including special/conditional use permits, and any other discretionary land use approval required (includes all legislative or quasi-judicial decisions). The Agency may grant an extension of this deadline if:
 - requested by the applicant in advance of the full application due date, and
 - all approval(s) are scheduled to be considered for final approval no later than thirty (30) days from the full application date.

In evaluating extension requests, the Agency will consider whether the applicant complied with the jurisdiction's deadlines and other requirements in a timely manner. The Agency will assess a \$250 fee for requests submitted within ten (10) calendar days of the full application deadline.

- (iii) Utilities (water, sewer and electricity) must be available with adequate capacity to serve the site. Sites should be accessed directly by existing paved, publicly maintained roads. If not, it will be the owner's responsibility to extend utilities and roads to the site. In such cases, the applicant must explain and budget for such plans at the preliminary application stage and document the right to perform such work.

(b) Criteria for Site Score Evaluation:

Site scores will be based on the following factors. Each will also serve as a threshold requirement; the Agency may remove an application from consideration if the site is sufficiently inadequate in one or more of the categories. Evaluation of sites will involve a relative comparison with other applications in the same geographic set-aside. The Agency will consider revitalization plans and other proposed development based on certainty, extent and timing. The score for a particular category will reflect the project's tenant type (family/elderly/supportive housing).

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 40 POINTS)

- Trend and direction of real estate development and area economic health.
- Physical condition of buildings and improvements in the immediate vicinity.
- Concentration of affordable housing, including HUD, Rural Development, and tax credit projects as well as unsubsidized, below-market housing.

(ii) **SURROUNDING LAND USES (MAXIMUM 20 POINTS, POSSIBLE 10 POINT DEDUCTION)**

- Land use pattern is suitable for multifamily residential.
- Effect of industrial, large-scale institutional or other incompatible uses, including but not limited to: wastewater treatment facilities, high traffic corridors, junkyards, prisons, landfills, large swamps, distribution facilities, frequently used railroad tracks, power transmission lines and towers, factories or similar operations, sources of excessive noise, and sites with environmental concerns (such as odors or pollution).
- Extent that the location is isolated.

(iii) **AMENITIES (MAXIMUM 40 POINTS)**

Availability, quality and proximity of the following: grocery store(s); basic shopping / general merchandise; pharmacy; community/senior center; public park or library; access to public transportation; other beneficial services or amenities.

(iv) **SITE SUITABILITY AND BUILDING LOCATION (POSSIBLE 10 POINT DEDUCTION)**

- Adequate traffic safety controls (i.e. stop lights, speed limits, turn lanes, lane width).
- Degree of negative features, design challenges or physical barriers that will impede project construction or adversely affect future tenants; for example: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive reuse projects- suitability for residential use and difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition).
- The project would not be visible to potential tenants using normal travel patterns.
- Other unusual and problematic circumstances.

2. MARKET ANALYSIS

The Agency will administer the market study process based on this Section and the terms of **Appendix A** (incorporated herein by reference).

- (a) The Agency will contract directly with market analysts to perform studies. Applicants may interact with market analysts and will have an opportunity to revise their project (unit mix, targeting). Any revisions must be submitted in writing to both the market analyst and to the Agency, following the schedule in Section III(A), and will be binding on the applicant for the full application.
- (b) The Agency will limit the number of projects awarded in the same application round to those that it determines can be supported in the market.
- (c) The following four criteria are threshold requirements for new construction applications:
 - (i) the project's capture rate,
 - (ii) the project's absorption rate,
 - (iii) the vacancy rate at comparable properties (what qualifies as a comparable will vary based on the circumstances), and
 - (iv) the project's effect on existing or awarded properties with 9% tax credits or Agency loans.Applicants may not increase rents or the number of units after the deadline for completing market-related project revisions.

- (c) The Agency is not bound by the conclusions or recommendations of the market analyst(s), and will use its discretion in evaluating the criteria listed in this subsection (A)(2).
- (d) Projects may not give preferences to potential tenants based on:
 - (i) residing in the jurisdiction of a particular local government,
 - (ii) having a particular disability, or
 - (iii) being part of a specific occupational group (e.g. artists).

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

- (a) Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CFR Part 983) must submit a letter from the issuing authority in a form approved by the Agency. Conversion of vouchers will be treated as funding source under Section VI(B)(6)(d); a project will be ineligible for an allocation if it does not meet requirements set by the Agency as part of the application and award process. Such requirements may involve the public housing authority's (PHA's) Annual Plan, selection policy, and approval for advertising.
- (b) Applicants must include a written agreement between the owner and all PHAs and Section 8 providers with jurisdiction inside the project's primary market area. The agreement must commit the PHAs to include the project in any listing of housing opportunities where households with tenant-based subsidies are welcome, and the project's management agent to actively seek referrals from the PHAs to apply for units at the proposed project. If one or more of the PHAs refuses to cooperate for any reason, an explanation must be submitted as well as a statement of commitment by the applicant to seek referrals from the PHA(s). This requirement does not apply to projects with rental assistance provided through RD or if one hundred percent (100%) of the units have project-based subsidy.

2. MORTGAGE SUBSIDIES AND LEVERAGING (MAXIMUM 20 POINTS)

(a) Eligibility:

Only loans or grants from the following sources will qualify for points under this subsection (B)(2):

- (i) HOPE VI,
- (ii) Community Development Block Grant (CDBG) program funds,
- (iii) HUD Section 202 or 811,
- (iv) established local government housing development funds, and
- (v) RD Section 515.

Other sources of funding may qualify PROVIDED THEY ARE APPROVED IN WRITING IN ADVANCE by the Agency prior to the preliminary application deadline. (Approval of a particular source in prior years does not meet this requirement.) Applications including market-rate units will be ineligible for points under subsection (B)(2) unless the total housing expense for all market-rate units are at least twenty percent (20%) higher than the maximum allowed for a unit at 60% area median income. Adjustments to the purchase price of the land by the seller, Agency loans, state credits and bond financing are not sources of mortgage subsidy.

(b) Required Terms:

In order to qualify for points under subsection (B)(2), loans must be listed as a source in the full application, comply with the requirements of Section VI(B)(6)(b), and have a term of at least

twenty (20) years and an interest rate less than or equal to two percent (2%). See Section IV(C)(2) for a restriction on RPP loans for applications with local government financing.

(c) Metro Region:

Applications will earn points based on the total amount of qualifying funds committed per unit (excluding an employee/manager's unit), as described below:

Funds/Unit	Points	Funds/Unit	Points
\$6,000	6	\$14,000	14
\$8,000	8	\$16,000	16
\$10,000	10	\$18,000	18
\$12,000	12	\$20,000	20

The calculation includes all units and amounts will not be rounded up. The funds-to-unit ratio approved by the lending source determines the score. The amount provided by a local government will be reduced by the amount included in the project budget for any impact, tap or related fees charged by that local government and the cost of land sold by that local government.

- (d) Projects that will utilize federal and state historic rehabilitation tax credits and are funded entirely with equity and state low-income housing tax credits (no grants or debt sources other than deferred developer fees) will be awarded five (5) points. Any deferred fee must comply with Section VI(B)(5).

3. TENANT RENT LEVELS (MAXIMUM 15 POINTS)

The application may earn points under one of the following scenarios:

(a) If the project is in a High Income county:

- Fifteen (15) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of county median income.
- Ten (10) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

(b) If the project is in a Moderate Income county:

- Fifteen (15) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
- Ten (10) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

- (c) If the project is in a Low Income county, fifteen (15) points will be awarded for projects in which at least forty percent (40%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

- (d) Ten (10) points will be awarded to applications for new construction tax exempt bond projects that meet one of the following requirements:

- at least twenty percent (20%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or
- at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

C. PROJECT DEVELOPMENT COSTS AND RPP LIMITATIONS

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 20 POINTS)

The Agency will assess negative points to applications listing more than the following in lines 5 and 6 of the Project Development Cost (PDC) description, as outlined in Chart A below. The point structure in Chart B will apply to the following:

- (a) all units are detached single family houses or duplexes,
- (b) serving persons with severe mobility impairments,
- (c) development challenges resulting from being within or adjacent to a central business district,
- (d) public housing redevelopment projects, or
- (e) building(s) with both steel and concrete construction and at least four (4) stories of housing.

The per-unit amount calculation includes all items covered by the construction contract, building permits, Energy Star, certifications for green programs, and any other costs not unique to the specific proposal.

Chart A		Chart B	
\$60,000	-10	\$71,000	-10
\$69,000	-20	\$85,000	-20

The Agency will review proposed costs for historic adaptive re-use projects and approve the amount during the application review process.

See Sections VI(B)(7), (8), and (9) for other cost restrictions.

2. RESTRICTIONS ON RPP AWARDS

(a) Projects requesting RPP funds may not:

- (i) request RPP loan funds in excess of the following amounts per unit- \$15,000 in High Income counties; \$20,000 in Moderate Income counties; \$25,000 in Low Income counties,
- (ii) include market-rate units,
- (iii) involve Principals who have entered into a workout or deferment plan within the previous year for an RPP loan awarded after January 1, 1999,
- (iv) request less than \$150,000 or more than \$1,000,000 per project, or
- (v) have a commitment of funds from a local government under terms that will result in more repayment than the RPP financing (see description in subsection (C)(2)(b) below).

The maximum award of RPP funds to any one Principal will be a total of \$1,600,000. Requesting an RPP loan may result in an application being ineligible under Section VI(B)(6)(d) if the Agency has inadequate funds.

(b) Projects may only request an RPP loan if the principal and interest payments for RPP and any local government financing will be equal to the anticipated net operating income divided by 1.15, less conventional debt service:

Repayment of RPP and local government loans = (NOI / 1.15) – conventional debt service.

The amount of repayment will be split between the RPP loan and local government lenders based on their relative percentage of loan amounts. For example:

RPP Loan = \$400,000
local government loan = \$200,000

	Year 1	Year 2	Year 3	Year 4
Anticipated amount available for repayment	\$10,000	\$8,000	\$6,000	\$4,000
RPP principal and interest payments	\$6,667	\$5,333	\$4,000	\$2,667
local government P&I payments	\$3,333	\$2,667	\$2,000	\$1,333

- (c) Loan payments made to the applicant, any Principal, member or partner of the ownership entity, or any affiliate thereof, will be taken out of cash flow remaining after RPP payments.

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE

- (a) At least one Principal must have successfully developed, operated and maintained in compliance one (1) North Carolina low-income housing tax credit project. The project must have been placed in service between December 1, 2005 and January 1, 2011. (The Agency may waive this requirement for applicants with adequate experience in the North Carolina tax credit program.) Such Principal must:

- (i) be identified in the preliminary application,
- (ii) become a general partner or managing member of the ownership entity, and
- (iii) remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service.

The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

- (b) All owners and Principals must disclose all previous participation in the low-income housing tax credit program. Additionally, owners and Principals that have participated in an out of state tax credit allocation may be required to complete an Authorization for Release of Information form.
- (c) The Agency reserves the right to determine that a particular development team does not meet the threshold requirement of subsection (D)(1)(a) due to differences between its prior work and the proposed project. Particularly important in this evaluation is the type of subsidy program used in the previous experience (such as tax-exempt bonds, RD).

2. MANAGEMENT EXPERIENCE

The management agent must have at least:

- (a) one similar tax credit project in their current portfolio, and
- (b) one staff person serving in a supervisory capacity with regard to the project who has been certified as a tax credit compliance specialist.

Such certification must be from an organization accepted by the Agency (refer to the list in **Appendix C**). None of the persons or entities serving as management agent may have in their portfolio a project with material or uncorrected non-compliance beyond the cure period. The management agent listed on the application must be retained by the ownership entity for at least two (2) years after project completion, unless the agent is guilty of specific nonperformance of duties.

3. PROJECT TEAM DISQUALIFICATIONS

The Agency may disqualify any owner, Principal or management agent, who:

- (a) has been debarred or received a limited denial of participation in the past ten years by any federal or state agency from participating in any development program;
- (b) within the past ten years has been in a bankruptcy, an adverse fair housing settlement, an adverse civil rights settlement, or an adverse federal or state government proceeding and settlement;

- (c) has been in a mortgage default or arrearage of three months or more within the last five years on any publicly subsidized project;
- (d) has been involved within the past ten years in a project which previously received an allocation of tax credits but failed to meet standards or requirements of the tax credit allocation or failed to fulfill one of the representations contained in an application for tax credits;
- (e) has been found to be directly or indirectly responsible for any other project within the past five years in which there is or was uncorrected noncompliance more than three months from the date of notification by the Agency or any other state allocating agency;
- (f) interferes with a tax credit application for which it is not an owner or Principal at a public hearing or other official meeting;
- (g) has outstanding flags in HUD's national 2530 National Participation system;
- (h) has been involved in any project awarded 9% tax credits in 2011 for which the equity investment has not closed as of the full application deadline;
- (i) has been involved in any project awarded tax credits after 2000 where there has been a change in general partners or managing members during the last five years that the Agency did not approve in writing beforehand;
- (j) would be removed from the ownership of a project that is the subject of an application under the rehabilitation set-aside in the current cycle; or
- (k) is not in good standing with the Agency.

A disqualification under this subsection (D)(3) will result in the individual or entity involved not being allowed to participate in the 2012 cycle and removing from consideration any application where they are identified.

E. UNIT MIX AND PROJECT SIZE

1. Ten (-10) points will be subtracted from any full application that includes market-rate units. This penalty will not apply where, as of the full application, the rents for all market rate units are at least five percent (5%) higher than the maximum allowed for a unit at 60% AMI and the market study indicates that such rents are feasible.
2. New construction 9% tax credit projects may not exceed one hundred and twenty (120) units.
3. New construction bond financed projects may not exceed two hundred (200) units.
4. All projects must have at least twenty four (24) qualified low-income units.

The Agency reserves the right to waive the penalties and limitations in this Section IV(E) for proposals that reduce low-income and minority concentration, including public housing projects, and subsection (E)(2) for proposals that are within a transit station area as defined by the Charlotte Region Transit Station Area Joint Development Principles and Policy Guidelines or adaptive re-use projects where made necessary by the building(s) physical structure.

F. SPECIAL CRITERIA AND TIEBREAKERS

1. ENERGY STAR

New construction residential buildings must comply with all Energy Star standards as defined in **Appendix B** (incorporated herein by reference). Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

2. COMMUNITY REVITALIZATION PLANS (MAXIMUM 5 POINTS)

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Five (5) points will be awarded to applications if all of the following apply:

- (a) the project is within the geographic area identified by a community revitalization plan (CRP), which does not include basic local land use plans unless there is a specific revitalization component;
- (b) the project is in a Qualified Census Tract or the CRP is primarily focused on an existing residential neighborhood;
- (c) completion of the project would contribute to one or more of the goal(s) stated in the CRP; and
- (d) the CRP was officially adopted or amended by a local government between January 1, 2004 and July 1, 2011.

Only documents or information included in the officially adopted CRP will be considered in evaluating the criteria in this subsection. The CRP must be included with the preliminary application to be eligible for points in this subsection.

3. UNITS FOR THE MOBILITY IMPAIRED

Five percent (5%) of all units in new construction projects must meet the accessibility standards as defined in **Appendix B** (incorporated herein by reference). THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). Units for the mobility impaired should be available to all tenants who would benefit from their design and are not necessarily reserved under the Targeting Plan requirements of subsection (F)(4).

4. TARGETING PLANS

All projects will be required to target ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects with federal project-based rental assistance must target at least five (5) units regardless of size. Projects that are targeting units under this subsection are not required to provide onsite supportive services or a service coordinator.

Owners must demonstrate a partnership with a local lead agency and submit a Targeting Plan for review and certification by the N.C. Department of Health and Human Services (DHHS). At a minimum, Targeting Plans must include:

- (a) A description of how the project will meet the needs of the targeted tenants including access to supportive services, transportation, proximity to community amenities, etc.
- (b) A description of the experience of the local lead agency and their capacity to provide access to supportive services, and to maintain relationships with the management agent and community service providers for the duration of the compliance period.
- (c) A Memorandum of Understanding (MOU) between the developer(s), management agent and the lead local agency. The MOU will include-
 - (i) A commitment from the local lead agency to provide, coordinate and/or act as a referral agent to assure that supportive services will be available to the targeted tenants.
 - (ii) The referral and screening process that will be used to refer tenants to the project, the screening criteria that will be used, and the willingness of all parties to negotiate reasonable accommodations to facilitate the admittance of persons with disabilities into the project.
 - (iii) A communications plan between the project management and the local lead agency that will accommodate staff turnover and assure continuing linkages between the project and the local lead agency for the duration of the compliance period.
- (d) Certification that participation in supportive services will not be a condition of tenancy.

- (e) Agreement that for a period of ninety (90) days after certificate of occupancy, the required number of units for persons with disabilities will be held vacant other than for such population(s).
- (f) Agreement to maintain a separate waiting list for persons with disabilities and prioritizing these individuals for any units that may become vacant after the initial rent-up period, up to the required number of units.
- (g) Agreement to affirmatively market to persons with disabilities.
- (h) Agreement to include a section on reasonable accommodation in property management's application for tenancy.
- (i) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.
- (j) A description of how the project will make the targeted units affordable to persons with extremely low incomes. NOTE: Key Program assistance is only available to persons receiving income based upon a disability. Projects targeting units to non-disabled homeless populations or persons in recovery with only a substance abuse diagnosis must have an alternative mechanism to assure affordability.

The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines that they are not feasible. A Targeting Plan template and other documents related to this subsection are included in **Appendix D** (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and **Appendix D** by the earlier of July 19, 2013 or four months prior to the project's placed in service date. (The Agency may set additional interim requirements.) This subsection (F)(4) does not apply to tax-exempt bond applications.

5. LOCAL GOVERNMENT LAND DONATION (MAXIMUM 5 POINTS)

Applications that meet the following criteria will be awarded five (5) points:

- (a) the real estate that will contain the proposed project buildings is owned by a unit of local government as of the preliminary application deadline;
- (b) the local government did not purchase any portion of the real estate from the applicant or any owner, Principal or affiliate thereof; and
- (c) the application shows no more than a total of \$1,000 in the line-items for purchase of land and buildings (in the case of a ground lease, no more than \$50 per year).

6. SECTION 1602 EXCHANGE PROJECTS (-40 POINT DEDUCTION)

The Agency may deduct up to forty (-40) points from any application if the applicant, any owner, Principal or affiliate thereof is also involved in a Section 1602 Exchange project with uncorrected material noncompliance.

7. TIEBREAKER CRITERIA

The following will be used to award tax credits in the event that the final scores of more than one project are identical.

First Tiebreaker: The project requesting the least amount of federal tax credits per unit based on the Agency's equity needs analysis.

Second Tiebreaker: Tenants with Children: Projects that can serve tenant populations with children. Projects will qualify for this designation if at least twenty-five (25%) of the units are three or four

bedrooms. This tiebreaker will only apply where the market study shows a clear demand for this population (as determined by the Agency).

Third Tiebreaker: Tenant Ownership: Projects that are intended for eventual tenant ownership. Such projects must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 30-year compliance period.

In the event that a tie remains after considering the above tiebreakers, the project requesting the least amount of federal tax credits will be awarded.

G. DESIGN STANDARDS

All proposed measures must be shown in the application in order to receive points.

1. THRESHOLD REQUIREMENTS

The minimum threshold requirements for design are found in **Appendix B** (incorporated herein by reference) and must be used for all projects receiving tax credits or RPP funding.

2. CRITERIA FOR SCORE EVALUATION (MAXIMUM OF 50 POINTS)

The Agency will determine points based on the following criteria as applied to the site drawings submitted with the full application.

(a) Site Layout

The Agency will award up to ten (10) points based on its evaluation of the site layout. The following characteristics will be considered.

- (i) The location of residential buildings in relation to parking, site amenities, community building, postal facilities and trash collection areas.
- (ii) The degree to which site layout ensures a low, controlled traffic speed through the project.

(b) Quality of Design and Construction

(The points in this subsection are mutually exclusive with Section IV(G)(2)(c) below.)

The Agency will award up to forty (40) points for new construction projects based on its evaluation of the quality of the building design, and the materials and finishes specified. The following characteristics will be considered:

- (i) The extent to which the design uses multiple roof lines, gables, dormers and similar elements to break up large roof sections.
- (ii) The extent to which the design uses multiple types, styles, and colors of siding and brick veneer to add visual appeal to the building elevations.
- (iii) The level of detail that is achieved through the use of porches, railings, and other exterior features.
- (iv) Use of brick veneer or masonry products on building exteriors.

(c) Adaptive Re-Use

(The points in this subsection are mutually exclusive with Section IV(G)(2)(b) above.)

The Agency will award up to forty (40) points based on the following characteristics:

- (i) The extent to which the building(s) fit with surrounding streetscape after adaptation or have problems with orientation, sightlines, bulk and scale.
- (ii) Aesthetics after adaptation.
- (iii) Presence of special design elements or architectural features that may not be physically or financially available if new construction was introduced on the same site.

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

1. GENERAL THRESHOLD REQUIREMENTS

In order to be eligible for funding under Section II(B), a project must:

- (a) have either (i) received a tax credit allocation or (ii) federal project-based rental assistance for at least thirty percent (30%) of the total units,
- (b) have been placed in service on or before December 31, 1996,
- (c) require rehabilitation expenses in excess of \$15,000 per unit (as supported by a physical needs assessment conducted or approved by the Agency),
- (d) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,
- (e) not be feasible using tax exempt bonds (as determined by the Agency),
- (f) not have received an Agency loan in the last five (5) years,
- (g) not be deteriorated to the point of requiring demolition,
- (h) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five (5) years, and
- (i) have total replacement costs of less than \$110,000 per unit, including all Agency-required rehabilitation work.

Rehabilitation expenses include hard construction costs directly attributable to the project, excluding costs for a new community building, as calculated using lines 2 through 7 (less line 6) in the PDC description.

2. THRESHOLD DESIGN REQUIREMENTS

In addition to the relevant sections of **Appendix B**, the Agency will require owners to complete the following as appropriate for their project.

- (a) Improve site amenities and common areas by upgrading or adding a freestanding community building, making repairs and additions to landscaping, adding new site amenities such as playgrounds, and repairing parking areas.
- (b) Improve building exteriors by replacing deteriorated siding, replacing aged roofing, adding gutters and downspouts, and adding new architectural features to improve appearance.
- (c) Upgrade unit interiors by replacing flooring, installing new cabinets and countertops, replacing damaged interior doors, replacing light fixtures, and repainting units.
- (d) Replace and upgrade mechanical systems and appliances including HVAC systems, water heaters and plumbing fixtures, electrical panels, refrigerators, and ranges.
- (e) Improve energy efficiency by replacing inefficient doors and windows, adding additional insulation in attics, and upgrading the efficiency of mechanical systems and appliances.
- (f) Improve site and unit accessibility for persons with disabilities by making necessary alterations at common areas, alterations at single story ground floor units, adding or improving handicapped parking areas, and repairing or replacing sidewalks along accessible routes.

3. EVALUATION CRITERIA

The Agency will evaluate applications under Section II(B) based on the following criteria, which are listed in order of importance. Each one will serve both to determine awards and as a threshold requirement; the Agency may remove an application from consideration if the proposal is sufficiently

inadequate in any of the categories. For purposes of making awards, the Agency will not consider subsections (d) through (g) below if the outcome is determined by the criteria in subsections (a) through (c).

- (a) The Agency will give the highest priority to applications proposing to rehabilitate the state's most distressed federally subsidized existing housing, particularly buildings with accessibility or life, health and safety problems.
- (b) Applications will have a reduced likelihood of being awarded tax credits to the extent that the purpose is to subsidize an ownership transfer.
- (c) Shortcomings in the above criteria will be mitigated to the extent that a tax credit allocation is necessary to prevent (i) conversion of units to market rate rents or (ii) loss of government resources (including past, present and future investments).
- (d) The Agency will give priority to applications that have mortgage subsidy resources committed as part of the application.
- (e) Applications will have priority to the extent that the rehabilitation improvements are a part of a community revitalization plan or will benefit the surrounding community. However, projects in severely distressed areas will have a reduced likelihood of being awarded tax credits.
- (f) Applications will have a reduced likelihood of being awarded tax credits based on the number of tenants that would be permanently relocated (including market-rate).
- (g) While the rehabilitation set-aside is not subject to any regional set-aside, the Agency will consider the geographic distribution of this resource and will attempt to avoid a concentration of awards in any one area of the state.

V. ALLOCATION OF BOND CAP

A. ORDER OF PRIORITY

The Committee will allocate the multifamily portion of the state's tax-exempt bond authority in the following order of priority:

- 1. Projects that serve as a component of an overall HOPE VI revitalization effort.
- 2. Rehabilitation of existing rent restricted housing.
- 3. Rehabilitation of projects consisting of entirely market-rate units.
- 4. Adaptive reuse projects.
- 5. Other new construction projects.

Applications will only be allocated bond authority if there is enough remaining after awarding all eligible applications in higher priority levels. Within each category, applications seeking the least amount of authority per low-income unit will have priority.

B. ELIGIBILITY FOR AWARD

Except as otherwise indicated, owners of projects with tax exempt bonds and 4% credits must meet all requirements of the Plan. Even with an allocation of bond authority, projects must meet the threshold requirements to be eligible for tax credits.

- 1. New construction applications must earn 100 points.
- 2. All projects must meet one of the following requirements:

- (a) at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or
 - (b) at least five percent (5%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
3. Rehabilitation applications must:
- (a) have been placed in service on or before December 31, 1996,
 - (b) require rehabilitation expenses in excess of \$10,000 per unit,
 - (c) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,
 - (d) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five (5) years, and
 - (e) not be deteriorated to the point of requiring demolition.
4. The inducement resolution must be submitted with the full application.

VI. GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. PROJECTS WITH HISTORIC TAX CREDITS

Buildings either must be on the National Register of Historic Places or approved for the State Housing Preservation Office's study list at the time of the full application. Evidence of meeting this requirement should be provided.

2. NONPROFIT SET-ASIDE

For purposes of being considered as a nonprofit sponsored application under Section II(D), at least one nonprofit entity (or, where applicable, its qualified corporation) involved in a project must:

- (a) be qualified under Section 501(c)(3) or (4) of the Code,
- (b) materially participate, as defined under federal law, in the acquisition, development, ownership, and ongoing operation of the property for the entire compliance period,
- (c) have as one of its exempt purposes the fostering of low-income housing,
- (d) be a managing member or general partner of the ownership entity.

The Agency reserves the right to make a determination that the nonprofit owner is not affiliated with or controlled by a for-profit entity or entities other than a qualified corporation. There can be no identity of interest between any nonprofit owner and for-profit entity, other than a qualified corporation.

3. ENVIRONMENTAL HAZARDS

All projects involving use of existing structures must submit a hazardous material report which provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. The testing must be performed by professionals licensed to do hazardous materials testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

4. APPRAISALS

The Agency will not allow the project budget to include more for land costs than the lesser of its appraised market value or the purchase price. Any project involving an existing structure or

budgeting more than \$15,000 per acre toward land costs must submit with the full application a real estate "as is" appraisal that is a) dated no more than six (6) months from the full application deadline, b) prepared by an independent, state certified appraiser and c) complies with the Uniform Standards of Professional Appraisal Practice. The Agency may order an additional appraisal with costs to be paid by the applicant. Appraisals for rehabilitation and adaptive reuse projects must break out the land and building values from the total value.

5. CONCENTRATION

Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site's census tract with the community overall). The Agency may make an exception for projects in economically distressed areas which have community revitalization plans with public funds committed to support the effort.

6. DISPLACEMENT

For rehabilitation projects and in every other instance of tenant displacement, including temporary, the applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The owner is responsible for all relocation expenses, which must be included in the project's development budget. Owners must also comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as revised in 49 C.F.R. Part 24.

7. FEASIBILITY

The Agency will not allocate tax credits or RPP funding to applications that may have difficulty being completed or operated for the compliance period. Examples include projects that may not secure an equity investment or a Principal that has inadequate capacity to successfully carry out the development process.

B. UNDERWRITING THRESHOLD REQUIREMENTS

The following minimum financial underwriting requirements apply to all projects. Projects that cannot meet these minimum requirements, as determined by the Agency, will not receive tax credits or RPP funding.

1. LOAN UNDERWRITING STANDARDS

- (a) Projects applying for tax credits only will be underwritten with rents escalating at two percent (2%) and operating expenses escalating at three percent (3%).
- (b) All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect a 1.15 Debt Coverage Ratio (DCR) for twenty (20) years.
- (c) Applications requesting RPP funds may be required to comply with HOME program requirements, including 42 U.S.C. 12701 et seq., 24 C.F.R. Part 92 and all relevant administrative guidance. Projects awarded RPP funds must also comply with the RPP Guidelines in Appendix G.
- (d) The Agency may determine that the interest rate on a loan must be reduced where an application shows an excessive amount accruing towards a balloon payment.

2. OPERATING EXPENSES

- (a) New construction (excluding adaptive reuse): minimum of \$3,200 per unit per year not including taxes, reserves and resident support services.

- (b) Renovation (includes rehabilitation and adaptive reuse): minimum of \$3,400 per unit per year not including taxes, reserves and resident support services. For projects with RD loans, the operating expenses will be based upon the current RD approved operating budget.
- (c) The proposed management agent (or management staff if there is an identity of interest) must sign a statement (to be submitted with the full application) agreeing that the operating expense projections are reasonable.

3. EQUITY PRICING

The Agency will conduct a survey of tax credit equity investors to determine appropriate pricing assumptions. Projects will be underwritten using the greater of this amount and the applicant's projection. The Agency may also set a maximum price. Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

4. RESERVES

- (a) Rent-up Reserve: Required for all except bond financed projects. A reasonable amount must be established based on the projected rent-up time considering the market and target population, but in no event shall be less than \$300 per unit. These funds must be available to the management agent to pay rent-up expenses incurred in excess of rent-up expenses budgeted for in the PDC description. The funds are to be deposited in a separate bank account and evidence of such transaction provided to the Agency ninety (90) days prior to the expected placed in service date. All funds remaining in the rent-up reserve at the time the project reaches ninety-three (93%) occupancy must be transferred to the project replacement reserve account.

For those projects receiving loan funds from RD, the 2% initial operating and maintenance capital established by RD will be considered the required rent-up reserve deposit.

- (b) Operating Reserve: Required for all projects except those receiving loan funds from RD. The operating reserve will be the greater of a) \$1,500 per unit or b) six month's debt service and operating expenses (four months for tax-exempt bond projects), and must be maintained for the duration of the low-income use period.

The operating reserve can be funded by deferring the developer fees of the project. If this method is utilized, the deferred amounts owed to the developer can only be repaid from cash flow if all required replacement reserve deposits have been made. For tax credit projects where no RPP loan applies, the operating reserve can be capitalized by an equity pay in up to one year after certificate of occupancy is received. This will be monitored by the Agency.

- (c) Replacement Reserve: All new construction projects must budget replacement reserves of \$250 per unit per year. Rehabilitation and adaptive reuse projects must budget replacement reserves of \$350 per unit per year. The replacement reserve must be capitalized from the project's operations, escalating by four percent (4%) annually.

In both types of renovation projects mentioned above, the Agency reserves the right to increase the required amount of annual replacement reserves if the Agency determines such an increase is warranted after a detailed review of the project's physical needs assessment.

For those projects receiving RD loan funds, the required funding of the replacement reserve will be established, administered and approved by RD.

5. DEFERRED DEVELOPER FEES

Developer fees can be deferred to cover a gap in funding sources as long as:

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- (a) the entire amount will be paid within fifteen (15) years and meets the standards required by the IRS to stay in basis,
- (b) the deferred portion does not exceed fifty percent (50%) of the total amount as of the full application, and
- (c) payment projections do not negatively impact the operation of the project.

Each of these will be determined by the Agency. Nonprofit organizations must include a resolution from the Board of Directors allowing such a deferred payment obligation to the project. The developer may not charge interest on the deferred amount in excess of the long term AFR.

6. FINANCING COMMITMENT

- (a) For all projects proposing private permanent financing, a letter of intent is required. This letter must clearly state the term of the permanent loan is at least eighteen (18) years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for eighteen (18) years.
- (b) For all projects proposing public permanent financing, binding commitments are required to be submitted by the full application due date. The Agency may grant a thirty (30) day extension of this deadline for local governments if requested by the applicant in advance of the full application due date. The Agency will assess a \$250 fee for requests submitted within ten (10) calendar days of the full application deadline. Local governments also must identify the source of funding (e.g. HOME, trust fund). All loans must have a fixed interest rate and no balloon payments for at least eighteen (18) years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.
- (c) The Agency may request a letter from a construction lender documenting the loan amount, interest rate, and any origination fees.
- (d) Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an amount or under the terms described in the application. The Agency may waive this limitation if the project otherwise demonstrates financial feasibility. Project cash flow may not be used as a source of funds.

7. DEVELOPER FEES AND ADDITIONAL CONTINGENCY

- (a) Developer fees shall be \$11,500 per unit for new construction projects and twenty-seven and one half percent (27.5%) of PDC line item 4 for rehabilitation projects.
- (b) Notwithstanding the amount calculated in subsection (7)(a), the developer fee for any project shall be a maximum of \$1,000,000 (the maximum for projects with tax-exempt bonds is \$1,500,000).
- (c) Builder's general requirements shall be limited to six percent (6%) of hard costs.
- (d) Builder's profit and overhead shall be limited to ten percent (10%) (8% profit, 2% overhead) of total hard costs, including general requirements.
- (e) Where an identity of interest exists between the owner and builder, the builder's profit and overhead shall be limited to eight percent (8%) (6% profit, 2% overhead).

- (f) The application may include up to the greater of \$500 per unit or \$30,000 in additional contingency to cover overruns in any project development cost. To the extent this amount is not used for cost overruns it may be taken as additional developer fee.

8. CONSULTING FEES

The total amount of any consulting fees and developer fees shall be no more than the maximum developer fee allowed to that project.

9. ARCHITECTS' FEES

The architects' fees, including design and inspection fees, shall be limited to three percent (3%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the PDC description). This amount does not include engineering costs.

10. INVESTOR SERVICES FEES

Investor services fees must be paid from net cash flow and not be calculated into the minimum debt coverage ratio.

11. PROJECT CONTINGENCY FUNDING

All new construction projects shall have a hard cost contingency line item of NO MORE THAN five percent (5%) of total hard costs, including general requirements, builder profit and overhead. Rehabilitation and adaptive reuse projects shall include a hard cost contingency line item of NO MORE THAN ten percent (10%) of total hard costs.

12. PROJECT OWNERSHIP

There must be common ownership between all units and buildings within a single project for the duration of the compliance period.

13. SECTION 8 PROJECT-BASED RENTAL ASSISTANCE

For all projects that propose to utilize Section 8 project-based rental assistance, the Agency will underwrite the rents according to the tax credit and HOME limits. These limits are based on data published annually by HUD. If the Section 8 contract administrator is willing to allow rents above these limits, the project may receive the additional revenue in practice, but Agency underwriting will use the lower revenue projections regardless of the length of the Section 8 contract.

Given the uncertainty of long-term federal commitment to Section 8 rental assistance, the Agency considers underwriting to the more conservative revenue levels to best serve the project's long-term financial viability.

14. WATER, SEWER, AND TAP FEES

Any water, sewer, and tap fees charged to the project must be entered on a separate line item of the PDC description. Any application that does not include these costs must provide a letter from the local provider that no fees will be charged.

VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. ALLOCATION TERMS AND CANCELLATION

1. At any time between award and issuance of the Form 8609, owners must have written approval from the Agency prior to:
 - (a) changing the anticipated or final sources (amount or provider), including equity;
 - (b) increasing the anticipated or final uses by more than two percent (2%);

- (c) altering the designs approved by
 - the Agency at full application, or
 - local building code office,
 including amenities, site layout, floor plans and elevations (“approved design”);
- (d) starting construction, including sitework; or
- (e) increasing rents for low-income units (does not apply to tax exempt bonds).

Failure to do so may result in a fine of up to \$25,000, revocation of the reservation or allocation, future disqualification under Section IV(D)(3) of any Principal involved, or other recourse available to the Agency.

2. The 9% tax credit reservation amount will be the total anticipated qualified basis amount multiplied by either:
 - nine percent (9%) if legislation extending the date in Section 42(b)(2)(A) is enacted as of March 16, 2012, or
 - the applicable percentage effective in March if not.
 The applicable percentage effective in March will be used for the 4% tax credit.
3. Ownership entities must submit a completed carryover agreement and expend at least ten percent (10%) of the project’s reasonably expected basis, both by dates to be determined by the Agency.
4. A federal form 8609 will not be issued until:
 - (a) submission of a Final Cost Certification that complies with the Agency’s requirements;
 - (b) the owner and management company document attendance at an Agency sponsored or approved tax credit compliance seminar sponsored within the previous 12 months;
 - (c) monitoring fees have been paid;
 - (d) the project has been built according to the approved design; and
 - (e) the Agency determines the project has adhered to all representations made in the approved application and will meet all relevant Plan requirements.
5. The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code. Projects will be required to elect a project-based allocation. An allocation does not constitute a representation or warranty by the Agency or Committee that the ownership entity or its owners will qualify for the tax credits. The Agency’s interpretation of the Code, regulations, notices, or other guidance is not binding on the federal government.
6. Owners must record a thirty (30) year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement) stating that the owner will not apply for relief under Section 42(h)(6)(E)(i)(II) of the Code and will comply with other requirements under the Code, Plan, other relevant statutes and regulations and all representations made in the approved application. The Extended Use Agreement also may contain other provisions as determined by the Agency. The owner must have good and marketable title and obtain the consent of any prior recorded lienholder (other than for construction financing) to be bound by the Extended Use Agreement terms.
7. The Agency may revoke an allocation if the owner fails to implement all representations in the approved application. In addition to the terms of Section VII(A)(1), owners will acknowledge that the following constitute conditions to their allocation:
 - (a) accuracy of all representations made to the Agency, including exhibits and attachments,

(b) adherence to the Plan and all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act, and

(c) provision and maintenance of amenities for the benefit of the tenants.

An owner's or project's failure to comply with all such conditions without written authorization from the Agency will entitle the Agency, in its discretion, to deem the allocation to be cancelled by mutual consent. After any such cancellation, the owner will acknowledge that neither it nor the project will have any right to claim tax credits pursuant to the allocation. The Agency reserves the right, in its discretion, to modify or waive any such failed condition.

B. STATE TAX CREDITS

As the administrative agent for state credit refunds issued under N.C.G.S. § 105-129.42, the Agency has a responsibility to ensure that ownership entities do not receive resources ahead of corresponding value being created in the project. Therefore the following restrictions will apply to the state tax credit refund program.

1. Loan Option: Loans made by the Agency pursuant to N.C.G.S. § 105-129.42(d) will not be closed until the outstanding balance on the first-tier construction financing exceeds the total state credit amount; the entire loan must be used to pay down a portion of the then existing construction debt.
2. Direct Refund Option: The Agency and ownership entity will enter into an escrow agreement with regard to the refund dollars. The agreement will state, among other reasonable limitations, that issuance of the funds under N.C.G.S. § 105-129.42(g)(1) will not occur until all of the following requirements have been met:
 - (a) at least fifty percent (50%) of the activities included in the project's eligible basis have been completed;
 - (b) the Agency and local government inspector have conducted their framing inspections and approved all buildings (including community facilities); and
 - (c) the outstanding balance on the first-tier construction financing exceeds the total state credit amount (the entire refund must be used to pay down a portion of the then existing construction debt).

Applicants must indicate which of the two options will apply to the project as part of the full application process; such decision may not be changed for the carryover allocation. Ownership entities will have to fully comply with the Plan, to be eligible for participation in the state tax credit program. The Agency may adopt other policies regarding the state tax credit after adoption of the Plan. Owners, partners, members, developers or other Principals (and their affiliated entities) that are involved in a violation of any state tax credit requirement or fail to place a project in service after taking a loan or refund may be assessed up to forty (-40) negative points or disqualified from participation in Agency programs.

C. COMPLIANCE MONITORING

1. Owners must comply with Section 42 of the Code, IRS regulations, rulings, procedures, decisions and notices, state statutes, the Fair Housing Act, state laws, local codes, Agency loan documents, **Appendix F** (incorporated herein by reference), and any other legal requirements. The Agency may treat any failure to do so as a violation of the Plan.
2. The Agency will adopt and revise standards, policies, procedures, and other requirements in administering the tax credit program. Examples include training and on-line reporting. Owners must comply with all such requirements regardless of whether or not they expressly appear in the Plan or **Appendix F**. The Agency will have access to any project information, including physical access to the property, all financial records and tenant information.

VIII. DEFINITIONS

The terms listed below will be defined in the Plan as indicated below regardless of capitalization, unless the context clearly indicates otherwise. Terms used in the Plan but not defined below will have the same meaning as under the Code and IRS regulations.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).

Applicant: The entity that is applying for the tax credits and/or any RPP loan funds, as applicable.

Choice-Limiting Activity: Includes leasing or disposition of real property and any activity that will result in a physical change to the property, including acquisition, demolition, movement, rehabilitation, conversion, repair, or construction.

Community Service Facility: Any building or portion of building that qualifies under Section 42(d)(4)(C)(iii) of the Code, Revenue Ruling 2003-77, and any Agency requirements for such facilities (which may be published as part of the Plan, an Appendix or separately).

Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.

Displacement: The moving of a person or such person's personal property from their current residence.

Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.

Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or temporary housing but originally came from places not meant for habitation or emergency shelters.

Management Agent: Individual(s) or Entity responsible for the day to day operations of the project, which may or may not be related to the Owner(s) or ownership entity.

Market-Rate Units: Units that are not subject to tax credit restrictions; does not include manager units.

Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.

Net Square Footage: The outside to outside measurements of all finished areas that are heated and cooled (conditioned). Examples include hallways, community and office buildings, dwelling units, meeting rooms, sitting areas, recreation rooms, game rooms, etc. Breezeways, stairwells, gazebos and picnic shelters are examples of unconditioned outside structures that may not be used as net square footage.

Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.

Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.

Ownership Entity Agreement: A written, legally binding agreement describing the rights, duties and obligations of owners in the ownership entity.

9% Tax Credit: Low-income housing tax credits available for allocation under the state's volume cap pursuant to Section 42(h)(3) of the Code.

Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.

Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a)).

Principal: Principal includes (1) all persons or entities who are or who will become partners or members of the ownership entity, (2) all persons or entities whose affiliates are or who will become partners or members of the ownership entity, (3) all persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the lesser of twenty-five percent (25%) of the development fee for such project or \$100,000, and (4) all affiliates of such persons or entities in clause (3) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the lesser of twenty-five percent 25% of the development fee for such project or \$100,000. For purposes of determining Principal status the Agency may disregard multiple layers of pass-through or corporate entities. A partner or member will not be a Principal where its only involvement is that of the tax credit equity investor.

Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).

Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing.

Stabilized Occupancy: Maintenance of at least ninety percent (90%) occupancy for three consecutive months.

APPENDIX B

Design Quality Standards and Requirements

The terms of this Appendix B are the minimum requirements for any project awarded tax credits in 2010. Required documents must be prepared by an engineer or architect licensed to do business in North Carolina.

Once final plans and specifications have been completed, owners must submit them to the Agency and receive written approval before commencing sitework or construction.

At all times after award the owner is responsible for promptly informing the Agency of any changes or alterations which deviate from the final plans and specifications approved by the Agency. In particular owners must not take action on any material change in the site layout, floor plan, elevations or amenities without written authorization from the Agency. This includes changes required by local governments to receive building permits.

I. DESIGN DOCUMENT STANDARDS

All required documents must be prepared by an engineer or architect licensed to do business in North Carolina. All drawings should be to scale, using the minimum required scale as detailed below.

A. PRELIMINARY APPLICATION PLAN REQUIREMENTS

Plans must be 11" x 17" and indicate the following:

1. Street name(s) where site access is made, site acreage, planned parking areas, layout of building(s) on site to scale, any flood plains that will prohibit development on site, retaining walls where needed, and adjacent properties with descriptions.
2. Front, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
3. Use a 1/8" or 1/16" scale for each building.

B. FULL APPLICATION PLAN REQUIREMENTS

Site and floor plans must be on a CD in .PDF format and 24" x 36" paper only and indicate the following:

1. Location of, and any proposed changes to, existing buildings, roadways, and parking areas.
2. All existing site and zoning restrictions including setbacks, right of ways, boundary lines, wetlands and any flood plains.
3. Existing topography of site and any proposed changes including retaining walls.
4. Front, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
5. Landscaping and planting areas (a plant list is not necessary). If existing site timber or natural areas are to remain throughout construction, the area must be marked as such on the site plans.
6. Locations of site features such as playground(s), gazebos, walking trails, refuse collection areas, postal facilities, and site entrance signage.
7. The location of units, common use areas and other spaces using a minimum scale of 1/16" = 1' for each building.
8. Dimensioned floor plans for all unit types using a minimum scale of 1/4" = 1'.

9. Net building square footage and heated square footage. See "Definitions" in this Appendix.
10. For projects involving renovation and/or demolition of existing structures, proposed changes to building components and design and also describe removal and new construction methods.
11. For projects involving removal of asbestos and/or lead based paint removal, general notes identifying location and procedures for removal.

II. BUILDING AND UNIT DESIGN PROVISIONS

A. EXTERIOR DESIGN AND MATERIALS

1. Building design must use different roof planes and contours to "break" up roof lines. Wide window and door trim must be used to better accent siding. If horizontal banding is used between floor levels, use separate color tones for upper and lower levels. If possible, use horizontal and vertical siding applications to add detail to dormers, gables, and extended front facade areas.
2. The use of no or very low maintenance materials is required for exterior building coverings on all new construction projects. These include high quality vinyl siding, brick, or fiber cement siding. The use of metal siding is prohibited. Vinyl siding must have a .044" thickness or greater and a limited lifetime warranty. Where band boards attach to and are part of the vinyl siding application, z-flashing must be installed behind, on top of, and below bands.
3. All exterior trim, including fascia and soffits, window and door trim, gable vents, etc, must also be constructed of no or very low maintenance materials.
4. All buildings must include seamless gutters and aluminum drip edge on all gable rakes and fascia boards. Drip edge must extend 2 inches minimum under the shingles.
5. All building foundations must have a minimum of 12 inches exposed brick veneer above finished grade level (after landscaping).
6. Breezeway and stairwell ceilings must be constructed of materials rated for exterior exposure.
7. Buildings and units must be identified using clearly visible signage and numbers. Building and unit identification signage must be well lit from dusk till dawn.
8. Exterior stairs must have a minimum clear width of 40 inches between handrails and be completely under roof cover.
9. Exterior railings must be made of vinyl, aluminum, or steel (no wood).
10. Anti-fungal shingles with a minimum 25-year warranty are required for all shingle roof applications.
11. Covered drop-offs must have a minimum 13 foot vehicle headroom clearance.
12. In vinyl siding applications, all exterior lights, GFIs, HVAC sub panels, hose bibs, telephone boxes, and cable boxes must be installed in plastic J-boxes.
13. When gang mailboxes are provided on a site or within a building, the number of mail box compartments must be equal or greater to those apartment units that are Type A or Type B units and not be installed higher than 48 inches above finished floor.

B. DOORS AND WINDOWS

1. All primary unit entries must either be within a breezeway or have a minimum roof covering of 3 feet deep by 5 feet wide, including a corresponding porch or concrete pad.

2. High durability, insulated doors (such as steel and fiberglass) are required at all exterior locations. Single lever deadbolts and eye viewers are required on all main entry doors to residential units.
3. Exterior doors for fully accessible units ("Type A") must include spring hinges.
4. Insulated, double pane, vinyl windows with a U-factor of 0.32 or below and a SHGC of 0.40 or below are required for new construction.
5. Windows must not be located over tub or shower units.
6. Install a continuous bead of silicone caulk behind all nail fins before installing new vinyl windows per manufacturer's specifications.
7. In "Type A" accessible units, an audible alarm and strobe light must be installed above the entry door.

C. INTERIOR DESIGN AND MATERIALS

1. All residential units must meet minimum unit size requirements. The square footage measurements below will be for heated square feet only, measured interior wall to interior wall, and do not include exterior wall square footage. Unheated areas such as patios, decks, porches, stoops, or storage rooms cannot be included.

Single Room Occupancy ("SRO")	250 square feet
Studio	375 square feet
Efficiency	450 square feet
1 Bedroom	660 square feet
2 Bedroom	900 square feet
3 Bedroom	1,100 square feet
4 Bedroom	1,250 square feet

For additional requirements see the "Definitions" section at the end of this Appendix.

2. All units must have a separate dining area, except for SRO, Studio and Efficiency units (see "Definitions" for description).
3. Newly constructed residential units containing two (2) or more bedrooms must have an exterior storage closet with a minimum of 16 unobstructed square feet. The square footage utilized by a water heater in the exterior storage closet may not be included in the 16 square foot calculation.
4. Carpet and pad must meet FHA minimum standards.
5. Kitchens, dining areas, and entrance areas must have vinyl, VCT or other non-carpet flooring.
6. The minimum width of interior hallways in residential units is 40 inches.
7. For new construction, interior doors must be constructed of six panel hardboard, solid core birch or solid core lauan. Hollow core, flat-panel wood doors are prohibited.
8. Bi-fold and by-pass doors are prohibited. Pocket doors are not allowed in elderly properties or "Type A" accessible units.
9. Fireplaces are prohibited in residential units.
10. Residential floors and common tenant walls must have sound insulation batts.
11. All bedroom closets, interior storage rooms/coat closets and laundry rooms/closets must have a 4 inch tall by 8 inch wide minimum pass-thru grille above doors for air circulation in those areas that do not get conditioned.
12. There must be a minimum of ¾ inch air space under all interior doors measured from finished

floor for air circulation.

13. All interior and exterior mechanical and storage closets must have finished floor coverings.
14. Signage for designated common areas and "Type A" accessible units must be in Braille.

D. BEDROOMS

1. The primary bedroom must have at least 130 square feet, excluding the closet(s).
2. Secondary bedrooms must have at least 110 square feet, excluding the closet(s).
3. Every bedroom must have a closet with a shelf, closet rod and door. The average size of all bedroom closets in each unit type must be at least 7 linear feet.
4. In "Type A" accessible units, an emergency pull station is required in master bedrooms.

E. BATHROOMS

1. A recessed medicine cabinet must be installed in every full bathroom in each residential unit.
2. Exclusive of fully accessible units, the average size of all vanities in each unit type must be at least 36 inches.
3. Mirrors in bathrooms must be low enough to reach the counter backsplashes.
4. All full bathrooms must have an overhead ceiling light and exhaust fan on the same switch. Vanity lights (if provided) must be on a separate switch.
5. All bathrooms must include an Energy Star rated exhaust fan rated at 90 CFM vented to the exterior of the building using hard ductwork along the shortest run possible.
6. For ceramic tile applications, tile should be applied over cement backer board rather than directly to drywall.
7. All new construction and adaptive re-use projects must comply with QAP Section IV(F)(3) and Appendix B Section VIII(D) regarding additional fully accessible bathrooms, including roll-in showers. All roll-in showers must have a collapsible water dam or beveled threshold that meets code. All roll-in showers must be 36 inches wide and have an adjustable shower rod and weighted curtain installed before occupancy.
8. Approaches to roll-in showers must be level, not sloped.
9. All bathroom ceilings and walls must utilize mold and water-resistant wall board.
10. All domestic water line cut off valves must have metal handles, not plastic.
11. In all "Type A" accessible units, the grab bars must be installed per ANSI A117.1 specifications around toilets and in the tubs/showers.. In roll-in showers the shower head with wand must be installed on a sliding bar.
12. In "Type A" accessible units, an emergency pull station is required in all bathrooms.

F. KITCHENS

1. New cabinets must include dual side tracks on drawers. Door fronts, styles, and drawer fronts must be made with solid wood or wood/plastic veneer products. Particle board or hardboard doors, stiles, and drawer fronts are prohibited.
2. The minimum aisle width between cabinets and/or appliances is 42 inches.

3. A pantry cabinet or closet in or near each kitchen must be provided (does not include SRO, studio or efficiency units). Pantry cabinet or closet door must be 24 inches minimum width.
4. All residential units must have either a dry chemical fire extinguisher mounted and readily visible and accessible in every kitchen, including kitchen in community building if present, or an automatic fire suppression canister mounted in each range hood.
5. Each kitchen must have at the least the following minimum linear footage of countertop, excluding the sink space (only include countertops that are at or below 36 inches in height above finished floor):

SRO	4.5 linear feet
Studio	5.0 linear feet
Efficiency	5.0 linear feet
1 Bedroom	10.0 linear feet
2 Bedroom	12.0 linear feet
3 Bedroom	13.0 linear feet
4 Bedroom	13.0 linear feet

Bar tops may be counted as long as they are 16 inches minimum width and installed no higher than 48 inches above finished floor.

6. All residential units must have a frost-free Energy Star rated refrigerator with a freezer compartment. Water and/or ice dispensers (if provided) must be connected and operational. For fully accessible ("Type A") units the refrigerator must be side by side or bottom freezer type. Doors must open beyond 90 degrees to allow bin removal. The following are the minimum sizes:

0-2 Bedroom	14 cubic feet
3 Bedroom	16 cubic feet
4 Bedroom	18 cubic feet

7. All residential units must have an Energy Star rated dishwasher (excluding elderly properties).
8. In Type "A" accessible units:
 - kitchen sinks must be rear-draining and have sink bottoms insulated if bottom of sink is at or below 29" above finished floor;
 - pull-out worktops are prohibited;
 - workstations must be installed beside the range;
 - the wall cabinet mounted over the work station must be 48 inches maximum above finished floor to the top of the bottom shelf; and
 - both the range hood fan and light must have remote switches.
11. Range hoods must be vented to the outside using hard duct.
12. Anti-tip devices must be installed on all kitchen ranges and be securely fastened.

G. LAUNDRY ROOM CLOSETS

1. Laundry room closets must be 36" minimum depth measured from back wall to back of closet doors.
2. Clothes dryer vent connection must be 2" maximum above finished floor.
3. All laundry room ceilings and walls must utilize mold and water resistant wall board.
4. Washer water shutoff valves must be installed right side up with the hose connection below the shutoff handle.

5. In "Type A" accessible units, each clothes washer and dryer must be centered in a four foot clear floor space area. The washer and dryer clear floor space areas may overlap.

H. PROVISIONS FOR ALL ELDERLY HOUSING

1. All elderly residential units must be equipped with emergency pull chains in the master bedroom and full bathroom. The pull chains must be wired to an exterior warning device which consists of a strobe light and an audible alarm.
2. Provide loop or "D" shape handles on cabinet doors and drawers.
3. Exhaust vents and lighting above ranges must be wired to remote switches for both the light and fan near the range in an accessible location.
4. Provide solid blocking at all water closets and tub/shower units for grab bar installation.
5. Provide a minimum 18 inch grab bar in all tub/shower units. The grab bar will be installed centered vertically at 48" A.F.F. on the wall opposite the controls.
6. Corridors in any common areas must have a continuous suitable handrail on one side mounted 34 inches above finished floor, and be 1 ¼ inches in diameter.
7. All doors leading to habitable rooms must have a minimum 3'-0" door and include lever handle hardware.
8. Hallways must have a minimum width of 42 inches.
9. The maximum threshold height at any entry door is ½ inch.

I. PROVISIONS FOR SIGHT AND HEARING IMPAIRED UNITS

Applies ONLY to projects using Rental Production Program funds. Under Section 504 of the Rehabilitation Act of 1973, two percent of the total number of units constructed, or a minimum of one, must be able to be equipped for residents with sight and hearing impairments. These requirements include the following:

1. The unit(s) must be roughed in to allow for smoke alarms with strobe lights in every bedroom and living area.
2. The units must have a receptacle next to phone jacks in units for future installation of TTY devices.
3. Each overhead light fixture and receptacle must be wired to accommodate a 150 watt load.
4. The unit must also be fully accessible ("Type A").

The requirements of this provision can be satisfied by adding the elements described above to the additional fully accessible units with roll-in showers required by QAP Section IV(F)(3) such that at least two percent (2%) of all units are properly equipped to serve persons with sight and or hearing impairments.

III. MECHANICAL, SITE AND INSULATION PROVISIONS

A. PLUMBING PROVISIONS

1. Zero to two bedroom units require at least one (1) full bathroom.
2. Three bedroom units require at least 1.75 bathrooms (including one bath with upright shower and one bath with full tub).

3. Four bedroom units require at least two (2) full bathrooms.
4. All tubs and showers must have slip resistant floors.
5. All electric water heaters must have an Energy Factor of at least 0.93. This can be achieved by using an insulated water heater jacket. All natural gas water heaters must have an Energy Factor of at least .61 efficiency.
6. In new construction and adaptive re-use projects, all water heater tanks must be placed in an overflow pan piped to the exterior of the building, regardless of location and floor level. The temperature and relief valve must also be piped to the exterior. Water heater must be placed in closets to allow for their removal and inspection by or through the closet door. Water heaters may not be installed over the clothes washer or dryer space.
7. Whirlpool baths or spas are prohibited.
8. A frost-proof exterior faucet must be installed on an exterior wall of the community/office building.
9. All tub/shower control knobs must be single lever handled and offset towards the front of the tub/shower.
10. Provide lever faucet controls for the kitchen and bathroom sinks.
11. All faucets, shower heads, and toilets must be EPA "Watersense" rated.
12. When using electric tankless water heaters the electrical panel must be rated at 200 amps or greater.
13. Domestic water lines are not allowed in unconditioned spaces.
14. In all "Type A" accessible units, the toilets, tubs and showers must have all grab bars installed. See ANSI A117.1 for mounting heights and locations.

B. ELECTRICAL PROVISIONS

1. Provide overhead lighting, a ceiling fan, telephone jack and a cable connection in every bedroom and living room. If using ceiling fans with light kits, the fan and light must have separate switches.
2. Any walk-in closets must also have a switched overhead light. A walk in closet is defined as any closet deeper than 36 inches from the back wall to the back of the closet door in the closed position.
3. Switches and thermostats must not be located more than 48 inches above finished floor height.
4. Receptacles, telephone jacks and cable jacks must not be located less than 16 inches above finished floor height.
5. Exterior lighting is required at each unit entry door.
6. Additional exterior light fixtures not specific to a unit will be wired to a "house" panel. The fixtures will be activated by a photo cell placed on the east or north side of the buildings.
7. All exterior stairways must have light fixtures wired to a "house" panel and activated by a photo cell placed on the east or north side of the buildings.
8. Projects with gas heating and/or appliances must provide a hard-wired carbon monoxide detector with a battery back-up in each residential unit.
9. All non-residential and residential spaces must have separate electrical systems.
10. Initially-installed bulbs in residential units and common areas must be compact fluorescent, LED, or pin-based lighting in 80% of all fixtures.

11. All telephone lines must be toned and tagged properly to each unit.

C. HEATING, VENTILATING AND AIR CONDITIONING PROVISIONS

1. All non-residential areas and residential units must have their own separate heating and air conditioning systems.
2. Through the wall HVAC units are prohibited in all but Studio, Efficiency and SRO units. They are allowed in laundry rooms and management offices where provided.
3. HVAC systems, including the air handler and line sets, must be rated at 14.5 SEER or greater and properly sized for the unit. All HVAC systems must use 410A refrigerant instead of R-22.
4. Connections in duct system must be sealed with mastic and fiberglass mesh.
5. All openings in duct work at registers and grills must be covered after installation to keep out debris during construction.
6. Fresh air returns must be a minimum of 12" above the floor.
7. Electric mechanical condensate pumps are not allowed.
8. Supply ducts in unconditioned attics must be insulated with an R-8 or greater value.
9. Range hoods and micro-hoods must be vented to the exterior of the building with hard duct, using the shortest possible run.
10. All hub drains serving HVAC condensate lines must be piped to the outside. Piping to the sanitary sewer is not allowed.

D. BUILDING ENVELOPE AND INSULATION

1. Buildings with residential units must be wrapped with an exterior air and water infiltration barrier.
2. Framing must provide for complete building insulation including the use of insulated headers on all exterior walls, framing roofs and ceilings to allow the full depth of ceiling insulation to extend over the top plate of the exterior walls of the building, and framing all corners and wall intersections to allow for insulation.
3. Seal at doors, windows, plumbing and electrical penetrations to prevent moisture and air leakage.

E. SITEWORK AND LANDSCAPING

1. Provide positive drainage at all driveways, parking areas, ramps, walkways and dumpster pads to prevent standing water.
2. Provide a non-skid finish to all walkways.
3. All water from roof and gutter system must be piped away from buildings and discharged no less than 6 feet from building foundation.
4. Lots must be graded so as to drain surface water away from foundation walls. The grade away from foundation walls must fall a minimum of 6 inches within the first 10 feet.
5. Burying construction waste on-site is prohibited.
6. No part of the disturbed site may be left uncovered or unstabilized once construction is complete.
7. Minimum landscaping budgets of \$300 per residential unit are required. This allowance is for plants and trees only and may not be used for fine grading, seeding and straw or sod.

8. Plant material must be native to the climate and area.

F. RADON VENTILATION

Passive, "stack effect" systems radon ventilation systems are required for all new construction projects in Zone 1 and 2 counties. For a list of county zones visit <http://www.ncradon.org/zone-counties.htm>

These systems reduce soil gas entry into the buildings by venting the gases to the outdoors and must include the following components.

1. Gas Permeable Layer of Aggregate. This layer is placed beneath the slab or flooring system to allow the soil gas to move freely underneath the house and enter an exhaust pipe. In many cases, the material used is a 4-inch layer of clean gravel.
2. Plastic Sheeting/Soil Gas Retarder. This is the primary soil gas barrier and serves to support any cracks that may form after the basement slab is cured. The retarder is usually made of 6 mil polyethylene sheeting, overlapped 12 inches at the seams, fitted closely around all pipe, wire, or other penetrations, and placed over the gas permeable layer of aggregate.
3. PVC Vent Pipe. A straight (no elbows) vertical PVC vent pipe of 3 inch diameter will be connected to a vent pipe "T" which is installed below the slab in the aggregate. The straight vent pipe runs from the gas permeable layer (where the "T" is) through the apartment to the roof to safely vent radon and other soil gases above the roof. A 12 inch perforated PVC pipe must be attached to the "T" on both ends in the aggregate to allow radon gas to easily enter the piping. The straight vent pipe runs vertically through the building and terminates at least 12 inches above the roof's surface in a location at least 10 feet from windows or other openings and adjoining or adjacent buildings. On each floor of the apartment, the pipe should be labeled as a "**Radon Reduction System**". Sealing and caulking with polyurethane or silicone on all openings in the concrete foundation floor must be used.

Check applicable federal, state and local building codes to see if more stringent codes apply.

IV. ENERGY STAR CERTIFICATION

New construction projects must be certified as compliant with ENERGY STAR 3.0 requirements. Additional information regarding the requirements for energy star certification can be found on the EPA website. (http://www.energystar.gov/index.cfm?c=new_homes.nh_features)

V. COMMON AREA AND SITE AMENITY PROVISIONS

All common use areas must be fully accessible to those with disabilities in compliance with all applicable State and Federal laws and regulations.

A. REQUIRED SITE AMENITIES

All projects are required to include a minimum of six (6) tenant amenities. There are four (4) amenities that are mandatory and the additional two (2) can be selected from the list below.

The required amenities vary by project type:

Family	Senior
Playground	Indoor or Outdoor Sitting Areas (min. of 3 locations)
Resident Computer Center (min. of 2 computers)	Multi-Purpose Room (250 sq.ft.)
Covered Picnic Area (150 sq.ft. with 2 tables and grill)	Resident Computer Center (min. of 2 computers)

Outdoor Sitting Areas with Benches (min. of 3 locations)	Tenant Storage Areas
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In addition to the required amenities, projects must also include at least two (2) of the following additional amenities:

- covered drive-thru or drop-off at entry
- covered patio with seating (150 sq. ft.)
- covered picnic area with two tables and one grille (150 sq. ft.)
- exercise room (must include new equipment)
- raised bed garden plots (50 sq. ft. per plot, 24 inches deep, one plot per 10 residents, elderly projects only)
- gazebo (100 sq. ft.)
- high-speed Internet access (involves both a data connection in the living area of each unit that is separate from the cable/telephone connection and support from a project-wide network or a functional equivalent)
- sunroom with chairs (150 sq. ft.)
- screened porch (150 sq. ft.)
- tot lot (family projects only)
- walking trails (4 ft. wide paved continuous around property)

Dimensions listed are the minimum required. Amenities must be located on the project site.

B. PLAYGROUND AREAS

1. Wherever possible tot lots and playgrounds must be located away from areas of frequent automobile traffic and situated so that the play area is visible from the office and maximum number of residential units.
2. A bench must be provided at playgrounds to allow a child's supervisor to sit. The bench must be anchored permanently, weather resistant and have a back.

C. POSTAL FACILITIES

1. Postal facilities must be located adjacent to available parking and sited such that tenants will not obstruct traffic while collecting mail.
2. On-site postal facilities must have a roof covering which offers residents ample protection from the rain while gathering mail.
3. Postal facilities must include adequate lighting on from dusk to dawn.

D. LAUNDRY FACILITIES

1. Laundry facilities are required at all projects.
2. There must be a minimum of one washer and one dryer per twelve (12) residential units if washer/dryer hookups are not available in each unit. If hookups are available in each unit, there must be a minimum of one washer and one dryer per twenty (20) units.
3. Laundry facilities must be located on an accessible route.
4. The entrance must have a minimum roof covering of 20 square feet.
5. The threshold height of the entrance door to the laundry room must not exceed ½ inch above finished interior grade level.

6. A "folding" table or countertop must be installed. The working surface must be 28 to 34 inches above the floor, and must have a 29 inch high clear knee space below. The working surface must be a minimum 48 inches long, and have a 30 by 48 inch clear floor space around it.
7. The primary entrance door to the laundry must be of solid construction and include a full height tempered glassed panel to allow residents a view of the outside/inside.
8. The laundry room must be positioned on the site to allow for a high level of visibility from residential units or the community building/office.
9. The laundry room must have adequate entrance lighting that is on from dusk to dawn.
10. If the project has only one laundry facility, it must be adjacent to the community building/office (if provided) to allow easy access and provide a handicap parking space(s).
11. One washer and one dryer must be front loading and usable by residents with mobility impairments (front loading), including at least a 30 by 48 inch clear floor space in front of each.

E. COMMUNITY / OFFICE SPACES

1. All projects must have an office on site of at least 200 square feet (inclusive of handicapped toilet facility) and a maintenance room of at least 100 square feet. This includes subsequent phases of a multi-phase development.
2. Projects with twenty four (24) or more units and more than one residential building must have a separate community building.
3. The community building must contain a both a handicapped toilet facility and a kitchen area that includes a refrigerator and sink.
4. The community building/space, including toilet facilities and kitchenette but excluding maintenance room and site office, must contain a minimum of seven (7) square feet for each residential unit.
5. The office must be situated as to allow the site manager a prominent view of the residential units, playground, entrances/exits, and vehicular traffic.
6. The community building/office must be clearly marked as such by exterior signs, placed at a visible location close to the building. The signs must use contrasting colors and large letters and numbers.

F. PARKING

1. Two parking spaces per unit are required for family projects.
2. Elderly projects require a minimum of two-thirds (2/3) parking space per unit.
3. If local guidelines require less parking, the number of parking spaces required by the Agency may be reduced to meet those standards upon receiving Agency approval.
4. There must be at least one handicap parking space for each designated fully accessible apartment unit and must be the nearest available parking space to the unit.

G. REFUSE COLLECTION AREAS

1. Fencing consistent with the appearance of the residential buildings must screen the collection area. The fencing must be made of PVC or treated lumber and constructed for permanent use.
2. The pad for the refuse collection area, including the approach area, must be concrete (not asphalt).
3. The refuse collection areas may not be at the entrances or exits of the project.

4. Signs must be at all refuse collection areas to prohibit parking in front of collection facilities.
5. A concrete parking bumper, pipe bollards or 8 inch x 8 inch treated timber must be installed behind dumpsters.
6. All projects must include a pad for tenant recycling receptacles as part of the collection area and participate in a recycling program.

VI. ADDITIONAL PROVISIONS FOR REHABILITATION OF EXISTING HOUSING

The following requirements apply to rehabilitation of existing units. Other than as described below, existing apartments do not need to be physically altered to meet new construction standards.

- A. Design documents must show all proposed changes to existing and proposed buildings, parking, utilities, and landscaping. An architect or engineer must prepare the design drawings.
- B. Any replacement of existing materials or components must comply with the design standards for new construction. In addition to needs identified by the Agency, the rehabilitation scope of work will include/address the following issues:
 - All mechanical and storage closets must have finished flooring.
 - All water heaters must be in an overflow pan and piped to the outside (where possible).
 - If range hoods were previously vented to the outside, the replacement hoods must be similar.
 - All bifold and accordion doors must be replaced with hinged doors.
 - All units must have individual water shut off valves in the unit.
 - All units must have looped smoke alarms.
 - Water heaters under kitchen countertops must be relocated.
 - All polybutylene ("Quest") piping must be replaced.
 - All original cast iron p-traps must be replaced.
 - Attic insulation must meet R-30 minimum value.
 - Tub/shower valves over twenty-five years old must be replaced.
 - Hard duct all new and existing bathroom exhaust fans where possible (in attics).
 - Shoe molding must be installed in areas where glue down flooring is/was installed.
 - Existing HVAC air handlers must have a secondary condensate overflow line or cutoff switch.
- C. Applicants must submit the following:
 1. A hazardous material report that provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect, building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.
 2. A report assessing the structural integrity of the building(s) being renovated from an architect or engineer.
 3. A current termite inspection report.
- D. Show "reserves for replacements" adequate to maintain and replace any existing systems and conditions not being replaced or addressed during rehabilitation.

VII. ADDITIONAL PROVISIONS FOR ADAPTIVE RE-USE OF EXISTING STRUCTURES

- A. Mechanical Systems: All mechanical systems (including HVAC, plumbing, electrical, fire suppression, security system, etc.) must be completely enclosed and concealed. This may be achieved by utilizing existing spaces in walls, floors, and ceilings, constructing mechanical chases or soffits, dropping ceilings in portions of units, or other means. Where structural or other significant limitations make complete enclosure and concealment impossible, the applicant must secure approval from the Agency prior to installation of affected systems.
- B. Windows: Retain original window sashes, frames, and trim where possible. All original sashes must be repaired and otherwise upgraded to insure that all gaps and spaces are sealed so as to be weather tight. All damaged or broken window panes must be replaced. Where original window sashes cannot be retained, install replacement sashes be installed into existing frames. In all cases, windows must be finished with a complete coating of paint.
- C. Floors: All wood flooring is to be restored as closely to original condition as possible. Where repairs are necessary, flooring salvaged from other areas of the building must be utilized as fill material. If salvaged wood is not available, flooring of similar dimension and species must be used. All repairs must be made by feathering in replacement flooring so as to make the repair as discreet as possible. Cutting out and replacing square sections of flooring is prohibited. Where original flooring has gaps in excess of 1/8 inch, the gaps must be filled with an appropriate filler material prior to the application of final finish.
- D. Hazardous Materials: Submit a hazardous material report that provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

VIII. APPLICABLE ACCESSIBILITY REGULATIONS**A. FAIR HOUSING AMENDMENTS ACT**

All new construction projects are required by law to meet the handicap-accessibility standards outlined in the Fair Housing Laws, including the Federal Fair Housing Amendments Act of 1988 (the "Act"). The law provides that failure to design and construct certain residential dwelling units to include certain features of accessible design will be regarded as unlawful discrimination. Renovation projects may be exempt from design guidelines.

The law applies to all housing built after March 13, 1991 with four or more units. All units in buildings with four or more units must meet the requirements of the law if the buildings have one or more elevators. All ground floor units in other buildings containing four or more units must meet the requirements of the law. Certain sites with steep terrain may have some exclusions.

B. THE AMERICANS WITH DISABILITIES ACT

All projects are required by law to meet the handicap accessibility standards outlined in the Americans With Disabilities Act (ADA). The law provides that failure to design and construct certain public accommodations to include certain features of accessible design will be regarded as unlawful discrimination.

ADA Legislation became effective on July 26, 1992. Title III deals with non-discrimination on the basis of disability by public accommodations and in commercial facilities. Public accommodations include all new construction effective January 26, 1993 and impacts any rental office, model unit, public bathroom, building entrances, or any other public or common use area. Existing public accommodations must be retrofitted or altered beginning January 26, 1992, unless a financial or administrative burden exists.

The ADA guidelines do not affect residential units, since these are covered under Fair Housing and Section 504 laws.

C. NORTH CAROLINA STATE ACCESSIBILITY CODE

All projects are required by law to meet the handicap accessibility standards as outlined in the North Carolina State Building Code, Chapter 11, and ANSI A117.1. State and/or local building code officials enforce the design and construction guidelines. Compliance with these guidelines is mandatory in order to receive a Certificate of Occupancy for your proposed development. A main feature of the state accessibility code is the provision requiring all multifamily residential projects intended as full time residences for rent or lease that have eleven or more living units to have a minimum of five percent of the units, or a minimum of one, that meet the requirements. These fully accessible designated units must also be distributed throughout the project, and not placed all in one building or just in one area of the site.

D. QUALIFIED ALLOCATION PLAN

Five percent (5%) of all units in new construction projects must:

1. be fully accessible according to the standards set forth in Chapter 11 of the North Carolina State Building Code and ANSI A117.1, and
2. have at least one bathroom with a toilet located in a five foot by five foot clear floor space (may overlap with the five foot turning diameter described in ANSI A117.1, with no overlapping elements or fixtures; the toilet must be positioned in a corner with the centerline of the toilet bowl 16 to 18 inches from the sidewall, and
3. have at least one bathroom with a 36" x 60" roll-in shower as described in Appendix B. Such showers must also meet the requirements for accessible controls and clear floor spaces as required by ANSI A117.1.

At least one unit in each class of fully accessible units must meet the above requirements. Unit classes are measured by the number of bedrooms. THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES).

DEFINITIONS

Efficiency Apartment: A unit with a minimum of 450 heated square footage (assuming new construction) in which the bedroom and living area are contained in the same room. Each unit has a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, full size refrigerator) that is located in a separate room.

Heated Square Feet: The floor area of an apartment unit, measured interior wall to interior wall, not including exterior wall square footage. Interior walls are not to be deducted, and the area occupied by a staircase may only be counted once.

Net Square Feet: Total area, including exterior wall square footage, of all conditioned (heated/cooled) space, including hallways and common areas.

One Bedroom Apartment: A unit of at least 660 heated square feet (assuming new construction) containing at least four separate rooms including a living/dining room, full kitchen, a bedroom and full bathroom.

Single Room Occupancy (SRO) Unit: A single room unit with a minimum of 250 heated square feet (assuming new construction) that is the primary residence of its occupant(s). The unit must contain either food preparation or sanitary facilities. At least one component of either a full bathroom (shower, water closet, lavatory) and/or a full kitchen (refrigerator, stove top and oven, sink) is missing. There are shared common areas in each building that contain elements of food preparation and/or sanitary facilities that are missing in the individual units.

Studio Apartment: A unit with a minimum of 375 heated square feet (assuming new construction) in which the bedroom, living area and kitchenette are contained in the same room. Each unit has components of a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, refrigerator).

Three Bedroom Apartment: A unit with a minimum of 1,100 heated square feet (assuming new construction) containing at least seven separate rooms including a living/dining room, full kitchen, three bedrooms and 1.75 bathrooms, with each unit including a minimum of one bath with a full tub and one bath with an upright shower stall.

Two Bedroom Apartment: A unit with a minimum of 900 heated square feet (assuming new construction) containing at least five separate rooms including a living/dining room, full kitchen, two bedrooms and full bathroom.

Appendix F

Monitoring Compliance with Low-Income Housing Tax Credit Requirements

(a) General.

Owners of low-income housing tax credit properties must comply with the following rules and procedures.

(b) Recordkeeping and record retention.

- (1) *Recordkeeping.* Owners must keep records for each qualified low-income building in the project that show for each year in the compliance period—
 - (i) the total number of residential rental units in the building (including the number of bedrooms and the size in square feet of each residential rental unit);
 - (ii) the percentage of residential rental units in the building that are low-income units;
 - (iii) the rent charged on each residential rental unit in the building (including any utility allowances);
 - (iv) the number of occupants in each low-income unit, but only if rent is determined by the number of occupants in each unit under Section 42(g)(2);
 - (v) the low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented;
 - (vi) the annual income certification of each low-income tenant per unit (for an exception to this requirement, see Section 42(g)(8)(B));
 - (vii) documentation to support each low-income tenant's income certification (other than as covered by the special rule for a 100 percent low-income building) as determined under Section 8 or by a public housing authority;
 - (viii) the eligible basis and qualified basis of the building at the end of the first year of the credit period; and
 - (ix) the character and use of the nonresidential portion of the building included in the building's eligible basis under Section 42(d).
- (2) *Record retention.* Owners must retain the records described in paragraph (b)(1) of this section for at least six (6) years after the due date (with extensions) for filing the federal income tax return for that year. The records for the first year of the credit period, however, must be retained for at least six (6) years beyond the due date (with extensions) for filing the federal income tax return for the last year of the compliance period of the building.
- (3) *Inspection record retention.* Owners must retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit (as described in paragraph (c)(1)(vi) of this section) for the Agency's inspection under paragraph (d) of this section. Retention of the original violation reports or notices is not required once the Agency reviews the violation reports or notices and completes its inspection, unless the violation remains uncorrected.

(c) Certification and review.

- (1) *Certification.* Owners must certify at least annually to the Agency that, for the preceding twelve (12) month period—
- (i) the project met the requirements of the 20-50 test under Section 42(g)(1)(A), the 40-60 test under Section 42(g)(1)(B), whichever is applicable to the project;
 - (ii) there was no change in the applicable fraction (as defined in Section 42(c)(1)(B)) of any building in the project, or that there was a change, and a description of the change;
 - (iii) the owner has received an annual income certification from each low-income tenant, and documentation to support that certification consistent with paragraph (b)(1)(vii) of this section;
 - (iv) each low-income unit in the project was rent-restricted under Section 42(g)(2);
 - (v) all units in the project were for use by the general public, including the requirement that no finding of discrimination under the Fair Housing Act occurred for the project (meaning an adverse final decision by HUD, a substantially equivalent state or local fair housing agency or federal court);
 - (vi) the buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project (owners must attach any violation report or notice to its annual certification and state whether the violation has been corrected);
 - (vii) there was no change in the eligible basis (as defined in Section 42(d)) of any building in the project, or if there was a change, the nature of the change;
 - (viii) all tenant facilities included in the eligible basis under Section 42(d) of any building in the project were provided on a comparable basis without charge to all tenants in the building;
 - (ix) if a low-income unit in the building became vacant during the year, that reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income;
 - (x) if the income of tenants of a low-income unit in the project increased above the limit allowed in Section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the project was or will be rented to tenants having a qualifying income; and
 - (xi) an extended low-income housing commitment as described in Section 42(h)(6) was in effect, including the requirement under Section 42(h)(6)(B)(iv) that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937;
 - (xii) all low-income units in the project were used on a non-transient basis (except for transitional housing for the homeless provided under Section 42(i)(3)(B)(iii) or single-room-occupancy units rented on a month-by-month basis under Section 42(i)(3)(B)(iv));
 - (xiii) no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under Section 42;

- (xiv) the ownership entity meets the requirements of the nonprofit set-aside if the project was allocated as such; and
- (xv) no unauthorized changes in ownership or management agent(s) have occurred.
- (2) *Review.*
 - (i) The Agency will review the certifications submitted under paragraph (c)(1) of this section for compliance with the requirements of Section 42.
 - (ii) With respect to each tax credit project—
 - (A) the Agency will conduct on-site inspections of all buildings in the project by the end of the second calendar year following the year the last building in the project is placed in service and, for at least twenty percent (20%) of the project's low-income units, inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units; and
 - (B) at least once every three (3) years, the Agency will conduct on-site inspections of all buildings in the project and, for at least twenty percent (20%) of the project's low-income units, inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units.
 - (iii) The Agency will randomly select low-income units and tenant records to be inspected and reviewed.
- (3) *Frequency and form of certification.* The certifications and reviews of paragraph (c)(1) and (2) of this section will be made annually covering each year of the fifteen (15) year compliance period under Section 42(i)(1). The owner certifications will be made under penalty of perjury.
- (d) **Inspections.**
 - (1) *In general.* The Agency has the right to perform an on-site inspection of any tax credit project at least through the end of the extended use period.
 - (2) *Inspection standard.* For the on-site inspections of buildings and low-income units required by paragraph (c)(2)(ii) of this section, the Agency will review any local health, safety, or building code violations reports or notices retained by the owner under paragraph (b)(3) in order to determine whether—
 - (i) the buildings and units are suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards); or
 - (ii) the buildings and units satisfy, as determined by the Agency, the uniform physical condition standards for public housing established by HUD (24 CFR 5.703).

The HUD physical condition standards do not supersede or preempt local health, safety, and building codes. A tax credit project under Section 42 must continue to satisfy these codes. The Agency will report any violation of these codes to the Service.

(e) Notification-of-noncompliance.

- (1) *In general.* The Agency will give the notice described in paragraph (e)(2) of this section to the owner of a tax credit project and the notice described in paragraph (e)(3) of this section to the Service.
- (2) *Notice to owner.* The Agency will provide prompt written notice to the owner of a tax credit project if the Agency does not receive the certification described in paragraph (c)(1) of this section, or does not receive or is not permitted to inspect the tenant income certifications, supporting documentation, and rent records described in paragraph (c)(2)(ii) of this section, or discovers by inspection, review, or in some other manner, that the project is not in compliance with the provisions of Section 42.
- (3) *Notice to Internal Revenue Service.*
 - (i) *In general.* The Agency will file Form 8823, "Low-Income Housing Credit Agencies Report of Noncompliance," with the Service no later than 45 days after the end of the correction period (as described in paragraph (e)(4) of this section, including extensions permitted under that paragraph) and no earlier than the end of the correction period, whether or not the noncompliance or failure to certify is corrected. The Agency will explain on Form 8823 the nature of the noncompliance or failure to certify and indicate whether the owner has corrected the noncompliance or failure to certify. Any change in either the applicable fraction or eligible basis under paragraph (c)(1)(ii) and (vii) of this section, respectively, that results in a decrease in the qualified basis of the project under Section 42(c)(1)(A) is noncompliance that will be reported to the Service under this paragraph (e)(3). If the noncompliance or failure to certify is corrected within three (3) years after the end of the correction period, the Agency will file Form 8823 with the Service reporting the correction of the noncompliance or failure to certify.
 - (ii) *Agency retention of records.* The Agency will retain records of noncompliance or failure to certify for six (6) years beyond the Agency's filing of the respective Form 8823. In all other cases, the Agency will retain the certifications and records described in paragraph (c) of this section for three (3) years from the end of the calendar year the Agency receives the certifications and records.
- (4) *Correction period.* The correction period shall be that period specified in the monitoring procedure during which an owner must supply any missing certifications and bring the project into compliance with the provisions of Section 42. The correction period is not to exceed ninety (90) days from the date of the notice to the owner described in paragraph (e)(2) of this section. The Agency may extend the correction period for up to six (6) months for good cause.

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

TITLE 04 – DEPARTMENT OF COMMERCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Alcoholic Beverage Control Commission intends to amend the rules cited as 04 NCAC 02R .0803; 02S .1008.

Link to agency website pursuant to G.S. 150B.19.1(c):

http://www.ncabc.com/legal/statutes_regulations.aspx

Proposed Effective Date: January 1, 2012

Public Hearing:

Date: October 6, 2011

Time: 10:00 a.m.

Location: ABC Commission's Office, 400 East Tryon Road, Raleigh, NC 27610

Reason for Proposed Action:

04 NCAC 02R .0802 - to delete staff policies from this rule and only use the requirements in G.S. 150B for the Commission's Notice of Proposed Commission Action and Offers in Compromise.

04 NCAC 02S .1008 - to give malt beverage and wine retail permittees more opportunities and less restrictions in advertising their businesses. This change was due to requests from permittees.

Procedure by which a person can object to the agency on a proposed rule: Interested persons may present oral or written statements at the Rule-Making Hearing. In addition, the record will be open for receipt of written comments from September 15, 2011, to November 14, 2011. Written comments not presented at the hearing should be directed to Robert Hamilton. The proposed rules are available for public inspection and copies may be obtained at the Commission's office at: 400 East Tryon Road, Raleigh, NC 27610.

Comments may be submitted to: Robert A. Hamilton, 4307 Mail Service Center, Raleigh, NC 27699-4307, phone (919)779-0700 x 436, fax (919)661-6165, email bob@adminrule.com

Comment period ends: November 14, 2011

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting

review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ Approval by OSBM not required

CHAPTER 02 – ALCOHOLIC BEVERAGE CONTROL COMMISSION

SUBCHAPTER 02R - ORGANIZATIONAL RULES: POLICIES AND PROCEDURES

SECTION .0800 - ADJUDICATION: CONTESTED CASES

04 NCAC 02R .0802 NOTICE OF ALLEGED VIOLATION

~~(a) Notice of Alleged Violation.~~ If facts reported by a law enforcement officer indicate a violation of the ABC laws, the Commission shall send a Notice of Alleged Violation to the ~~permittee, which shall contain a short and plain statement of the facts alleged, and a reference to the particular sections of the statutes or rules involved.~~ The notice may also contain an offer to settle the case, and an indication of the procedure by which ~~this may be accomplished.~~ permittee. Such Notice shall be sufficient service of process if delivered to the permittee's address as stated on the permit.

~~(b) Offers in Compromise.~~ A permittee may enter into a stipulated settlement or offer in compromise pursuant to G.S. 18B-104, subject to ratification by the Commission. ~~If a permittee indicates a desire for a hearing, or does not respond to the Notice of Alleged Violation, the Commission will file a petition with the Office of Administrative Hearings. Contested case procedures are governed by Chapter 150B of the General Statutes and the rules of the Office of Administrative Hearings.~~

Authority G.S. 1A-1, Rule 4(j); 18B-100; 18B-104; 18B-203(a)(12); 18B-207; 150B-22; 150B-23.

SUBCHAPTER 02S - RETAIL BEER: WINE: MIXED BEVERAGES: BROWNBAGGING: ADVERTISING: SPECIAL PERMITS

SECTION .1000 - ADVERTISING

04 NCAC 02S .1008 ADVERTISING OF MALT BEVERAGES, WINE AND MIXED BEVERAGES BY RETAILERS

(a) Interior Advertising.

- (1) Point-of-Sale. Retail malt beverage, wine and mixed beverage permittees may utilize any amount of point-of-sale advertising for malt beverage, wine and mixed beverage products offered for sale in the establishment. This advertising may be supplied by the industry member unless it constitutes a fixture or has value other than as advertising material; except that an industry member may give a retailer brand-identified items listed in 04 NCAC 02T .0713(c) for use as point-of-sale advertising;
- (2) Price Boards. Retail malt beverage, wine and mixed beverage permittees may display inside price boards showing the brand names and prices of malt beverage, wine and mixed beverage products offered for sale in the establishment;
- (3) Menus and Beverage Lists. Retail on-premise malt beverage, wine and mixed beverage permittees may place on the menu and beverage lists the brand names and prices of malt beverage, wine and mixed beverage products offered for sale in the establishment. Beverage lists may be supplied by an industry member and may include up to six items from the retailer's food menu but shall not include the name, logo or other identifier of the retail permittee on the advertisement. A table tent shall be considered a beverage list for purposes of this Rule;
- (4) Retailer Advertising Specialty Items. Retailer advertising specialty items are items such as trays, coasters, mats, meal checks, paper napkins, glassware, cups, foam scrapers, back bar mats, thermometers and other similar items that bear advertising matter. Advertising specialty items may be provided to a retailer by an industry member as provided in 04 NCAC 02T .0713(b)(8);
- (5) Window Displays. Retail malt beverage, wine and mixed beverage permittees may arrange unopened malt beverage, wine or spirituous liquor products in a window display;
- (6) Location. No point-of-sale advertising, advertising specialty item or price board shall be displayed in a manner designed or intended

to advertise malt beverages, wine or mixed beverages on the outside of the establishment; T-shirts. A retailer's employees shall not wear alcoholic beverage brand identified t-shirts while working on the retailer's licensed premises; and

(8) Removal of Signs. A permittee shall remove any sign, display or advertisement in or about his licensed premises if the Commission finds it is contrary to public interest and orders its removal.

(b) Exterior Advertising.

(1) Outside signs on the premises.

- (A) Malt Beverages. Retail malt beverage permittees may display the term "beer" or "cold beer" or "draught beer" or "specialty beer" or "craft beer" or "North Carolina beer" or "local beer" or "imported beer" on a single, non-mechanical outside sign. This sign may be neon illuminated. The letters and figures on the sign shall not be more than 5 inches in height and 2 inches apart and the sign shall be attached to the building on the licensed ~~premises;—premises.~~ Retail malt beverage permittees may also display the term "beer" or "cold beer" or "draught beer" or "specialty beer" or "craft beer" or "North Carolina beer" or "local beer" or "imported beer" or a substantially equivalent term on a single, portable, non-mechanical sidewalk sign that is no larger than 25 inches by 45 inches on each of its two sides. The sidewalk sign shall only be displayed during the hours of operation;
- (B) Wine. Retail wine permittees may display the term "wine permit-off premise" or "wine permit-on premise" or "fine wine" or a substantially equivalent term on a single non-mechanical outside sign. This sign may be neon illuminated. The letters and figures on the sign shall not be more than 5 inches in height and 2 inches apart and the sign shall be attached to the building on the licensed premises. Instead of the sign described in this Paragraph, retail wine permittees substantially engaged in off-premise sales of wine may display the term "Wine Shop" or "Wine and Cheese" or a substantially equivalent term on a single non-mechanical sign. This sign may be neon illuminated. The letters and figures on the sign shall not be more

- than 18 inches in height and the sign shall be attached to the building on the licensed ~~premises;—premises.~~ Retail wine permittees may also display the term "wine permit-off premise" or "wine permit-on premise" or "fine wine" or a substantially equivalent term on a single, portable, non-mechanical sidewalk sign that is no larger than 25 inches by 45 inches on each of its two sides. Instead of the sidewalk sign described in this Paragraph, retail wine permittees substantially engaged in off-premise sales of wine may display the term "Wine Shop" or "Wine and Cheese" or "fine wine" or a substantially equivalent term on a single, portable, non-mechanical sidewalk sign that is no larger than 25 inches by 45 inches on each of its two sides. A sidewalk sign shall only be displayed during the hours of operation;
- (C) Restriction. Retail malt beverage, wine and mixed beverage permittees shall not allow price advertising or additional signs advertising malt beverages, wine and mixed beverages on the outside of their premises. Outside signs alluding to malt beverages, wine or mixed beverages by slang descriptions such as "brew," "suds," "six-pack," "vino" or "booze" are prohibited;
- (D) Exceptions; Menus; Trade Names. The placement of a food menu that also contains a list of alcoholic beverages by brand and price in a window or window, on the exterior of the retailer's building or on a sidewalk sign that is no larger than 25 inches by 45 inches on each of its two sides~~of a food menu that also contains a list of alcoholic beverages by brand and price~~ is not a violation of this Rule. A sidewalk sign shall only be displayed during the hours of operation. Additional exceptions shall be granted by the Commission in the case of corporate names or franchise trade names;
- (E) Mixed Beverages. Retail mixed beverage permittees may display the term "mixed beverages," "all ABC permits," "mixed drinks," "cocktails," or "spirits," on a single non-mechanical, non-neon, or otherwise self-illuminated outside sign. The letters and figures on the sign shall not be more than five inches in height and two inches apart and the sign shall be attached to the building on the licensed premises; and
- (F) Private Club. A private club shall not display any exterior sign advertising the availability of malt beverages, wine or mixed beverages;
- (2) Billboards. Retail permittees shall not advertise malt beverage, wine or mixed beverage products or the availability of alcoholic beverages by means of a billboard or outdoor sign except as provided in this Section. Industry members with retail permits may advertise tastings; ~~and~~
- (3) Aerial Displays. Retail permittees shall not advertise malt beverage, wine or mixed beverage products or the availability of alcoholic beverages by means of an aerial display or an inflatable item that is ~~tethered-~~ tethered; and
- (4) Only exterior advertising permitted by local ordinances shall be authorized.
- (c) Removal of Signs. A permittee shall remove any sign, display, or advertisement in or about his licensed premises if the Commission finds it is contrary to public interest and orders its removal.
- (d) Media Advertising. A retail malt beverage, wine or mixed beverage permittee may advertise price and brand of malt beverage, wine and mixed beverage products offered for sale by means of circular, newspaper, magazine, radio, television and internet.

Authority G.S. 18B-100; 18B-105; 18B-1116(b).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Sedimentation Control Commission intends to adopt the rules cited as 15A NCAC 04B .0132.

Link to agency website pursuant to G.S. 150B.19.1(c):
<http://portal.ncdenr.org/web/1r/erosion>

Proposed Effective Date: *January 1, 2012*

Public Hearing:

Date: *October 11, 2011*

Time: *10:00 a.m.*

Location: *Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC*

Reason for Proposed Action: *Session Law 2009-486 established temporary standards for the design of erosion and sedimentation control measures, and time limits for the*

provision of ground cover in the watershed of Falls Lake. The session law further directed the Sedimentation Control Commission to adopt permanent rules concerning these design standards and time limits for ground cover by December 31, 2011. In adopting the permanent rules, the Commission is directed to consider the standards in the session law. The proposed rule adopts the design standards from the session law for the design storm, sediment basin efficiency, the slope of channels and time limits for ground cover. There is no change in economic impact from the session law. The rule establishes permanent standards for erosion and sedimentation control in the Falls Lake watershed identical to the existing standards in Session Law 2009-486.

Procedure by which a person can object to the agency on a proposed rule: A person may file a written, signed objection to the proposed rule by mail, delivery service, hand delivery, facsimile transmission, or an electronic scan of an original via electronic mail. Objections must be received by 5:00 pm on November 15, 2011. Objections should be addressed to T. Gray Hauser, Jr., PE, DENR, Division of Land Resources, 1612 Mail Service Center, Raleigh, NC 27699-1612, fax (919)733-2876, email gray.hauser@ncdenr.gov.

Comments may be submitted to: T. Gray Hauser, Jr., PE, DENR, Division of Land Resources, 1612 Mail Service Center, Raleigh, NC 27699-1612, fax (919)733-2876, email gray.hauser@ncdenr.gov

Comment period ends: November 15, 2011

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ Approval by OSBM not required

CHAPTER 04 - SEDIMENTATION CONTROL

SUBCHAPTER 04B - EROSION AND SEDIMENT CONTROL

15A NCAC 04B .0132 DESIGN STANDARDS FOR THE UPPER NEUSE RIVER BASIN (FALLS LAKE WATERSHED)

In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the drinking water supply reservoir that meets the applicability requirements of Session Law 2009-486, Section 3.(a), shall meet all of the following design standards for sedimentation and erosion control:

- (1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.
- (2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least 70 percent for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States or any generally recognized organization or association.
- (3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper side slopes or where the side slopes are stabilized by using mechanical devices, structural devices, or other acceptable ditch liners. In any event, the angle for side slopes shall be sufficient to restrain accelerated erosion.
- (4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but in no case later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:

- (a) For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.
- (b) For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 10 days. For purposes of this Item, "moderate slope" means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.

- (c) For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this Item, "steep slope" means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

Authority S.L. 2009-486.

This Section contains information for the meeting of the Rules Review Commission on Thursday August 18, 2011 9:00 a.m. at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS**Appointed by Senate**

Addison Bell
Margaret Currin
Pete Osborne
Bob Rippy
Faylene Whitaker

Appointed by House

Ralph A. Walker
Curtis Venable
George Lucier
Garth K. Dunklin
Stephanie Simpson

COMMISSION COUNSEL

Joe Deluca (919)431-3081
Bobby Bryan (919)431-3079

RULES REVIEW COMMISSION MEETING DATES

September 15, 2011 October 20, 2011
November 17, 2011 December 15, 2011

RULES REVIEW COMMISSION**August 18, 2011****MINUTES**

The Rules Review Commission met on Thursday, August 18, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Addison Bell, Margaret Currin, Garth K. Dunklin, George Lucier, Pete Osborne, Bob Rippy, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

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

The following people were among those attending the meeting:

David Tuttle	Board of Engineers and Surveyors
Don Garbrick	Roxboro/PEASE Association
Jonathan Womer	Office of State Budget and Management
Norman Young	Wildlife Resources Commission
Lynda Elliot	Board of Cosmetic Arts
Ann Wall	Secretary of State
Nancy Pate	Department of Environment and Natural Resources
Karen Waddell	Department of Insurance
Elizabeth Kountis	DENR/Division of Water Quality
Bob Hensley	DHHS/Division of Social Services
Laura O'Donoghue	DENR/Division of Coastal Resources
Deborah Gore	DENR/Division of Water Quality
Barbara Williams	Board of Massage and Bodywork Therapy
Charles Wilkins	Board of Massage and Bodywork Therapy
Jason Robinson	DENR/Division of Water Quality
Laura Leslie	WRAL
Joelle Burleson	DENR/Division of Air Quality
W.H. Potter, Jr	Physical Therapy Authority
William Creech	Department of Administration
Betsy Foard	Wildlife Resources Commission
Chris Evans	Blue Cross Blue Shield of North Carolina
Mary Maclean Asbill	Southern Environmental Law Center

The meeting was called to order at 10:00 a.m. Judge Walker, as senior member present presided over the meeting. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

APPROVAL OF MINUTES

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the July 21, 2011 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

10A NCAC 70G .0403 – Social Services Commission. The Commission approved the rewritten rule submitted by the agency.

10A NCAC 70H .0114 – Social Services Commission. The Commission approved the rewritten rule submitted by the agency.

10A NCAC 70J .0106 – Social Services Commission. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 30 .0624 – Massage and Bodywork Therapy. Charles Wilkins answered questions from the Commission. The Commission approved the rewritten rule submitted by the agency contingent up receiving a technical change. The technical change was received after the meeting.

21 NCAC 56 .0201, .0501, .0801 – Marriage and Family Therapy Licensure Board. No rewritten rules were submitted by the agency and no action was taken.

21 NCAC 56 .0701, .1602 – David Tuttle answered questions from the Commission. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 64 .0307 –Board of Examiners for Speech and Language Pathologists and Audiologists. This rule has been withdrawn by the agency.

LOG OF FILINGS

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

Public Librarian Certification Commission

All rules were approved unanimously. Laura O'Donoghue representing the agency addressed the Commission.

Home Inspector Licensure Board

All rules were approved unanimously with the following exception:

11 NCAC 08 .1006 - The Commission objected to this Rule based on lack of statutory authority and ambiguity. G.S. 143-151.51(b)(2)(c) requires the Board to establish coverage parameters for errors and omissions insurance if used to meet licensure requirements. Apparently the Board has not done so and has thus not complied with the statute. It is therefore not clear what the coverage parameters are.

Private Protective Services Board

12 NCAC 07D .1303 – The Commission objected to this Rule based on lack of statutory authority and ambiguity. In Paragraph (f), it is not clear what is meant by the requirement that a course be "appropriate to the licensee." It is not clear what the standards are for approving the courses "on a case-by-case basis." There is no authority cited to approve them based on standards not adopted as rules.

Environmental Management Commission

All rules were approved unanimously with the following exceptions.

Elizabeth Kountis from the Division of Water Quality and Joelle Burleson from the Division of Air Quality addressed the Commission

15A NCAC 02B .0311 – This rule was withdrawn by the agency.

15A NCAC 02B .0313 – The Commission voted against a motion to approve the rule as submitted. Commissioners Walker and Lucier voted in favor of the motion. Commissioners Currin, Bell, Dunklin, Osborne, Rippey, Simpson, Whitaker voted against the motion. The Commission voted in favor of Commissioner Dunklin's motion to extend the period of review for this rule. The Commission did this to determine whether there was a better way of expressing the amendment dates and their current effectiveness.

The rule also has the potential to be confusing by having amendment dates in (c) and then repeating those dates in subsequent paragraphs that apply to individual portions of waters within the Roanoke River Basin.

Wildlife Resources Commission

All rules were approved unanimously with the following exceptions.

15A NCAC 10G .0403 – The Commission objected based on lack of statutory authority. There is no authority cited for the agency to require Wildlife Services Agents to comply with administrative requirements that have not been adopted as rules.

15A NCAC 10G .0405 – The Commission objected based on ambiguity. In this Rule, it is not clear what standards the Commission uses in determining whether to temporarily suspend or to terminate an agent's appointment. Most of the items listed in (7) and (8) would result in either and it is not clear what the distinction is.

The Commission granted the Agency's Request for Waiver of Rule 26 NCAC 05 .0108 and approved the re-written rules 15A NCAC 10G .0403 and .0405.

The meeting recessed at 12:03 p.m. and reconvened at 12:13 p.m.

Department of Environment and Natural Resources

15A NCAC 28 .0302 was approved unanimously.

Board of Cosmetic Arts

Lynda Elliot from the Board addressed the Commission.

All rules were approved unanimously.

Board of Refrigeration Examiners

21 NCAC 60 .0102 was approved unanimously.

TEMPORARY RULES

There were no temporary rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission elected officers for the remainder of the calendar year. The Commission's Bylaws require that elections be held at the January meeting.

Judge Walker was elected Chairman by acclamation.

Margaret Currin was elected Vice-Chairman by acclamation.

George Lucier was elected 2nd Vice-Chairman by acclamation.

The Commissioners discussed having ethics training after the September meeting.

The Commissioners discussed how they wanted their notebooks and materials given to them.

Commissioner Bell discussed having a complete review for obsolete rules. Jonathan Womer from the Office of State Budget and Management addressed the Commission and said that the Office of State Budget and Management is doing this now.

The meeting adjourned at 1:02 p.m.

The next scheduled meeting of the Commission is Thursday, September 15 at 10:00 a.m.

Respectfully Submitted,

Julie Edwards
Editorial Assistant

**LIST OF APPROVED PERMANENT RULES
August 18, 2011 Meeting**

PUBLIC LIBRARIAN CERTIFICATION COMMISSION

<u>Purpose of the Commission</u>	07 NCAC 02F .0101
<u>Full Certification</u>	07 NCAC 02F .0102
<u>Application Procedure for Public Librarian Certification</u>	07 NCAC 02F .0103
<u>Purpose of the Commission</u>	07 NCAC 02J .0101
<u>Full Certification</u>	07 NCAC 02J .0102
<u>Application Procedure for Public Librarian Certification</u>	07 NCAC 02J .0103

SOCIAL SERVICES COMMISSION

<u>Licensure</u>	10A NCAC 70G .0403
<u>Licensure</u>	10A NCAC 70H .0114
<u>Buildings and Ground Equipment</u>	10A NCAC 70J .0106

HOME INSPECTOR LICENSURE BOARD

<u>Definitions</u>	11 NCAC 08 .1020
<u>Program Structuring and Admission Requirements</u>	11 NCAC 08 .1021
<u>Program Sponsors</u>	11 NCAC 08 .1022
<u>Application for Program Sponsor</u>	11 NCAC 08 .1023
<u>Course Requirements</u>	11 NCAC 08 .1024
<u>Course Completion Standards</u>	11 NCAC 08 .1025
<u>Course Scheduling</u>	11 NCAC 08 .1026
<u>Textbooks</u>	11 NCAC 08 .1027
<u>Course Completion</u>	11 NCAC 08 .1028
<u>Purpose and Scope</u>	11 NCAC 08 .1103

ENVIRONMENTAL MANAGEMENT COMMISSION

<u>Jordan Water Supply Nutrient Strategy: Purpose and Scope</u>	15A NCAC 02B .0262
<u>Jordan Water Supply Nutrient Strategy: Protection of Exis...</u>	15A NCAC 02B .0267
<u>Jordan Water Supply Nutrient Strategy: Mitigation of Exis...</u>	15A NCAC 02B .0268
<u>Jordan Water Supply Nutrient Strategy: Stormwater Require...</u>	15A NCAC 02B .0271
<u>Sulfur Oxides</u>	15A NCAC 02D .0402
<u>Nitrogen Dioxide</u>	15A NCAC 02D .0407

WILDLIFE RESOURCES COMMISSION

<u>Tyrell County</u>	15A NCAC 10F .0365
<u>Appointment of Wildlife Service Agents</u>	15A NCAC 10G .0402
<u>Wildlife Service Agent Agreement</u>	15A NCAC 10G .0403
<u>Wildlife Service Agent Terms and Conditions</u>	15A NCAC 10G .0405

ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF

<u>Fee Schedule</u>	15A NCAC 28 .0302
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COSMETIC ART EXAMINERS, BOARD OF

<u>Prerequisites</u>	21	NCAC 14C .0202
<u>Renewals, Expired Licenses, Licenses Required</u>	21	NCAC 14P .0105
<u>Revocation of Licenses and Other Disciplinary Measures</u>	21	NCAC 14P .0108

MASSAGE AND BODYWORK THERAPY, BOARD OF

<u>Standards of Professional Conduct</u>	21	NCAC 30 .0624
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ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

<u>Rules of Professional Conduct</u>	21	NCAC 56 .0701
<u>Surveying Procedures</u>	21	NCAC 56 .1602

REFRIGERATION EXAMINERS, BOARD OF

<u>Office of the Board</u>	21	NCAC 60 .0102
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CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby

Randall May
A. B. Elkins II
Joe Webster

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
ABC Commission v. TruVisions Enterprises, LLC, T/A Touch	10 ABC 7025	06/29/11	26:06 NCR 509
ABC Commission v. Universal Entertainment, LLC T/A Zoo City Saloon	11 ABC 2294	07/05/11	
ABC Commission v. Quick Quality Inc., T/A Quick Quality	11 ABC 2543	07/19/11	
ABC Commission v. GK Mart Inc., T/A GK Mart	11 ABC 02647	07/22/11	
ABC Commission v. CH Pub LLC, T/A Kildares Irish Pub	11 ABC 07109	08/16/11	
<u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u>			
Donnie R. Holbrook, Susan R Holbrook v. Victim and Justice Service	09 CPS 0449	08/19/11	26:06 NCR 509
Felicia G. Awaritoma v. Crime Victims Compensation Commission	10 CPS 01451	09/01/11	
Dianne Moody Costello v. Victim and Justice Services	11 CPS 05780	06/20/11	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Scott M. Jensen, DMD v. DHHS, Division of Medical Assistance	09 DHR 3252	06/21/11	26:06 NCR 509
Patricia Anne Edwards v. DHHS, Division of Child Development	10 DHR 0292	06/06/11	
Marchell Gunter, The Home of Marchell F Gunter v. DHHS	10 DHR 0557	06/03/11	
Qingxia Chen and Chen Family Child Care Home Inc v. Division of Child Development	10 DHR 0790	07/29/11	26:06 NCR 509
Theracare Home Health and Staffing, LLC v. DHHS, Division of Medical Assistance Program Integrity	10 DHR 1455	06/01/11	
Alternative Life Programs, Inc. Marchell F Gunter v. DHHS	10 DHR 3583	06/03/11	
Carolyn Rucker v. DHHS, Division of Medical Assistance	10 DHR 3717	05/19/11	26:06 NCR 509
Qingxia Chen and Chen Family Child Care Home Inc v. Division of Child Development	10 DHR 4182	07/29/11	
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc, d/b/a Rext Healthcare, Holly Springs Surgery Center, LLC and Novant Health, Inc	10 DHR 5274	05/17/11	
Rex Hospital Inc d/b/a Rex Healthcare v. DHHS, Division of Health Service Regulation, CON Section And WakeMed, Springs Surgery Center, LLC and Novant Health, Inc	10 DHR 5275	05/17/11	26:06 NCR 509
Angela Mackey v. DHHS, Division of Health Service Regulation	10 DHR 5499	06/01/11	
Cynthia Dawn Sloop v. DHHS	10 DHR 5500	06/07/11	
Carteret Family Practice Clinic, P.A., v. DHHS, DMA, Program Integrity Section	10 DHR 5859	07/13/11	26:06 NCR 516
Alternative Life Programs, Inc. Marchell F Gunter	10 DHR 6204	06/03/11	
Cherie L Russell v. DHHS, Division of Health Services Regulation	10 DHR 6240	05/17/11	
Grover L. Hunt v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	10 DHR 6710	05/25/11	26:06 NCR 516
Christopher Sanders v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	10 DHR 7511	06/23/11	
Raymond Taylor Mabe Jr. v. OAH, Debbie Odette/Glana Surles	10 DHR 8094	05/26/11	
Shanta M. Collins v. DHHS, Division of Health Service Regulation	10 DHR 8444	06/22/11	26:06 NCR 516
Geraldine Highsmith, Pediatric Therapy Associates v. DHHS	10 DHR 8735	07/08/11	
Marcell Gunter, Alternative Life Programs Inc. v. DHHS, Durham Center LME and DMA (CSCEVC NC Medicaid Provider)	10 DHR 03827	06/23/11	

CONTESTED CASE DECISIONS

American Human Services Inc, v. DHHS, Division of Medical Assistance	10 DHR 05575	08/19/11	26:06 NCR 540
Chera L Dargan v. Department of Health and Human Services Registry	10 DHR 05796	09/01/11	
Gwendolyn Fox, Trinity III v. DMA Program Integrity DMA Controller's Section	10 DHR 06499	09/01/11	
Edna Lee v. DHHS, Division of Health Service Regulation	10 DHR 08938	07/22/11	
Yolanda M. Brown v. Health Care Registry Personnel	10 DHR 09708	07/14/11	
James L. Graham v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	11 DHR 0303	06/28/11	
Geraldine Highsmith, Pediatric Therapy Associates v. DHHS	10 DHR 0691	07/08/11	
Geraldine Highsmith, Pediatric Therapy Associates v. DHHS	10 DHR 0762	07/08/11	
Geraldine Highsmith, Pediatric Therapy Associates v. DHHS	10 DHR 0763	07/08/11	
Angela Clark v. DHHS	11 DHR 1565	06/03/11	
Geraldine Highsmith, Pediatric Therapy Associates v. DHHS	11 DHR 2021	07/08/11	
April G. Cooper v. Edgecombe County, Dept. of Social Services (DHHS) Food Stamps	11 DHR 2146	06/15/11	
Patricia Anne Edwards v. DHHS, Division of Child Development	11 DHR 2149	06/06/11	
Nicole Shante McGee v. DHHS, Division of Facility Services, Health Care Personnel	11 DHR 2355	08/08/11	
Demetrius L. Brooks v. DHHS, Division of Health Service Regulation	11 DHR 2441	06/30/11	
Danielle Whitman v. DHHS	11 DHR 2709	08/08/11	
Cyonna Hallums v. DHHS, Healthcare Registry	11 DHR 2858	06/30/11	
Angela L. Jordan v. DHHS, Division of Health Service Regulation	11 DHR 2920	06/30/11	
Creative Hands Occupational Therapy v. Susan Olmschenk v. Office of Administrative Hearings	11 DHR 2924	06/10/11	
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CONTESTED CASE DECISIONS

Christopher R. Eakin v. Department of Secretary of State

11 SOS 0139

06/08/11

UNC HOSPITALS

Elizabeth Pate v. UNC Hospital Systems

11 UNC 06879

08/31/11

Filed

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

2011 JUN 29 PM 4:11

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 ABC 7025

	Office of	
NC Alcoholic Beverage Control Commission,	Administrative Hearings	
Petitioner)	
)	
v.)	DECISION
)	
TruVisions Enterprises, LLC,)	
T/A Touch,)	
Respondent)	

This contested case was heard before Julian Mann III, Chief Administrative Law Judge, Office of Administrative Hearings, on March 2, 2011, Guilford County Courthouse, High Point, North Carolina.

APPEARANCES

For Petitioner:	K. Renee Cowick Assistant Counsel NC ABC Commission Raleigh, NC
For Respondent:	Charles K. Blackmon Tuggle Duggins & Meschan, PA Greensboro, NC

STATUTES AND RULES

N.C.G.S. §18B-904(e)
N.C.G.S. §18B-900(a)
4 NCAC 2S. 0213

ISSUES

1. Whether Respondent's imputed employee, Erica Leggett, interfered with and failed to cooperate with AM Deal, an officer engaged in the performance of his duties on or about October 16, 2010, at 1:22 AM, in violation of ABC Commission Rule 4 NCAC 2S.0213.
2. Whether the location occupied by the Permittee is no longer suitable to hold ABC permits and the operation of the business with an ABC permit at that location is detrimental to the neighborhood due to the violence and lack of concern for patrons' well-being, occurring from January 2009 through October 16, 2010, pursuant to NCGS §18B-904(e).

3. Whether Respondent's status as a limited liability company has been administratively dissolved by the Secretary of State of North Carolina pursuant to NCGS §57C-6-03. Therefore, Respondent no longer meets the definition of "person" under NCGS §18B-101(12), and as a result is no longer eligible "to receive and to hold an ABC permit" pursuant to NCGS §18B-900(a).

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Administrative Law Judge has weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with other believable evidence.

1. Respondent has held permanent Malt Beverage, Unfortified Wine and Mixed Beverage Private Club ABC permits since January 2008. Mr. Reginald L. Green is the principal owner of Respondent's establishment, known as Touch Night Club or Club Touch. On October 16, 2010, Mr. Green was not present on the premises because he had leased the premises to a promoter, but his staff was present in addition to other staff employed by the promoter.

2. Petitioner dismissed allegation number three (3) due to Respondent's compliance with the North Carolina Secretary of State requirements pursuant to law.

3. On October 16, 2010, Dakotsha Lynette Harris-Fuller ("Harris-Fuller") was standing in line with friends outside Touch Night Club, Respondent's establishment. Harris-Fuller had been to Respondent's establishment approximately three times prior to October 16, 2010.

4. Harris-Fuller observed security personnel escorting two argumentative persons from the establishment to a location across the street. Approximately five minutes later, Harris-Fuller heard gunshots and sought cover inside the entrance to Respondent's establishment.

5. Once inside Respondent's establishment, Harris-Fuller noticed a hole in her leggings and realized she had been shot in the leg. Harris-Fuller sat down while her cousin placed a call to a relative. A black male picked Harris-Fuller up and carried her into a coat room, approximately six feet by fifteen feet, where he placed Harris-Fuller on the floor.

6. A few minutes later, a man was brought to the coat room who apparently was another patron and who also had been shot in the leg. Not including the persons who were in and out of the coat room, Harris-Fuller counted six persons in the coat room.

7. Although Respondent's imputed employees may have summoned emergency medical assistance, Harris-Fuller was not informed that 911 had been called. Harris-Fuller and those assisting her among her friends called 911 while Harris-Fuller remained seated in the coat room.

8. Approximately two weeks after the shooting, Harris-Fuller had the bullet surgically removed from the upper thigh of her right leg.

9. Officer AM Deal ("Deal") has been employed with the Greensboro Police Department for approximately six years. Deal is a patrol officer assigned to 310 Zone, which includes Respondent's establishment in the City of Greensboro, Guilford County, North Carolina.

10. Deal was on duty on October 16, 2010, and parked several hundred feet east of Respondent's establishment.

11. Respondent's establishment is in a "repeat call area" where Greensboro Police Department patrols this area more than establishments not in that area. The department sends patrol cars to maintain high visibility as a preventative measure.

12. At approximately 1:22 AM on October 16, 2010, Deal heard eight gunshots from the area of Respondent's establishment. Deal moved his patrol car several hundred feet from Respondent's establishment to identify any suspect who might have been fleeing by car or on foot.

13. Officer TB Cole ("Cole") has been employed by the Greensboro Police Department for approximately three years. Cole is a patrol officer who is also assigned to 310 Zone. Cole was on duty on October 16, 2010, a short distance from Respondent's establishment when he heard Deal's call regarding gun shots. Cole joined Deal at Respondent's establishment.

14. Deal and Cole were not able to identify any suspects from outside of the establishment. As they approached the front door, the officers became aware that someone may have been shot.

15. Erica Nicole Leggett ("Leggett"), a member of the event security for that evening and located at the front entrance of the establishment, heard gunshots, but she was unaware that anyone had been hurt and reported this to Officers Deal and Cole.

16. As Deal and Cole headed to the back parking lot, the Greensboro Police Department Communications Dispatch advised, via radio, that 911 calls were placed from inside Respondent's establishment, reporting that someone inside Respondent's establishment had been shot.

17. Deal and Cole then attempted to gain entry to Respondent's establishment but their path was obstructed by Leggett for approximately 10 seconds, which as a consequence of that conduct, denied the officers access. Leggett was routinely admitting and monitoring patrons, who were standing in line for admission. Because Deal and Cole knew of the originating 911 call, Deal and Cole moved Leggett aside and entered Respondent's establishment.

18. Deal and Cole located Harris-Fuller and others in the coat room and verified that EMS was on its way. Deal then assisted Cole in placing Leggett under arrest for resisting, delaying, obstructing an officer.

19. In spite of the fact that the employees of the contract event sponsors were aware of gun fire in the parking lot; that two patrons had been shot; and that these patrons were on the floor in the coat room, these imputed employees neither provided a warning to other patrons nor did they take any other precaution for the safety of other patrons but, instead, allowed the "event" to go on without interruption until its conclusion.

20. Over the course of Deal's patrols, he has observed approximately five fights outside Respondent's establishment when closing for the evening.

21. Special Agent KM Gee ("Gee") has been employed with Alcohol Law Enforcement for approximately two years. Greensboro Police Department contacted Gee October 18, 2010, regarding the shooting two days prior. Gee reviewed the calls for service for Respondent's establishment and found that although the number of calls for service was about average, the types of calls were more violent than average. There had been a history of calls for service for stabbings, gunshot wounds, discharge of fire arms and disorderly conduct.

22. Officer SP Roberts ("Roberts") has worked for the Greensboro Police Department for 27 years. Roberts has been with the Community Resource Team for 11 years. The Community Resource Team collects data regarding complaints from law enforcement, citizens, or any other source.

23. Roberts received complaints regarding Respondent's establishment for approximately 2-3 years. In comparison to other establishments in the area, the number of calls to Respondent's establishment is above average.

24. Since Respondent's ABC permits were summarily suspended by Petitioner in October 2010, the complaints from citizens regarding gunshots have stopped.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction in this contested case.

2. At all times relevant hereto, Respondent was responsible as permittee for the conduct and activities that occurred on the premises on October 16, 2010. However, Mr. Green was not present on the premises. Based upon my observations of Mr. Green's demeanor, Mr. Green's testimony, and Mr. Green's business acumen, one could conclude that the response to this sudden emergency would have been more reasonable, had Mr. Green been present on the premises that evening.

3. Respondent's imputed agent, Erica Leggett, momentarily interfered with and failed to cooperate with AM Deal, an officer engaged in the performance of his duties on or about October 16, 2010, at 1:22 AM, in violation of ABC Commission Rule 4 NCAC 2S.0213. Although she may have been unaware that any patron had been injured by gun fire, as were others similarly situated including Harris-Fuller who was not immediately aware that she had been shot, nevertheless, Leggett did not respond to information imputed to her by other employees who had actual knowledge. Leggett admitted that she was aware that gunshots had been fired. Officers, responding to a police emergency, were seeking admission, and Leggett denied them immediate access, notwithstanding that she knew, at a minimum, that gun shots had been fired.

4. The location occupied by the Permittee is no longer suitable to hold ABC permits and the operation of the business with an ABC permit. On October 16, 2010 Respondent's location was detrimental to the neighborhood due to the firing of gunshots, injuries that resulted, and the failure to seek protection for the injured patrons as well as other patrons who were not aware of the danger. In addition, there have been a history of calls for service for stabbings, gunshot wounds, discharge of firearms and disorderly conduct, occurring from January 2009 through October 16, 2010, pursuant to NCGS §18B-904(e).¹

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge's orders that the ABC Commission revoke Respondent's ABC permits, but in mitigation based solely on Mr. Green's absence on October 16, 2011, that the revocation be for the limited period of three years and that Petitioner be credited with the time of the active emergency suspension and thereafter, after the conclusion of the one year active suspension, that two years of the active three year suspension be itself suspended on the condition that, and with Petitioner's consent, that Petitioner pay a civil penalty to Respondent of one thousand dollars; that no ABC permit violations occur on Respondent's establishment; that Respondent not lease his premises to any promoter for any special event, and that no patron be found on the premises' establishment or the premises' parking lot with a concealed fire arm or other deadly weapon, not otherwise permitted by law.

ORDER

¹ Query? Has it become so routine that citizens who are shot while standing in line at entrances to night clubs are considered by these establishments as those who assume the risk of potentially deadly bodily harm as a result of unlawful activity as being within a class of patrons who are within a foreseeable zone of danger and that such unlawful activity is considered so routine that this conduct is considered a norm, ancillary to a business activity of providing musical entertainment to such an extent that no major effort is made to assist those who are injured from such illegal activity, and that such activity, when it occurs, serves only as a temporary interruption that may be ignored as a collateral consequence of attending such an event in favor of continuing, uninterrupted, the profitability of the business activity, as opposed to taking emergency precaution to shield, treat and protect patrons who are injured by or who are unaware of the danger. I do not believe the law can sanction such a norm, if it be one, and I assert by my holding that this establishment, its patrons, or other night clubs, similarly situated, cannot seek protection within such a new norm and as a consequence, such conduct and response (or lack thereof) is completely subject to administrative sanctions.

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with NCGS §150B-36(b).

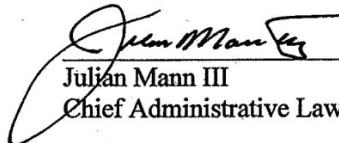
NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. NCGS §150B-36(a).

The agency is required by NCGS §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys on record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the NC Alcoholic Beverage Control Commission.

This is the 29th day of June 2011.



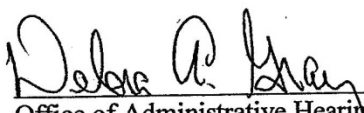
Julian Mann III
Chief Administrative Law Judge

A copy of the foregoing was mailed to:

K. Renee Cowick
Assistant Counsel
NC ABC Commission
4307 Mail Service Center
Raleigh, NC 27699-4307
ATTORNEY FOR PETITIONER

Charles K. Blackmon
Tuggle Duggins & Meschan, PA
Attorneys at Law
Greensboro, NC
ATTORNEY FOR RESPONDENT

This the 29th day of June, 2011.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714
919-431-3000
FAX: 919-431-3100

STATE OF NORTH CAROLINA
COUNTY OF CARTERET

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DHR 5859

CARTERET FAMILY PRACTICE CLINIC,
P.A.,

Petitioner,

v.

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
MEDICAL ASSISTANCE, PROGRAM
INTEGRITY SECTION,

Respondent.

DECISION

This case came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, commencing on April 20, 2011 at the Office of Administrative Hearings, Raleigh, North Carolina at 9:00 a.m.

APPEARANCES

Petitioner: K. Edward Greene, Esq.
Sarah M. Johnson, Esq.
Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27607

Respondent: Jennifer L. Hillman, Esq.
Assistant Attorney General
114 W. Edenton Street
Raleigh, NC 27603

ISSUE

Whether, in deciding to require Petitioner to repay Medicaid \$464,888.65 for prescription medications Petitioner dispensed to Medicaid patients, Respondent:

1. Exceeded its authority or jurisdiction;
2. Acted erroneously;
3. Failed to use proper procedure;
4. Acted arbitrarily or capriciously; or
5. Failed to act as required by law or rule.

EXHIBITS

<u>Joint Exhibit 1:</u>	Medicaid Participation Agreement
<u>Joint Exhibit 3:</u>	Upheld Recoupment Chart
<u>Joint Exhibit 4:</u>	Letter from Dr. Reece to USDOJ (June 6, 2008)
<u>Joint Exhibit 5:</u>	Notice of Decision (Dec. 31, 2009)
<u>Joint Exhibit 6:</u>	Letter from DMA to Dr. Reece (June 11, 2010)
<u>Joint Exhibit 7:</u>	Clinical Coverage Policy No. 9 (Rev'd Feb. 1, 2009)
<u>Petitioner's Exhibit A:</u>	HIPAA Companion Guide Specifications
<u>Petitioner's Exhibit B:</u>	Dispensing Physician Registrations 2007-2010
<u>Petitioner's Exhibit C:</u>	Carteret Family Practice Pharmacy Policies and Procedures
<u>Petitioner's Exhibit G:</u>	Letter from CSC EVC Center to Dr. Reece (Oct. 21, 2009)
<u>Petitioner's Exhibit H:</u>	Letter from Dr. Reece (Oct. 28, 2009)

WITNESSES

For Petitioner:

Donald B. Reece II, M.D.
Tamara Holmes

For Respondent:

none

DECISION

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witnesses, any interest, bias, or prejudice the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Dr. Donald Reece ("Dr. Reece") has practiced family medicine in Carteret County for almost forty (40) years. (Hr'g Tr. 48:10-12.) Dr. Reece owns and operates Petitioner Carteret Family Practice Clinic, P.A. ("CFP"). (Hr'g Tr. 49:17-24.) Approximately one-third of CFP's patients are Medicaid patients. (Hr'g Tr. 40:9-10, 52:25-54:3.)

2. Respondent North Carolina Department of Health and Human Services, Division of Medical Assistance, Program Integrity Section ("Respondent") is the agency of the State of North Carolina authorized to manage the Medicaid program. N.C. Gen. Stat. § 108A-54.

3. Although some family medical care practices in Carteret County limit the number of their Medicaid patients or do not accept new Medicaid patients at all, CFP accepts, and has always accepted, an unlimited number of Medicaid patients. (Hr'g Tr. 40:12-41:8.)

4. In 2000, CFP opened a limited liability pharmacy as a convenience to CFP's patients, in part because some of CFP's Medicaid patients experienced discrimination or poor treatment at large commercial pharmacies, or could not receive transportation to large commercial pharmacies. (Hr'g Tr. 9:22-12:6.) As a limited liability pharmacy, CFP kept a pharmacy manager on staff. (Hr'g Tr. 14:7-18.)

5. CFP only provided pharmacy services to its own patients and did not accept or fill any outside prescriptions. (Hr'g Tr. 66:5-21.) CFP never advertised its pharmacy services to anyone other than its own patients. (Hr'g Tr. 66:22-23.)

6. CFP's pharmacy service was in-network with major third-party payors such as Express Scripts, Blue Cross/Blue Shield, and United Health Care. (Hr'g Tr. 13:7-13.)

7. On or about August 1, 2002, CFP entered into a Medicaid Participation Agreement with Respondent, pursuant to which CFP was permitted to participate in Respondent's Medicaid Program as a provider of pharmacy services, and Respondent would reimburse CFP for those services. (Joint Ex. 1.)

8. The Agreement stated in part:

A. [CFP] agrees to participate in the North Carolina Medicaid Program and agrees to abide by the following terms and conditions:

1. Comply with federal and state laws, regulations, state reimbursement plan and policies governing the services authorized under the Medicaid Program and this agreement (including, but not limited to, Medicaid provider manuals and Medicaid bulletins published by the Division of Medical Assistance and/or its fiscal agent).

....

C. AS A PROVIDER OF PHARMACY SERVICES, [CFP] CERTIFIES AND AGREES:

1. It is currently meeting on a continuing basis, standards for operation as a pharmacy in the State of NC and is managed by a licensed pharmacist who holds a current license.

2. To notify [Respondent] within 30 days after transactions involving change of ownership or IRS number, pharmacist manager, lease or sale.

(Joint Ex. 1.)

9. Under 21 N.C. Admin. Code 46.1401(a): "All places providing services which embrace the practice of pharmacy shall register with the North Carolina Board of Pharmacy as provided in G.S. 90-85.21 and acquire a permit to do so."

10. Clinical Coverage Policy 9 of Respondent's Outpatient Pharmacy Program provides:

6.1 Conditions of Participation

....Pharmacies must be operating under permit or license to dispense drugs issued by the appropriate state or federal authority.

6.2 Changes in Pharmacy Status

All changes in pharmacy status must be reported to DMA Provider Services uses the Provider Change Form.

(Joint Ex. 7.)

11. In 2002, CFP's pharmacy held North Carolina Board of Pharmacy ("NCBOP") license number 7616. (Joint Ex. 1.)

12. When CFP first started offering pharmacy services, its pharmacy manager was Charles Brownlow Pace. (Hr'g Tr. 14:7-13.) In approximately 2004, Burwell Temple ("Mr. Temple") became the pharmacy manager. (Hr'g Tr. 14:13-15.)

13. The provision of pharmacy services was not a money-making venture for CFP and often resulted in CFP losing money. (Hr'g Tr. 38:17-20.) Due to its small size, CFP could not buy in bulk and had to pay high prices for the medications. (Hr'g Tr. 38:21-39:1.) The reimbursement that CFP received from Respondent for medications rarely covered CFP's cost for the medications. (Hr'g Tr. 39:7-8.)

14. Despite the fact that CFP lost money on the prescription medications it dispensed, it continued to offer the service because of the health benefits to its patients. Dr. Reece testified:

...I found over the years in serving the underserved that I had a lot better control over [patients'] health care as I had control over their medications. Medications w[ere] the tool that I had. I knew at least that they got the medicine

because I would insist upon it. I knew if they didn't come in when they were supposed to come in [that] they weren't taking their medicine....

So it was a matter of helping them with their health care. I looked on it as a loss leader – maybe that's a wrong statement – but like a Walmart or a Kmart would use to get you into their facility. We did all right on the side of office visits, so we were being compensated there. The cash pay, insurance pay made up for what we didn't make in any profit at all as far as the underserved, the Medicaid [patients].

...It was a convenience. It helped [the patients] to be accountable. It helped us to be better caretakers. And the patients, by and large, really, really enjoyed [the service], and they were very, very grateful, and that was satisfying to us.

(Hr'g Tr. 65:6-66:4.)

15. Respondent reimburses all pharmacy service providers the same rate for prescription medications. (Hr'g Tr. 39:11-12.) Therefore, regardless of whether a CFP Medicaid patient had a medication dispensed by CFP or by a larger commercial pharmacy, Respondent paid the same amount for that medication. (Hr'g Tr. 39:16-20.)

16. In May 2007, Mr. Temple passed away. (Hr'g Tr. 14:20.) The NCBOP gave the Pharmacy sixty (60) days to find a replacement pharmacy manager. (Hr'g Tr. 15:6-11.)

17. CFP's attempts to find a pharmacy manager to replace Mr. Temple were unsuccessful. (Hr'g Tr. 15:11-14.)

18. In order to determine how CFP could continue to offer pharmacy services without a pharmacy manager, CFP telephoned Respondent, explained the situation, and asked what it needed to do. (Hr'g Tr. 15:18-16:3.) Respondent did not give CFP a definitive answer, but rather referred CFP to Respondent's website. (Hr'g Tr. 16:4-6.)

19. CFP reviewed Respondent's website but was unable to find any guidance as to what CFP needed to do to continue to offer pharmacy services without a pharmacy manager. (Hr'g Tr. 16:7-17.)

20. Since Respondent had issued documents that CFP interpreted as meaning that the National Council for Prescription Drug Programs (the "NCPDP") could give advice as to Respondent's policies and procedures, Respondent next contacted the NCPDP. (Hr'g Tr. 16:18-20, 19:21-20:9; Pet.'s Ex. A.)

21. The NCPDP informed CFP that in order for CFP to continue to dispense prescription medications and be reimbursed by third party payors, CFP needed only to change the taxonomy associated with the Pharmacy's billing numbers from a limited liability pharmacy to a dispensing physician. (Hr'g Tr. 16:22-17:23.) The NCPDP further stated that if any of the

third party payors had any questions about the Pharmacy or its credentials, the third party payors would contact the Pharmacy. (Hr'g Tr. 17:2-3.)

22. Thus, in July 2007, CFP changed the taxonomy associated with the Pharmacy's billing numbers from limited liability pharmacy to dispensing physician. (Hr'g Tr. 17:5-23.)

23. At all times relevant hereto, Dr. Reese was a registered dispensing physician with the NCBOP. (Pet.'s Ex. B.)

24. CFP also turned in the Pharmacy's permit to the NCBOP immediately upon the change in taxonomy and never concealed that it no longer had a permit and was no longer operating as a limited liability pharmacy but was instead providing pharmacy services through Dr. Reece as a dispensing physician. (Hr'g Tr. 20:14-21:3; Joint Ex. 4.)

25. After the change was made, some third party payors contacted CFP with questions. (Hr'g Tr. 17:24-18:1.) For example, Blue Cross/Blue Shield and Express Scripts asked CFP for its pharmaceutical credentials. (Hr'g Tr. 18:1-3.) In response, CFP sent the payors copies of Dr. Reece's dispensing license, medical license and DEA registration. (Hr'g Tr. 18:5-7.) CFP was not asked any further questions by any of the third party payors, and CFP continued to receive reimbursement from them. (Hr'g Tr. 18:7-10; 73:19-74:10.)

26. Respondent never contacted CFP after the Pharmacy's taxonomy changed. (Hr'g Tr. 18:16-19.)

27. CFP kept billing Respondent for prescription medications that it dispensed to Medicaid patients, and Respondent continued to reimburse CFP for those prescription medications, even though the dispensing was performed by Dr. Reece as a dispensing physician and not a pharmacy. (Hr'g Tr. 16:20-24.)

28. At all times, Dr. Reece was licensed as dispensing physician and maintained registration with the DEA. (Pet.'s Ex. B.)

29. CFP also maintained specific written policies and procedures that ensured the practice complied with all applicable laws and regulations, including but not limited to those regarding prescription medications dispensed by Dr. Reece. (Hr'g Tr. 24:4-17; Pet's Ex. C.)

30. Even though CFP no longer had a pharmacy manager on staff, Dr. Reece performed all the duties that would otherwise be performed by a pharmacy manager as required by N.C. Gen. Stat. § 90-85.15A and 21 N.C. Admin. Code 46.2502. (Hr'g Tr. 62:9-69:25.)

31. Respondent performed a routine audit of the Pharmacy in March 2009. (Hr'g Tr. 26:2-4.) At that time, Respondent was informed and aware that CFP no longer offered pharmacy services through a limited liability pharmacy with a pharmacy manager, but rather offered pharmacy services pursuant to Dr. Reece's dispensing physician registration. (Hr'g Tr. 26:14-24.) At that time, Respondent did not inform CFP that this manner of operation was problematic or otherwise improper. (Hr'g Tr. 26:12-14.) Therefore, CFP carried on in that manner and

continued to bill Respondent for the dispensed prescription medications. (Hr'g Tr. 27:25-28:3.) Likewise, Respondent continued to pay CFP for those prescription medications. (Hr'g Tr. 28:4-30:9.)

32. Approximately six (6) months later and without any notice, CFP received a letter dated October 21, 2009 stating that Respondent was terminating the Pharmacy billing number effective July 10, 2007 for failure to maintain a pharmacy permit. (Hr'g Tr. 29:10-18; Pet.'s Ex. G.)

33. CFP filed a request for reconsideration of the termination of the Pharmacy billing number. (Pet.'s Ex. H.)

34. The North Carolina Department of Health and Human Services Hearing Office (the "Hearing Office") issued its reconsideration decision on December 31, 2009, in which it upheld the termination of the Pharmacy billing number. (Joint Ex. 5.) However, the reconsideration decision did not state that Respondent would or intended to recoup payment for any or all of the all reimbursement payments Respondent made to CFP for prescription medications it dispensed after July 10, 2007. (*Id.*)

35. Over five (5) months later, and again without any notice, Respondent sent CFP a letter dated June 11, 2010 in which Respondent stated it intended to recoup payment for all reimbursement payments made to CFP pursuant to the Pharmacy billing number since July 10, 2007. (Hr'g Tr. 35:12-36:2; Joint Exs. 3 & 6.) The total amount Respondent intended to recoup was \$464,888.45 in payment for 10,508 prescription medications. (Joint Exs. 3 & 6.)

36. CFP filed a request for reconsideration of Respondent's decision to recoup \$464,888.45. (*See* Joint Ex. 2.)

37. The Hearing Office issued its reconsideration decision on August 6, 2010, in which it upheld the recoupment of \$464,888.45. (*Id.*)

38. Respondent filed an appeal from the reconsideration decision to this venue.

39. If CFP had known that Respondent would not pay for prescription medications CFP dispensed after July 10, 2007, CFP would not have done dispensed the medications or billed Respondent for them. (Hr'g Tr. 41:9-13.)

40. Respondent has never raised any issue regarding the medical necessity, quantity or quality of prescription medications CFP provided to its patients.

41. Respondent has not alleged any fraud or dishonesty in this case.

42. As of the date of the hearing in this case, Respondent had recouped approximately \$50,000. (Hr'g Tr. 76:19-20.) In addition, CFP posted a \$30,000 bond to limit Respondent's ability to recoup to just \$2,500 per month. (Hr'g Tr. 76:17-21.)

43. CFP's loss of approximately \$80,000 has been a great burden and hardship on the practice. (Hr'g Tr. 76:22-77:1.)

44. In the event Respondent is permitted to recoup the full \$464,888.45, CFP will be forced to file for bankruptcy, especially since Medicaid patients make up approximately one-third of CFP's patient population. (Hr'g Tr. 77:2-18.)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the subject matter and the parties to this contested case, and this matter is properly before the undersigned Administrative Law Judge.

2. Under 10A N.C. Admin. Code 22F.0202, Respondent has the authority to investigate provider abuse.

3. By entering into the Agreement, CFP accepted the responsibility of providing a service to Respondent's clients and agreed to follow Medicaid rules and regulations. In return, Respondent agreed to pay CFP for its services.

4. CFP met its burden of proving it substantially complied with the Agreement, Medicaid statutes, rules and regulations, and Respondent's policies when it dispensed prescription medications to Medicaid patients pursuant to Dr. Reece's registration as a dispensing physician.

5. CFP acted in good faith and reasonably and justifiably relied upon the information provided by the NCPDP that it could continue to dispense and bill Respondent for prescription medications.

6. CFP has met its burden of proof and has shown by the preponderance of the evidence that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, failed to act as required by law or rule, deprived CFP of property, or otherwise substantially prejudiced CFP's rights in requesting CFP to repay the Medicaid reimbursements Respondent paid CFP for prescription medications that it dispensed.

7. CFP did not act fraudulently or dishonestly, recklessly or intentionally, in attempting to comply fully with the Agreement, Medicaid statutes, rules and regulations, and Respondent's policies.

8. Under 10A N.C. Admin. Code 22F.0601(b), CFP "may argue all or part of a recoupment imposed by [Respondent]." Because CFP rendered the services and did not violate the Agreement, Medicaid statutes, rules or regulations, or Respondent's policies, Respondent should not be permitted to recoup the \$464,888.65 from CFP.

9. Even if the undersigned were to find that CFP violated the Agreement, Medicaid statutes, rules or regulations, or Respondent's policies, which the undersigned expressly does

not, the remedy imposed by Respondent of recouping the \$464,888.65 is so harsh under the specific facts of this case that it violates all notions of fairness and due process. To impose such a penalty would be unconscionable.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to recoup \$464,888.65 from CFP should be REVERSED. All amounts heretofore recouped should be immediately refunded to CFP and the \$30,000 bond released.

ORDER


It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

NOTICE

The Agency making the final decision will review the decision of the Administrative Law Judge in this contested case per N.C. Gen. Stat. § 150B-36(a) and N.C. Gen. Stat. § 150B-36(b)(b1) and (b2). The Agency making the final decision is required to give each party an opportunity to file exceptions to the Administrative Law Judge's decision and to present written argument to those in the Agency who will make the final decision. The Agency is required by N.C. Gen. Stat. § 150B-36(b3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Medical Assistance.

This the 8th day of July, 2011.

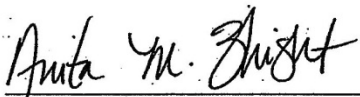

The Honorable Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Sarah M Johnson
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4101 Lake Boone Trail Suite 300
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ATTORNEY FOR PETITIONER

Jennifer L. Hillman
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 14th day of July, 2011.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

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APPEARANCES

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ISSUES

1. Whether Respondent had just cause to dismiss Petitioner based on grossly inefficient job performance?
2. Whether Petitioner is entitled to back pay and attorneys' fees?

WITNESSES

Called by Petitioner: Beverly Moore Terry Vanta S. Lambert	Called by Respondent: Cheala Garland-Downey Tasha Timberlake Gloria Chambers
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EXHIBITS

The Court received into evidence the following exhibits submitted by Respondent without objection:

- Exhibit #1 - Job Description of Income Maintenance Caseworker II
- Exhibit #2 - DSS' Policy and Procedures Manual (pages 16-17)
- Exhibit #3 - Acknowledgment of Understanding of DSS' Policy and Procedures Manual
- Exhibit #4 - Durham County's Successive Warning System
- Exhibit #5 - Receipt of Durham County's Policy Verifications
- Exhibit #8 - Notice of Pre-Disciplinary Conference (Dated July 26, 2010)
- Exhibit #9 - Notice of Dismissal (Dated July 28, 2010)
- Exhibit #10 - Final Agency Action (Dated August 17, 2010)
- Exhibit #11 - Amended Final Agency Action (Dated August 18, 2010)
- Exhibit #12 - Certified Court Copy of Domestic Violence Complaint and Order
- Exhibit #13 - Certified Court Copy of No Contact Complaint and Order
- Exhibit #14 - Training Records
- Exhibit #15 - Telephone Log

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence and the entire record of the proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to: the demeanor of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

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FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Petitioner Beverly Moore Terry was a permanent State employee subject to N.C.G.S. §126-5(A)(2) of the North Carolina General Statutes.
3. Respondent County of Durham Department of Social Services is subject to Chapter 126 of the North Carolina General Statutes and was Petitioner's employer.
4. Petitioner began work for Respondent on January 10, 2005.
5. Petitioner worked as an Income Maintenance Caseworker II within the Family Economic Independence Division / Food and Nutrition Services (FNS) Department for the Durham County Department of Social Services (DSS). Petitioner began work in the FNS Department effective March 31, 2010. Petitioner was assigned to work under the supervision of Tasha Timberlake, Income Maintenance Supervisor.
6. Petitioner had been employed in the area of income maintenance / economic services (social services) in North Carolina for twenty years.
7. In the FNS Department, Petitioner was responsible for taking information and determining the eligibility of applicants for food and nutrition services. The information solicited included previous employment, wage information, utility payment information, rent payment information, address information, and names and ages of any individuals living within the same home.
8. Employees in the FNS Department routinely work with caseloads of approximately 580-600 active files.
9. Employees in the FNS Department not only conduct appointments with applicants for FNS services, but also investigate and verify applications for DSS services by calling prior employers and generally verifying the information provided by the applicants.
10. FNS employees receive numerous phone calls on a daily basis from pending applicants and current clients to which they must respond. Many times the clients are upset or irate. On average, FNS caseworkers receive between 20-30 phone calls or messages per day from clients.
11. Respondent has a confidentiality policy, of which Petitioner was aware, that prohibits the disclosure of confidential personal information to non-County employees.
12. Employees for DSS are required to participate in classes to hone and develop skills to

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improve their job performance. One of these classes specifically addresses dealing with irate clients, and Petitioner participated in this and other such classes.

13. Ms. Chambers applied for food assistance in May, 2010 at the Durham County Department of Social Services. At that time, Ms. Bonita Kirby was living with Ms. Chambers. They both applied for food assistance at the same time but with separate caseworkers in Durham County.

14. Petitioner was assigned to Bonita Kirby's case as an Income Maintenance Caseworker. Petitioner met with Ms. Kirby on or about May 21, 2010.

15. During the interview with Ms. Kirby, Petitioner learned that Ms. Kirby was from Yanceyville, the same small town in Caswell County in which Petitioner had lived for most of her life.

16. Petitioner also learned that Ms. Kirby had previously worked at the Sonic Restaurant in Reidsville ("Sonic"). Further, for purposes of obtaining food assistance, Ms. Kirby disclosed that she was living with Ms. Gloria Chambers.

17. Gloria Chambers is the DSS client who alleged that her confidential information had been improperly disclosed by the Petitioner.

18. Petitioner contacted the Sonic in Reidsville for the purposes of verifying Ms. Kirby's wage and employment information. Petitioner had to contact the Sonic twice because the first manager to which she spoke was unable to assist her at that time. She called back later in the day and spoke to another manager who was able to verify Ms. Kirby's information.

19. Ms. Chambers was not one of Petitioner's clients, but she did receive food nutrition assistance from Respondent through the assistance of a separate caseworker.

20. Ms. Chambers met the Petitioner's daughter at Sonic while Ms. Chambers was employed there in a managerial position. Ms. Kirby was also employed at that particular Sonic location.

21. Vanta Lambert is the Petitioner's daughter. Ms. Lambert lives in Petitioner's home in Yanceyville, North Carolina. During 2010 through the present, Ms. Lambert was enrolled as a student in a community college.

22. In addition to her studies, Ms. Lambert has worked multiple jobs concurrently and was doing so in 2010. Several of Ms. Lambert's jobs included an internship at the Durham County DSS, working at the Sonic in Reidsville as well as working as a CNA at a healthcare facility.

23. Ms. Lambert began employment at the Sonic in Reidsville on or about April 19, 2010.

24. Ms. Lambert was hired by Gloria Chambers who was a manager at Sonic at that time.

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During the interview, Ms. Chambers advised Ms. Lambert that she was married to Cliff Chambers who was also a manager at the Sonic restaurant.

25. Ms. Chambers went by the name Andrea at Sonic and introduced herself to Ms. Lambert in that way.

26. Ms. Chambers told Ms. Lambert at her initial employment interview that she shouldn't hire Ms. Lambert because she was young and she might try to steal her husband, Mr. Cliff Chambers, who was an assistant manager at Sonic.

27. Ms. Lambert also disclosed during the employment interview that she had an internship at DSS in Durham and also provided Ms. Chambers with her school schedule.

28. Ms. Chambers asked Ms. Lambert if she had children and, if so, who would be watching her child while she was working. Ms. Lambert advised Ms. Chambers that her mother, the Petitioner, would be watching her child.

29. Gloria Chambers and Cliff Chambers were co-managers at the Sonic in Reidsville and they were married to each other.

30. On her first day of employment at Sonic, Ms. Lambert worked one four-hour shift with Ms. Kirby.

31. After the initial employment interview, Ms. Lambert only worked one shift with Ms. Chambers. Ms. Lambert also worked in the Medicaid Department as an intern with the Durham County DSS during the spring semester of 2010.

32. During the spring and summer of 2010, Ms. Chambers was living at 911 Chalk Level Road, Apt. M6 in Durham, North Carolina with her two children, Ms. Bonita Kirby and a man by the name of Alvin Hooks.

33. Ms. Chambers separated from Cliff Chambers in April, 2010 and moved to the apartment in Durham at that time.

34. The Court heard testimony from Gloria Chambers. She testified that her estranged husband, Cliff Chambers, did not know where she was living prior to May 2010 when she applied for food assistance at Respondent's office.

35. After the separation, Ms. Chambers communicated with Mr. Chambers primarily through her sister and occasionally called him on the telephone.

36. Gloria and Cliff Chambers had a volatile domestic relationship, and Gloria Chambers would often call law enforcement during or after one of their arguments.

37. On June 30, 2010, Mr. Chambers was ordered by the Court in Durham County, North Carolina to have no contact with Ms. Kirby or Ms. Chambers for one year.
38. Ms. Chambers left Sonic at the end of April or the beginning of May, 2010. She never saw or spoke to Ms. Lambert after she left Sonic.
39. Ms. Chambers never met the Petitioner.
40. Ms. Lambert never had any contact with Ms. Chambers after April, 2010 and Ms. Lambert never visited Ms. Chambers' residence in Durham.
41. Ms. Lambert did not know where Ms. Chambers lived or where Ms. Kirby lived.
42. Petitioner never visited Ms. Chambers' and Ms. Kirby's residence in Durham.
43. In late June or early July of 2010, Ms. Chambers sent her two children to visit their father, Cliff Chambers, in Cedar Grove, Orange County for two weeks.
44. While the children were with their father, Ms. Chambers' daughter called to speak with her, and Ms. Chambers heard Cliff Chambers in the background yelling that he knew where she lived.
45. Ms. Chambers testified that in the end of June or the beginning of July, 2010 Cliff Chambers knew where she lived and knew details about her apartment and that she had a boyfriend.
46. Ms. Chambers further testified that she had called Sonic at one point and, while on hold, heard voices over the phone line. She had been speaking with her husband, Cliff Chambers, and he put her on hold and then she testified that she heard him speaking with Vanta Lambert about where Gloria Chambers lived. When she requested that Cliff put Ms. Lambert on the phone, he stated that Ms. Lambert was not there with him.
47. Ms. Lambert never knew that Bonita Kirby nor Gloria Chambers were clients of Durham County DSS.
48. Ms. Lambert did not know Gloria Chambers' first name, and only knew Ms. Chambers by "Andrea".
49. Petitioner never spoke with Ms. Lambert regarding confidential information about Petitioner's clients, nor did Petitioner ever mention to Ms. Lambert that Bonita Kirby was her client or that one of Petitioner's clients worked at the same Sonic as Ms. Lambert.
50. Ms. Lambert never spoke with Cliff Chambers about his personal relationships, his separation from his wife, Gloria Chambers, or Ms. Chambers' and Ms. Kirby's whereabouts.

51. Ms. Lambert did not socialize with her co-workers at Sonic or discuss personal details with them. The only manager with whom she developed a friendship was an individual by the name of Eric Wright.

52. The Petitioner did not share any confidential information about Gloria Chambers, Bonita Kirby or any other client with Ms. Lambert or any other unauthorized individual.

53. Petitioner denies all of the allegations of Gloria Chambers, Bonita Kirby and the Respondent. The undersigned finds Petitioner's testimony concerning her denial to be credible when compared with all of the other evidence in the record.

54. Petitioner has never admitted to violating the Respondent's confidentiality policy, nor has she ever admitted to disclosing confidential information about a client to a non-County employee or other unauthorized person.

55. Because of the high quantity of phone calls and messages received during the day, Petitioner would often listen to voice messages remotely from her cell phone on her commute home every evening. Petitioner received a message from Ms. Chambers on her way home one day. In the message, Ms. Chambers was very agitated and was cursing. Petitioner did not return the phone message because Ms. Chambers was not her client and Petitioner knew she could not give information about a client to a non-County employee or unauthorized person.

56. Respondent does not have any written rules regarding when or if an employee should report a client's dissatisfaction to a supervisor. Rather, it is left to the discretion of the employee, and it is expected that the employee will diffuse the situation.

57. In the beginning of June 2010, Petitioner received a phone call from Bonita Kirby during which call Ms. Chambers got on the phone and yelled at Petitioner. Ms. Chambers was very agitated and irate. Petitioner tried to calm Ms. Chambers using techniques she learned during her DSS training. In particular, Petitioner told Ms. Chambers that she was sorry that Ms. Chambers felt the way she did, but that she had never shared any confidential information with an unauthorized person. Petitioner stated that she had been a social worker for a long time and she knew better than to do so. Further, upon hearing Ms. Chambers' allegations that Ms. Lambert was involved, Petitioner informed Ms. Chambers that Ms. Lambert had nothing to do with the situation, that Ms. Lambert had no information about the Petitioner's clients and that she would never compromise a client's safety. Petitioner also informed Ms. Chambers that if she ever did disclose a client's confidential information, she would lose her job and then be unable to pay her bills.

58. Petitioner received numerous calls from various clients who were upset or irate regarding the status of their benefits and various other issues.

59. Petitioner received verbally abusive messages from clients and other individuals on a

daily basis.

60. Petitioner understood that due to the volume of calls from upset clients, the caseworkers were expected to diffuse the situations on their own.

61. During her time in social services, the Petitioner was taught to prioritize matters that arose on behalf of clients in her discretion. She also learned to handle client's issues above those issues of individuals who were not in her case files.

62. The Petitioner was involuntarily separated from her employment with the Durham County Department of Social Services (DSS), Respondent, following a pre-disciplinary conference held on July 27, 2010.

63. Petitioner received written notice of the pre-disciplinary conference on July 27, 2010 and participated in the conference on the same day.

64. Prior to the pre-disciplinary conference, Petitioner met with Tasha Timberlake, her immediate supervisor, as well as Pinkie Davis-Boyd, the FNS Program Manager.

65. On July 27, 2010 Tasha Timberlake called the Petitioner and asked her to report to Ms. Pinkie Davis-Boyd's office, the FNS Program Manager.

66. Ms. Chambers and Ms. Kirby wrote statements with allegations against the Petitioner which were given to the Respondent. The statements were each stamped with the date of July 30, 2010 at the top of the first page.

67. Petitioner was never given the written statements of Bonita Kirby or Gloria Chambers at the pre-conference meeting or at the pre-disciplinary conference. Petitioner never had an opportunity to read these statements prior to her dismissal from employment.

68. At the meeting with Ms. Timberlake and Ms. Davis-Boyd, Petitioner did not admit to breaching the Respondent's confidentiality policy nor did she admit to sharing Ms. Chambers' information or Ms. Kirby's information with a non-County employee or with any other unauthorized individual.

69. Petitioner was given her Notice of Pre-Disciplinary Hearing at the meeting with Ms. Timberlake and Ms. Davis-Boyd.

70. Petitioner did not receive advance notice of the earlier meeting and was very surprised by the allegations. At first Petitioner did not remember Gloria Chambers' name. Upon having her memory refreshed, Petitioner did recall Bonita Kirby's file and that she had a roommate by the name of Gloria Chambers. At the pre-disciplinary conference, held later during the day on July 27th, Petitioner met with Gerri Robinson, Director of DSS, Tasha Timberlake, Petitioner's immediate supervisor, Rhonda Stevens, the assistant director, and Pinkie Davis-Boyd, the FNS

program manager.

71. At the pre-disciplinary conference, Petitioner denied ever disclosing confidential information to a non-County employee and denied violating the confidentiality policy in any way.

72. Petitioner was shocked to hear the allegations against her and her daughter and felt that they were absurd. She was told that a CPS (child protective services) worker had contacted Petitioner's supervisor and advised that a DSS client had been put in danger because Ms. Lambert, Petitioner's daughter, had given a specific address of that client to the client's estranged husband.

73. The Petitioner's first reaction was to defend her daughter because she felt that Ms. Lambert was being personally attacked.

74. Petitioner was frustrated by the accusations because she felt she was blind-sided and did not have any statements from the complainant to review in defending herself and to fully understand the allegations against her.

75. After leaving the pre-disciplinary conference, Petitioner called Ms. Lambert on the phone to find out if she knew anything about the accusations. Petitioner was highly emotional at this point and was crying. She initially asked her daughter, "What have you done?" Ms. Lambert advised that she did not know anything about the alleged breach of confidentiality and that she did not even know Ms. Chambers or Ms. Kirby very well at all because she had barely worked with either of them.

76. According to the Notice of Dismissal dated July 28, 2010, Petitioner was separated from employment as an Income Maintenance Caseworker II due to "grossly inefficient job performance."

77. The specific actions alleged for which Petitioner was terminated are set forth in the Notice of Dismissal as follows:

- a. A DSS client informed the Respondent that Petitioner had released confidential information without proper authorization.
- b. According to the client, Petitioner had disclosed the client's address to a non-County employee.
- c. In turn, the client believed that the non-County employee had disclosed that information to the client's estranged husband.
- d. The client alleged that these actions placed her in an unsafe situation.

80. The undersigned finds that the testimony of Petitioner and Vanta Lambert was very credible. Van Lambert's testimony regarding the limited time she spent with her co-workers, her casual relationship void of any personal visits in the co-workers' home or even

knowledge of where they lived, was also credible and was given great weight as opposed to the weight afforded the mere allegations or speculation of Respondent's witnesses that Petitioner's daughter had disclosed the residential address of Ms. Chambers to her estranged husband.

CONCLUSIONS OF LAW

16. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action pursuant to N.C.G.S. §150B-23. The parties received proper notice of the hearing. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be considered without regard to the labels given.

17. Pursuant to N.C.G.S. §126-5(A)(2), Petitioner was covered by, and is subject to, the State Personnel Act, as an employee of a local social service agency department.

18. Petitioner was employed with the Durham County Department of Social Services (DSS) on January 10, 2005 and worked continuously until she was involuntarily discharged on July 29, 2010.

19. Pursuant to N.C.G.S. §126-35, no career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause.

20. Pursuant to 25 NCAC 1J.0604, the two bases for the discipline or dismissal of employees under the statutory standard for "just cause" are grossly inefficient job performance and/or unacceptable personal conduct.

21. 25 NCAC 1J.0614(f) defines "grossly inefficient job performance" as a type of unsatisfactory job performance that occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan or as directed by the management of the work unit or agency; and, that failure results in: (1) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility; or (2) the loss of or damage to state property or funds that result in a serious impact on the State or work unit.

22. 25 NCAC 1J. 0614(I) defines "unacceptable personal conduct" as:

- (a) Conduct for which no reasonable person should expect to receive prior warning;
 - (b) Job-related conduct which constitutes a violation of state or federal law;
 - (c) Conviction of a felony or offense involving moral turpitude;
 - (d) The willful violation of known or written work rules;
 - (e) Conduct unbecoming a state employee that is detrimental to state service;
 - (f) Abuse of a client;
 - (g) Absence from work after all authorized leave credits or benefits are exhausted; or

(h) Falsification of a state application or in other employment documentation.

8. N.C.G.S. §126 states that in a contested case pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended or demoted for just cause rests with the department or agency employer.

9. The Respondent has the burden of proof in just cause terminations, pursuant to N.C.G.S. §126. The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

10. The North Carolina Supreme Court held in *N.C. D.E.N.R. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), that "determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." The first of these inquiries is a question of fact, while the second inquiry is a question of law.

11. As to the first inquiry, the Respondent has failed to establish by a preponderance of the evidence that the Petitioner provided confidential information either to her daughter or to any other non-County employee. The Respondent's witness, Gloria Chambers, had no concrete evidence to support the allegation that it was the Petitioner and no other individual, who provided her address and whereabouts to her estranged husband. Ms. Chambers admitted to communicating with her husband through her sister and also through Ms. Bonita Kirby. Further, Ms. Chambers admitted that her children had contact with their father, her estranged husband, at one point in the late spring and early summer of 2010. It was also established through testimony from both Ms. Chambers and the Petitioner that neither the Petitioner, nor her daughter, had ever been to Ms. Chambers' residence.

12. The Petitioner has consistently denied providing confidential information to any third party in breach of Respondent's confidentiality policy. Petitioner also explained her shock, surprise and confusion by the allegations against her, and stated that her reaction was a reflection of the lack of notice she received before attending the pre-disciplinary hearing. Petitioner's first reaction was to defend her daughter, who she believed was under attack, and, due to her confusion as to what was being alleged, she called her daughter in an attempt to find out what she knew, if anything, about the allegations.

13. Petitioner acknowledged to the Court that she would have handled the situation differently looking back on the circumstances because, at the time, she did not believe the situation was as dire as it became. Petitioner further explained that she did not take Ms. Chambers' complaints seriously due to their "absurdity" in nature and because she knew she had

done nothing wrong.

14. In the matter, *N.C. D.O.C. v. McKimmey*, 149 N.C. App. 605, 561 S.E.2d 340 (2002), the employee in question was a probation officer for the Department of Correction. The employee was involuntarily discharged from employment on the basis of grossly inefficient job performance. The respondent employer in that case alleged that one of the probationers under the supervision of the petitioner had received additional and new criminal charges while on probation that went unreported by the employee. The probationer then shot and killed a state trooper in Maryland while on probation. The respondent employee argued that if the petitioner had properly followed procedure and filed the appropriate reports, the probationer would not have been free to travel to Maryland and have the opportunity to shoot a state trooper. The Administrative Law Judge reversed the Department of Correction's decision and held that there was not just cause to terminate the petitioner's employment.

15. In the current matter, the only admission made by the Petitioner was her failure to report an irate person to her supervisor. No evidence was presented as to protocol for handling irate clients other than the employees are trained to diffuse situations and must use their best judgment in handling such matters.

16. The second inquiry under the *Carroll* test relates to whether the conduct as alleged constitutes just cause for the disciplinary action taken. The Respondent's Notice of Dismissal states that the conduct for which the Petitioner was dismissed was releasing confidential information without proper authorization.

17. Because the Respondent has failed to prove by a preponderance of the evidence that the Petitioner released confidential information, the inquiry ends. There is no conduct for which the Petitioner could be terminated for just cause.

18. Based on an analysis of all the evidence presented, including but not limited to the testimony of the witnesses, Respondent has failed to satisfy its burden of proof for its dismissal of Petitioner for just cause. Respondent's termination of Petitioner is hereby reversed for lack of just cause. Petitioner should be reinstated to her same or similar position and given back pay. Petitioner is entitled to back pay and attorney fees.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following decision:

DECISION

The Undersigned finds and holds that the Petitioner was unjustly terminated from employment by the Respondent in that Respondent failed to carry its burden of proof by a preponderance of the evidence. As such, Respondent's termination of Petitioner is REVERSED. As such, Petitioner is hereby awarded attorneys' fees and back pay in an amount to be determined.

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NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

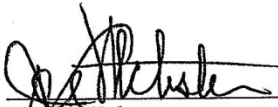
In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the Commission are in accordance with Appeal to Commission, Section 0.0400 *et seq.* of Title 25, Chapter 1, SubChapter B of the North Carolina Administrative Code (25 NCAC 01B .0400 *et seq.*).

ORDER

It is hereby ordered that the County of Durham Department of Social Services serve a copy of the final decision to on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings in Raleigh in accordance with N.C.G.S. §150B-36.

This the 25th day of July, 2011.



Joe L. Webster
Administrative Law Judge

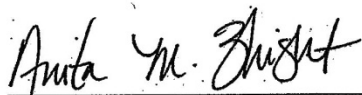
Page -13-

A copy of the foregoing was mailed to:

Jennifer L Bogacki
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ATTORNEY FOR PETITIONER

Kathy R. Everett-Perry
Assistant County Attorney
County of Durham
PO Box 3508
Durham, NC 27702
ATTORNEY FOR RESPONDENT

This the 27th day of July, 2011.



Office of Administrative Hearings
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**FILED
OFFICE OF
ADMINISTRATIVE HEARINGS**

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DHR 05575

American Human Services Inc.
Petitioner

VS.

North Carolina Department of Health and
Human Services Division of Medical
Assistance
Respondent

DECISION

This cause coming on to be heard and being heard before Administrative Law Judge Donald W. Overby, beginning on February 1, 2011 with the hearing being completed on February 18, 2011, upon Petitioner's Petition for a Contested Case Hearing.

APPEARANCES

The Petitioner American Human Services, Inc. ("Petitioner" or "AHS") is represented by James T. Johnson of the Law Office of James T. Johnson, P.A.

The Respondent North Carolina Department of Health and Human Services, Division of Medical Assistance ("Respondent" or "DMA") is represented by Assistant Attorney General Brenda Eaddy with the N.C. Department of Justice.

EVIDENCE

Petitioner properly tendered into evidence Exhibits numbered 1 – 18, 20, and 22 – 23, which were admitted into evidence.

Respondent properly tendered into evidence Exhibits identified as A – I, which were admitted into evidence.

Tara Fields and Naomi Carraway testified on behalf of Petitioner. Peter Bernardini testified on behalf of Respondent.

ISSUE

Issue to be resolved: whether Respondent correctly rejected Petitioner's requests for prior approval for authorization to provide services to two minor Medicaid recipients where the requests for authorization were incomplete and/or lacking required documentation.

After hearing the testimony of the witnesses, reviewing the evidence of both parties introduced at the hearing, and after hearing arguments of counsel, the Court makes the following

FINDINGS OF FACT

1. AHS is a non-profit corporation duly formed and organized by the State of North Carolina.
2. During the relevant time period, AHS was a properly licensed and authorized group home services provider.
3. During the relevant time period, DMA managed payment of Medicaid benefits in North Carolina to group homes for services provided to group home residents that qualified for benefits. DMA contracted with Value Options ("VO") to review and authorize requests for payment of Medicaid benefits submitted by group homes for services the group home provided to qualified residents. During the relevant time period, VO was an agent of DMA and DMA was acting by and through VO.
4. Standard practice was for the group homes to submit requests for payment authorization packages to VO, usually on a monthly basis for each qualified resident, and VO would then review the requests and ensure the resident met the medical necessity criteria.
5. Implementation Update No. 12, July 13, 2006, states that the first and foremost commitment of VO and DMA is to make sure that group home resident consumers continue to receive services even if an authorization request has not yet been approved and, therefore, providers are instructed and directed to continue to provide necessary services even though the authorization has not yet been approved. Pursuant to Implementation Update No. 12, as long as a complete package for authorization is received and the consumer meets the necessary criteria, the authorization will be approved. (Petitioner's Ex. 1). This is the course of conduct followed by Petitioner and VO until the issues arose herein.
6. A. P., a minor child Medicaid recipient, was admitted into an AHS group home on October 6, 2009. A. P. was court-ordered to the group home. A. P. had a Medicaid authorization for Level III services through VO that expired on October 30, 2009.
7. AHS submitted its request for a renewal of the authorization for A.P. for Level III services to VO. On or about November 6, 2009, VO received Petitioner's request for prior approval authorization to provide residential treatment services to recipient A.P. indicating a requested start date of November 1, 2009. The Petitioner contends that the request was mailed on October 30, 2009; however, the evidence was not clear when Petitioner mailed its request or when Respondent received it.
8. Even though AHS did not yet have authorization for Medicaid payment for the month of November, AHS continued to provide the necessary group home services to A. P., as instructed pursuant to Implementation Update No. 12 and in accord with the customary practice at that time.
9. By letter dated November 13, 2009, the AHS authorization package for A. P. was returned by VO to AHS for failing to have all the necessary signatures and for failing to have a clinical assessment included in the package.

10. A clinical assessment was not required for either A. P. or R.C. as part of the package and should not have been requested by VO for either of the minor children. Respondent's witness corroborates that the clinical assessment was not required, and it was an error for VO to include that as a basis for returning the package. (Petitioner's Ex. 20). Therefore, the correct reasons for returning the package would have been signatures missing on the PCP and discharge plan for each.
11. The letter dated November 13, 2009 from VO specifies that the "request cannot be processed" for the stated reasons. Further it states that there are no appeal rights because no action is taken. These two factors are critical to disposition of this contested case.
12. When the package was returned, AHS promptly attempted to remedy the problems identified by VO, including attempting to obtain the clinical assessment which was not required. (Testimony of T. Fields and N. Carraway).
13. AHS had difficulty in obtaining a new clinical assessment for A. P. because all the doctors that normally performed the assessments were very busy with extended backlogs for performing assessments. To further delay the process, the county had just transferred A. P.'s case to a new case manager, and at this same time, A. P.'s new case manager was on vacation. AHS was eventually able to obtain a new clinical assessment for A. P.
14. AHS resubmitted the authorization package for A. P. to VO numerous times during the next two months in an attempt to be compensated. (Petitioner's Exs. 4 – 10).
15. VO responded to the various submissions from Petitioner by the letters entitled "Notice of Return Request to Provider" on November 13, 2009 (two separate letters), December 8, 2009, December 9, 2009, December 23, 2009, December 28, 2009 and December 29, 2009. Each of the letters stated that the request could not be processed and that there were no appeal rights.
16. The letter dated December 8, 2009 specifically asked for Petitioner to "Resubmit" on a different form because the form had changed since the process had begun.
17. On or about December 1, 2009, AHS submitted an additional request for authorization on A. P. for December services. (Testimony of T. Fields).
18. A. P. left the AHS group home on December 20, 2009.
19. R. C., a minor child Medicaid recipient, was admitted into an AHS group home in August 2009. Like A. P., R. C. was court-ordered to the group home. R. C. had a Medicaid authorization for Level III services through VO that expired on October 2, 2009.
20. AHS mailed to VO its request for a renewal of the authorization for R.C. for Level III services on or about September 30, 2009.

21. Even though AHS did not yet have authorization for Medicaid payment for the month of October, AHS continued to provide the necessary group home services to R. C., as instructed pursuant to Implementation Update No. 12, and as was the customary practice at the time.

22. The authorization package for R. C. followed much the same tract as did the submission for A. P.; that is, the package was returned by VO to AHS for failing to have all the necessary signatures and erroneously requesting a clinical assessment; on return AHS promptly attempted to remedy the problems identified by VO, including obtaining the clinical assessment; AHS resubmitted the authorization package for R. C. to VO numerous times during the next two months; and AHS had difficulty in obtaining a new clinical assessment for R. C. At one point, VO returned the authorization request package to AHS because they said they could not read the physician's handwriting on the clinical assessment and so they required that the clinical assessment be typed. It took several weeks for AHS to have the physician type out the assessment. AHS undertook the extra effort since VO had requested it, even though the assessment was not required.

23. Illustrative of the confusion created by the Respondent's correspondence is the fact that on return of one submission it was noted that the discharge plan had not been signed and the subsequent return to the Petitioner noted that there was no discharge plan.

24. AHS submitted a full and complete authorization request package for both A. P. and R. C., including the completed clinical assessment, to VO on or about the first week of February 2010. (Petitioner's Exs. 17 and 18).

25. AHS submitted new information attempting to comply with VO's various demands regarding the authorization request package for A. P. at least seven different times from November 1 through December 29, 2009. AHS submitted new information attempting to comply with VO's various demands regarding the authorization request package for R.C. at least four different times from November 1 through December 29, 2009. During this time, AHS routinely called VO to clarify what was wrong with each package and what needed to be done to get the authorization requests approved. VO agents told AHS on numerous different occasions what was missing in each package and requested AHS to resubmit the authorization request packages. (Petitioner's Exs. 4 - 10, 12 - 15, 20).

26. R. C. left the AHS group home on November 14, 2009.

27. VO agents told AHS to resubmit its authorization request packages for both A. P. and R. C. both before and after their respective discharges from the facilities. (Petitioner's Ex. 20; Testimony of T. Fields and N. Carraway).

28. Upon each submittal of information for both A. P. and R. C., VO sent to AHS a Notice of Return Request to Provider informing AHS that the authorization request "cannot be processed." Each of these Notices also stated AHS's "appeal rights are not implicated as no action could be taken on this request." (Petitioner's Exs. 4 - 10, 12 - 15).

29. After AHS had complied with all of VO's different demands regarding both A. P. and R. C.'s authorization request, and a full and complete package had been received by VO for each

minor recipient, VO informed AHS verbally that the request still could not be processed. VO's position at that point was that the request had not been received in a timely manner. This was confirmed in a follow up email. VO continued to tell AHS that because the request could not be processed, no "decision" had ever been made on the request and therefore AHS had no right of appeal. (Testimony of T. Fields).

30. It is not disputed that during all relevant times, A. P. and R. C. met the medical necessity criteria to obtain the requested Medicaid funding for Level III services.

31. Prior to October 2009, AHS had submitted hundreds of Medicaid payment authorization request packages to VO on behalf of its group home residents. Prior to October 2009, AHS had never had a request authorization denied unless there was an issue regarding whether the resident met medical necessity criteria. Prior to October 2009, if something was missing in an authorization request package, VO would inform them as to what was missing, allow AHS to resubmit the request, and would process the request as of the date the original request was sent.

32. In returning each package to the Petitioner, each letter from VO specifically states for the Petitioner to contact VO if there are any questions. Petitioner in fact followed that directive. During the process of attempting to obtain authorizations for A. P. and R. C., the uncontroverted evidence shows that AHS agents called VO to follow-up with authorization request packages recently submitted and were told on various occasions that the request packages had either been lost or could not be located. (Testimony of N. Carraway). Petitioner was never told not to proceed or not to follow up with completing the application.

33. At no time did VO inform the Petitioner that deadlines had been missed or any other reason as to why they would not be paid. The only reasonable inference to be drawn from the course of conduct was for the Petitioner to continue to submit the requests on behalf of the minor child recipients, even though perhaps the most time consuming part of the resubmissions was the Petitioner's efforts to get the clinical assessments for each which were not required.

34. At no time did VO inform Petitioner that the applications had become "initial" requests for authorization.

35. No correspondence or communication by Respondent to Petitioner ever referenced that there was a "gap in service" which might change the nature of the various submissions. Implementation Update #39, page 5, indicates under what circumstances the "gap in service" might apply and specifically notes that the relevant time is when the request is sent, not when received by VO as contended by Respondent.

36. During the fall of 2009, at the same time AHS was attempting to obtain their authorizations for A. P. and R. C., DMA and VO issued numerous Implementation Updates changing the procedures to follow and the forms to be used by providers when submitting their authorization request packages. These changes contributed to the difficulty AHS had in meeting VO's demands. (Petitioner's Exs. 2 and 3; testimony of T. Fields).

37. These changes apparently lead to problems in implementation for VO as is illustrated by the notation on at least one form specifically asking for the submission to be resubmitted on the

new and different form. During the time that AHS was submitting their authorization request packages for A. P. and R. C., the "accepted" form to be used for a discharge plan was changed twice. The original applications for each of the boys were on the appropriate form when initially submitted.

38. From the events in this contested case, it is obvious that VO, and thereby the Respondent, was just as confused if not more so than the Petitioner in how to handle these applications at that time.

39. Another significant change in the process brought about by the Implementation Updates was the fact that VO could return an authorization request package as "unable to process". Prior to October 2009, AHS had never had a request package returned as "unable to process". Prior to October 2009, AHS had never heard of the phrase "unable to process", and AHS did not understand what it meant. (Testimony of T. Fields).

40. At the time of the original and each successive submissions on behalf of A.P. and R. C., the phrase "unable to process" was not defined in any administrative code, session law or implementation update.

41. Respondent's only witness is employed by Respondent DMA, not VO, and was not involved in the day to day handling of the applications, but only reviewed the decisions made after the fact and rendered an opinion. Respondent's witness testified that Petitioner's could not be given extra time to complete their applications because the first submission was marked "unable to process." There is nothing in evidence to support this contention, and especially in the Implementation Updates submitted into evidence.

42. If the two authorization requests for A. P. and R. C. had been processed and approved, AHS would have received \$22,337.22 in Medicaid funding as reimbursement for the services AHS had provided to the residents. Respondent did not present any testimony or evidence to contradict this amount, and therefore, this amount is not in dispute.

BASED ON THESE FINDINGS, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. The foregoing findings of fact may contain conclusions of law and the following conclusions of law may contain findings of fact. The findings of fact and conclusions of law contained herein should be considered appropriately without regard to the designations.

2. The Office of Administrative Hearings has both subject matter and personal jurisdiction to hear this matter. Petitioner and Respondent are proper parties to this action, and are properly before this Court.

3. During all times relevant herein, Respondent managed payment of Medicaid benefits in North Carolina to group homes for services provided to qualified group home residents. During all times relevant herein, VO was an agent of DMA and DMA was acting by and through VO to review and authorize requests for payment of Medicaid benefits submitted by group homes for services the group home provided to qualified residents.

4. Each of the letters addressed to the Petitioner as a response to the various submissions to VO for each of the minor child recipients used the language that they were “unable to process” and that they contained no appeal rights because it was not a final “agency action.”
5. Implementation Update #60 refers to “unable to process” several times but never defines what that means or what consequence may flow from it. At all times relevant herein, the phrase “unable to process” was not defined in any administrative code, session law or implementation update.
6. At no time has Petitioner been given its appeal rights. Via a telephone call and confirmed by an email, the Petitioner was apprised of the fact that VO was not going to pay the claims on behalf of each minor child recipient.
7. By never giving the Petitioner any indication of a “final agency action”, Respondent was denying Petitioner of any manner of appeal and thereby denying Petitioner of due process. To follow the logic (or lack thereof) that there was no “final agency action” and nothing from which to appeal would give the Respondent the unfettered ability to deny requests without ever giving anyone a due process hearing.
8. Since the phrase “unable to process” was not defined in any literature from Respondent, coupled with the fact that there was no “final agency action,” the only reasonable inference to be drawn from VO’s letters returning the requests is that the request for payment was in no way closed out and that Petitioner was to continue to make the submissions. Telephone conversations between the parties during the relevant times bear this out.
9. Implementation Update #63 specifically states that the independent psychiatric evaluation is not needed for the first 120 days unless clinically indicated, which not the case was for these two minor recipients. It also states that the providers could resubmit if there were problems as specifically articulated concerning the psych-eval. It does not address whether or not the provider could resubmit when VO was incorrectly requiring a psych-eval, but a logical inference would indicate that such would be the case.
10. The course of conduct between Petitioner and VO, Respondent’s duly appointed agent, both prior to and during the events at issue here, indicated that the Petitioner would eventually get paid for delivery of services to each minor recipient. That had been the course of conduct between Petitioner and Respondent for at least several years, and in accord with Respondent’s Implementation Update #12. Petitioner had submitted hundreds of such claims over the years of service, and in each instance wherein errors were made, the Petitioner was ultimately successful in providing the required information and paid for delivery of the services.
11. Respondent’s contention that Petitioner was not entitled to any more time because the application had been marked and returned “unable to process” is not substantiated by the evidence. Such a requirement would place an onerous burden on Petitioners to absolutely make sure that every application is correct on submission. While it is certainly a reasonable expectation for the applications to be correct, denying payment in the event one fails to be absolutely correct overlooks the fact of human nature to on occasion make a mistake. It also

overlooks the fact that VO, and thereby the Respondent, made considerable errors themselves in this process. It is holding the providers to an absolute standard of perfection that the Respondent itself cannot achieve. Such a concept as the Respondent is asking this Court to adopt would mean that if a Provider submitted an application and it was marked "unable to process" as under the situation in this contested case, which in turn means that the provider is foreclosed in getting paid for that recipient, then it would of necessity mean that the recipient would have to be moved from the facility. If that is the intent of marking an application "unable to process", then the burden would be on Respondent to inform providers of that consequence, and it did not, either by Implementation Updates or otherwise.

12. Respondent contends that Value Options "cannot process a request for prior approval for authorization to provide services after the services have been provided." If that is the case, then VO had a duty to inform the Petitioner on receipt of the initial application for each of these minor recipients because at the time VO received the applications, services were already being provided without prior approval, yet VO allowed this to continue for months. Had VO simply denied the application from the outset or otherwise informed the Petitioner, then the Petitioner could have removed the recipients and thereby minimized the loss. Petitioner continued to rely on Implementation Update #12 and provide the services without interruption until the authorization could be approved.

13. There has never been a question that the minor recipients met the requirement for medical necessity, that the Petitioner provided the services and that the services were adequate. If the process for payment is allowed to work as it has in these two cases, then the Respondent becomes unjustly enriched at the expense of any provider who happens to make a mistake in the request for authorization.

14. In submitting the requests for authorization, Petitioner complied with the Implementation Updates to the best of its ability, was not in derogation of the Implementation Updates language and reasonable inferences to be drawn there from, and in accord with instructions from VO, either explicitly or implicitly. Petitioner reasonably relied on its interpretation of the Updates and its interpretation of the communications with VO, both oral and written,

15. VO and DMA's refusal to process the subject requests for payment authorizations was tantamount to a de facto denial of the requests for authorizations.

16. VO and DMA acted arbitrarily and capriciously, and acted erroneously, when it refused to process and when it denied the subject requests for payment authorizations.

17. VO and DMA violated AHS's due process rights when it refused to process, and in effect denied, the subject requests for payment authorizations without allowing for any right of appeal or other administrative review.

18. Petitioner has met its burden of proof. Petitioner AHS is entitled to receive compensation for the services provided for the two minor recipients at issue herein, in the amount of \$22,337.22, and Petitioner is entitled to recover from DMA damages in this amount.

19. The federal corrective payment regulation compels Respondent to promptly reimburse Petitioner for the improperly denied services retroactive to the date the incorrect action was taken. 42 C.F.R. § 431.246; See also, *McCraun v. DHHS, DMA*, N.C. App. No. COA10-80, Filed January 18, 2011.

20. Petitioner's request for attorney's fees pursuant to the N.C. Rules of Civil Procedure, Rule 11, is denied.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner is entitled to reimbursement for providing services to the two minor recipients in the amount of \$22,337.22.

ORDER


It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The North Carolina Department of Health and Human Services, Division of Medical Assistance will make the Final Decision in this contested case. Before the Agency makes the Final Decision, it is required by N.C. General Statute §150B-36(a) to give each party an opportunity to file exceptions to this Decision and to present written arguments to those in the Agency who will make the final decision.

The Agency is required by N.C. General Statute §150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the parties' attorneys of record.

This the 19th day of August, 2011.



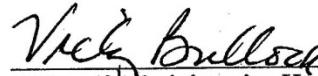
Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR PETITIONER

Brenda Eaddy
Assistant Attorney General
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ATTORNEY FOR RESPONDENT

This the 19th day of August, 2011.



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