# NORTH CAROLINA REGISTER

**VOLUME 29 • ISSUE 09 • Pages 997 - 1186**

**November 3, 2014**

# Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

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

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

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## Rule Review and Legal Issues

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Raleigh, North Carolina 27609 (919) 431-3104 FAX

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## Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX
Contact: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919) 807-4740

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603
contact: Amy Bason amy.bason@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Sarah Collins scollins@nclm.org

## Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street (919) 733-2578
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**NORTH CAROLINA REGISTER**
Publication Schedule for January 2014 – December 2014

| 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<br>31st legislative day of the session beginning: | 270th day from publication in the Register |
| 28:13 | 01/02/14 | 12/06/13 | 01/17/14 | 03/03/14 | 03/20/14 | 05/01/14 | 05/2014 | 09/29/14 |
| 28:14 | 01/15/14 | 12/19/13 | 01/30/14 | 03/17/14 | 03/20/14 | 05/01/14 | 05/2014 | 10/12/14 |
| 28:15 | 02/03/14 | 01/10/14 | 02/18/14 | 04/04/14 | 04/21/14 | 06/01/14 | 01/2015 | 10/31/14 |
| 28:16 | 02/17/14 | 01/27/14 | 03/04/14 | 04/21/14 | 05/20/14 | 07/01/14 | 01/2015 | 11/14/14 |
| 28:17 | 03/03/14 | 02/10/14 | 03/18/14 | 05/02/14 | 05/20/14 | 07/01/14 | 01/2015 | 11/28/14 |
| 28:18 | 03/17/14 | 02/24/14 | 04/01/14 | 05/16/14 | 05/20/14 | 07/01/14 | 01/2015 | 12/12/14 |
| 28:19 | 04/01/14 | 03/11/14 | 04/16/14 | 06/02/14 | 06/20/14 | 08/01/14 | 01/2015 | 12/27/14 |
| 28:20 | 04/15/14 | 03/25/14 | 04/30/14 | 06/16/14 | 06/20/14 | 08/01/14 | 01/2015 | 01/10/15 |
| 28:21 | 05/01/14 | 04/09/14 | 05/16/14 | 06/30/14 | 07/21/14 | 09/01/14 | 01/2015 | 01/26/15 |
| 28:22 | 05/15/14 | 04/24/14 | 05/30/14 | 07/14/14 | 07/21/14 | 09/01/14 | 01/2015 | 02/09/15 |
| 28:23 | 06/02/14 | 05/09/14 | 06/17/14 | 08/01/14 | 08/20/14 | 10/01/14 | 01/2015 | 02/27/15 |
| 28:24 | 06/16/14 | 05/23/14 | 07/01/14 | 08/15/14 | 08/20/14 | 10/01/14 | 01/2015 | 03/13/15 |
| 29:01 | 07/01/14 | 06/10/14 | 07/16/14 | 09/02/14 | 09/22/14 | 11/01/14 | 01/2015 | 03/28/15 |
| 29:02 | 07/15/14 | 06/23/14 | 07/30/14 | 09/15/14 | 09/22/14 | 11/01/14 | 01/2015 | 04/11/15 |
| 29:03 | 08/01/14 | 07/11/14 | 08/16/14 | 09/30/14 | 10/20/14 | 12/01/14 | 01/2015 | 04/28/15 |
| 29:04 | 08/15/14 | 07/25/14 | 08/30/14 | 10/14/14 | 10/20/14 | 12/01/14 | 01/2015 | 05/12/15 |
| 29:05 | 09/02/14 | 08/11/14 | 09/17/14 | 11/03/14 | 11/20/14 | 01/01/15 | 01/2015 | 05/30/15 |
| 29:06 | 09/15/14 | 08/22/14 | 09/30/14 | 11/14/14 | 11/20/14 | 01/01/15 | 01/2015 | 06/12/15 |
| 29:07 | 10/01/14 | 09/10/14 | 10/16/14 | 12/01/14 | 12/22/14 | 02/01/15 | 05/2016 | 06/28/15 |
| 29:08 | 10/15/14 | 09/24/14 | 10/30/14 | 12/15/14 | 12/22/14 | 02/01/15 | 05/2016 | 07/12/15 |
| 29:09 | 11/03/14 | 10/13/14 | 11/18/14 | 01/02/15 | 01/20/15 | 03/01/15 | 05/2016 | 07/31/15 |
| 29:10 | 11/17/14 | 10/24/14 | 12/02/14 | 01/16/15 | 01/20/15 | 03/01/15 | 05/2016 | 08/14/15 |
| 29:11 | 12/01/14 | 11/05/14 | 12/16/14 | 01/30/15 | 02/20/15 | 04/01/15 | 05/2016 | 08/28/15 |
| 29:12 | 12/15/14 | 11/20/14 | 12/30/14 | 02/13/15 | 02/20/15 | 04/01/15 | 05/2016 | 09/11/15 |

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## 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) text of proposed rules;
(3) text of permanent rules approved by the Rules Review Commission;
(4) emergency rules
(5) Executive Orders of the Governor;
(6) 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; and
(7) 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.

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North Carolina Department of Labor
Division of Occupational Safety and Health
1101 Mail Service Center
Raleigh, NC 27699-1101

(919) 807-2875

## NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS

In consideration of G.S. 150B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC 07.0101, .0201, and .0502, to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Parts 1910 and 1926 promulgated as of April 11, 2014; Part 1910 promulgated as of April 18, 2014; Part 1910 corrections promulgated as of July 1, 2014; Part 1910 corrections promulgated as of September 24, 2014; and Part 1917 promulgated as of April 21, 2014, except as specifically described, and

- the *North Carolina Administrative Code* at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the *Code of Federal Regulations*, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses the following recent verbatim adoptions:

- Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment
(79 FR 20315, April 11, 2014)

- Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment; Corrections
(79 FR 56955, September 24, 2014)

- Record Requirements in the Mechanical Power Presses Standard
(Direct Final Rule 78 FR 69543, November 20, 2013)
(Final Rule Confirmation 79 FR 21848, April 18, 2014)

- Vehicle-Mounted Elevating and Rotating Wok Platforms and Logging Operations; Corrections
(79 FR 37189, July 1, 2014)

- Vertical Tandem Lifts
(79 FR 22018, April 21, 2014)

The *Federal Registers* (FR), as cited above, contain both technical and economic discussions that explain the basis for the changes.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance
Occupational Safety and Health Division
North Carolina Department of Labor
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

Karissa B. Sluss, Assistant Agency Rulemaking Coordinator
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1101 Mail Service Center
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# The 2015 Low-Income Housing Tax Credit Qualified Allocation Plan For the State of North Carolina

## I. INTRODUCTION

The 2015 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 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 tax credits:
- Project location and site suitability.
- Market demand and local housing needs.
- Serving the lowest income tenants.
- Serving qualified tenants for the longest periods.
- Design and quality of construction.
- Financial structure and long-term viability.
- Use of federal project-based rental assistance.
- Use of mortgage subsidies.
- Experience of development team and management agent(s).
- Serving persons with disabilities and the homeless.
- Willingness to solicit referrals from public housing waiting lists.
- Tenant populations of individuals with children.
- Projects intended for eventual tenant ownership.
- Projects that are part of a community redevelopment effort.
- Energy efficiency.
- Historic nature of the buildings.

B. Threshold, underwriting and process requirements.

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 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, including tax credits and RPP funding,

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(A) or II(B). This Section II only applies to 9% Tax Credit applications.

A. 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. The Agency may exceed this limitation in order to completely fund a project request. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

The following will be considered new construction under Section II(B) below:

- adaptive reuse projects,
- entirely vacant residential buildings,
- proposals to increase and/or substantially re-configure residential units.

B. NEW CONSTRUCTION SET-ASIDES

1. GEOGRAPHIC REGIONS

The Agency will award tax credits remaining after awards described above to 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 in order to award the next highest scoring application statewide under Section II(G)(1).

| WEST 16% | | CENTRAL 24% | | METRO 37% | EAST 23% | |
|---|---|---|---|---|---|---|
| Alexander | Jackson | Alamance | Moore | Buncombe | Beaufort | Johnston |
| Alleghany | Lincoln | Anson | Orange | Cumberland | Bertie | Jones |
| Ashe | Macon | Cabarrus | Person | Durham | Bladen | Lenoir |
| Avery | Madison | Caswell | Randolph | Guilford | Brunswick | Martin |
| Burke | McDowell | Chatham | Richmond | Forsyth | Camden | Nash |
| Caldwell | Mitchell | Davidson | Rockingham | Mecklenburg | Carteret | New Hanover |
| Catawba | Polk | Davie | Rowan | Wake | Chowan | Northampton |
| Cherokee | Rutherford | Franklin | Scotland | | Columbus | Onslow |
| Clay | Surry | Granville | Stanly | | Craven | Pamlico |
| Cleveland | Swain | Harnett | Stokes | | Currituck | Pasquotank |
| Gaston | Transylvania | Hoke | Union | | Dare | Pender |
| Graham | Watauga | Iredell | Vance | | Duplin | Perquimans |
| Haywood | Wilkes | Lee | Warren | | Edgecombe | Pitt |
| Henderson | Yadkin | Montgomery | | | Gates | Robeson |
| | Yancey | | | | Greene | Sampson |
| | | | | | Halifax | Tyrrell |
| | | | | | Hertford | Washington |
| | | | | | Hyde | Wayne |
| | | | | | | Wilson |

2. REDEVELOPMENT PROJECTS

(a) If necessary, the Agency will adjust the awards under the Plan to ensure the overall allocation results in awards for three (3) Redevelopment Projects. Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not meet the criteria below will be awarded to the next highest ranking Redevelopment Project(s). The Agency may make such adjustment(s) in any set-aside.

(b) The following are required to qualify as a Redevelopment Project:

(i) The site currently contains or contained at least one structure used for commercial, residential, educational, or governmental purposes.

(ii) The application proposes adaptive reuse with historic rehabilitation credits and/or new construction.

(iii) Any required demolition has been completed or is scheduled for completion in 2015 (not including the project buildings).

(iv) A unit of local government initiated the project and has invested community development resources in the Half Mile area within the last ten years.

(v) As of the preliminary application deadline, a unit of local government formally adopted a plan to address the deterioration (if any) in the Half Mile area and approved one or more of the following for the project:

- donation of at least one parcel of land,
- waiver of impact, tap, or related fees normally charged, or
- commitment to lend/grant at least $750,000 in the Metro region and $250,000 in the East, Central or West of its housing development funds (net of any amount paid to the unit of government) as a source of permanent funding.

The Agency will require official documentation of each element of local government participation.

C. USDA RURAL DEVELOPMENT

Up to $750,000 will be awarded to eligible rehabilitation and/or new construction project(s) identified by the U.S. Department of Agriculture, Rural Development (RD) state office as a priority. These projects will count towards the applicable set-asides and limits. The maximum award under this set-aside to any one Principal will be one project. Other RD applications will be considered under the applicable set-asides.

D. NONPROFIT AND CHDO SET-ASIDES AND LIMITS

1. 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.

(a) Nonprofit Set-Aside

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

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

(b) CHDO Set-Aside

In order to qualify as a CHDO application,

- the proposed project must meet the requirements of subsection (D)(1)(a) above and 24 CFR 92.300(a)(1),
- 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
- 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)(1)(b).

2. LIMITS

No more than twenty percent (20%) of the overall allocation will be awarded to projects where a nonprofit organization (or its qualified corporation) is the applicant under Section III(C)(5). New construction awards will be counted towards this limitation first (in score order), then rehabilitation awards.

E. PRINCIPAL AND PROJECT AWARD LIMITS; BASIS BOOST

1. PRINCIPAL LIMITS

(a) The maximum awards to any one Principal will be a total of $1,800,000 in tax credits, including all set-asides. New construction awards will be counted towards this limitation first (in score order), then rehabilitation awards.

(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 $1,000,000.

3. AGENCY-DESIGNATED BASIS BOOST

The Agency will boost the eligible basis of those projects receiving points in Section IV(B)(2) by up to fifteen percent (15%). The Agency may boost the eligible basis of projects awarded in 2015 by up to an additional fifteen percent (15%) if the deadline for the flat nine percent tax credit rate in Section 42(b)(2)(A) is not ~~extended~~reinstated. (~~excluding p~~Projects using the DDA or QCT basis increase~~)~~ are not eligible under this section.)

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

(a) Rehabilitation and East, Central, and West Regions

No county will be awarded more than one project under the rehabilitation set-aside. No county will be awarded more than one project under the new construction set aside.

(b) Metro Region

The initial maximum award(s) for a county will be its percent share of the Metro region based on population (see **Appendix K**), unless exceeding this amount is necessary to complete a project

request. If any tax credits remain, the Agency will make awards to the next highest scoring application(s). A county may receive one additional award, even if in excess of its share.

2. INCOME DESIGNATIONS

~~Pursuant to N.C.G.S. § 105-129.42(c) t~~The Agency is responsible for designating each county as High, Moderate or Low Income. The chart below follows the N.C. Department of Commerce 2014 County Tier designations. Specifically, Tier 3 are High Income, Tier 2 are Moderate, and Tier 1 are Low.~~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 | |
|---|---|---|---|---|
| Brunswick* | Alamance* | Macon* | Alleghany | Jackson |
| Buncombe | Alexander | Madison* | Anson | Jones |
| Cabarrus | Ashe* | McDowell* | Beaufort | Lenoir |
| Carteret* | Avery* | Nash | Bertie | Martin |
| Chatham | Catawba* | Onslow | Bladen | Mitchell |
| Durham | Cherokee* | Pamlico* | Burke* | Montgomery |
| Forsyth | Cleveland | Person | Caldwell | Northampton |
| Guilford | Craven | Pitt | Camden | Pasquotank |
| Henderson* | Cumberland | Polk | Caswell | Perquimans |
| Iredell | Currituck* | Randolph | Chowan | Richmond |
| Johnston | Dare | Rowan | Clay | Robeson |
| Lincoln* | Davidson | Sampson* | Columbus | Rockingham* |
| Mecklenburg | Davie | Stanly | Edgecombe | Rutherford |
| Moore* | Duplin* | Stokes | Gates | Scotland |
| New Hanover | Franklin | Transylvania* | Graham | Surry |
| Orange | Gaston* | Wayne | Greene | Swain |
| Pender* | Granville | Wilkes* | Halifax | Tyrrell |
| Union | Harnett | Yadkin | Hertford | Vance |
| Wake | Haywood | Yancey* | Hoke | Warren |
| Watauga* | Lee | | Hyde | Washington |
| *indicates a changed designation from 2014 | | | | Wilson* |

G. OTHER AWARDS AND RETURNED ALLOCATIONS

1. The Agency may award tax credits remaining from the geographic set-asides to the next highest scoring eligible new construction application(s) in the East, Central, and West regions and/or one or more eligible rehabilitation applications. The Agency may also carry forward any amount of tax credits to the next year.

2. An owner returning a valid allocation of 2012~~1~~ tax credits between October 1, 2014~~3~~ and December 31, 2014~~3~~ will receive an allocation of the same amount of 2015~~4~~ tax credits if:
   - the project has obtained a building permit and closed its construction loan,
   - the owner pays a fee equal to the original allocation fee amount upon the return, and
   - the project's design is the same as approved at full application (other than changes approved by the Agency in writing).

   None of the Principals for the returned project may be part of a 2015~~4~~ application. The project must place in service in 2015~~4~~.

3. The Agency may 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.

**III. DEADLINES, APPLICATION AND FEES**

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2015 application process for 9% Tax Credits and the first round of tax-exempt 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 2~~3~~4 | Deadline for submission of preliminary applications (12:00 noon) |
| March 1~~6~~7 | Market analysts will ~~mail~~ submit studies to the Agency and Applicants |
| March 2~~7~~8 | Notification of final site scores |
| April ~~6~~7 | Deadline for market-related project revisions |
| April 1~~3~~4 | Deadline for the Agency and Applicant to receive ~~a hard copy of~~ the revised market study, if applicable |
| May 1~~5~~6 | Deadline for full applications (12:00 noon) |
| August | Notification of tax credit awards |

The Agency reserves the right to change the schedule to accommodate weather events or other unforeseen circumstances.

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All Applicants are required to pay a nonrefundable fee of $5,6~~0~~80~~60~~ at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a $1,2~~0~~80~~60~~ 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 $1,2~~0~~80~~60~~ 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 0.7~~4~~2% 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 $8~~0~~2~~00~~ 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 a Workforce Housing Loan Program 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.
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.
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 and be considered under Section IV(D)(1). 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**

Applications must meet all applicable threshold requirements to be considered for award and funding. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2015 cycle.

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 60 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 as 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).

(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.

(iv) In order to be eligible for RPP funds, the preliminary application must contain the Agency's "Notice of Real Property Acquisition" form. The form must be executed by all parties before or at the same time as the option or contract.

(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 of the categories.

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 18 POINTS)

Good: 18 points if structures within a Half Mile are well maintained or the site qualifies as a Redevelopment Project (see Section II(B)(2)(b))

Fair: 9 points if structures within a Half Mile are not well maintained and there are visible signs of deterioration

Poor: 0 points if structures within a Half Mile are Blighted or have physical security modifications (e.g. barbed wire fencing or bars on windows)

Half Mile: The half mile radius from the approximate center of the site (does not apply to Amenities below).

Blighted: A structure that is abandoned, deteriorated substantially beyond normal wear and tear, a public nuisance, or appears to violate minimum health and safety standards.

(ii) AMENITIES (MAXIMUM 27 POINTS)

Points will be determined according to the matrix below. The amenity must be open for business as of the preliminary application deadline to be considered.

| | **driving distance in miles** | | | |
|---|---|---|---|---|
| | **≤ 1** | **≤ 2** | **≤ 3** | **> 3** |
| Grocery | 18 pts. | 15~~2~~ pts. | 12~~6~~ pts. | 0 pts. |
| Shopping or pharmacy | 9 pts. | 6 pts. | 3 pts. | 0 pts. |

For example, an application will receive 6 points if the driving distance between the site and either Shopping or a pharmacy is greater than 1 mile but not more than 2 miles.

The driving distance will be the mileage as calculated by Google Maps and must be a drivable route as of the preliminary application deadline. The measurement will be:

- the point closest to the site entrance to or from
- the point closest to the amenity entrance.

Driveways, access easements, and other distances in excess of 500 feet between the nearest residential building of the proposed project and road shown on Google Maps will be included in the driving distance. For scattered site projects, the measurement will be from the location with the longest driving distance(s).

The following establishments qualify as a Grocery:

| | | | |
|---|---|---|---|
| Aldi | Food Lion | Kroger | Super Target |
| Bi-Lo | Fresh Air Galaxy Food Centers | Lowes Foods | Trader Joe's |
| Bo's Food Stores | The Fresh Market | Piggly Wiggly | Walmart Express |
| Bloom | Harris Teeter | Publix | Walmart Neighborhood Market |
| Compare Foods | IGA | Red & White | Walmart Supercenter |
| Earth Fare | Ingle's Market | Sav-Mor | Whole Foods |
| Family Foods | Just $ave | Save-A-Lot | |

The following establishments qualify as Shopping:

| | | | |
|---|---|---|---|
| Big Lot's | Family Dollar | Roses' | Walmart |
| Dollar General | Fred's Super Dollar | Target | Walmart Express |
| Dollar Tree | Kmart | Super Target | Walmart Supercenter |

To qualify as a pharmacy the establishment must have general merchandise items for sale.

A commitment of at least $250,000 in Native American Housing Assistance and Self Determination Act (NAHASDA) funding qualifies for twelve (12) points, not to exceed the total for subsection (ii). The commitment must meet the requirements of Section VI(B)(6)(b).

A bus/transit stop qualifies for six (6) points, not to exceed the total for subsection (ii), if it is:

- in service as of the preliminary application date,
- on a fixed location and has a covered waiting area,
- served by a public transportation system at least every hour between 6:00AM and 7:00PM, seven days a week, and
- within 0.25 miles walking distance of the proposed project site entrance using existing sidewalks and crosswalks.

(iii) SITE SUITABILITY (MAXIMUM 15 POINTS)

6 points if there is no Incompatible Use, which includes the following activities, conditions, or uses within the distance ranges specified:

Half Mile

- airports
- chemical or hazardous materials storage/disposal
- industrial or agricultural activities with environmental concerns (such as odors or pollution)
- commercial junk or salvage yards
- landfills currently in operation
- sources of excessive noise
- wastewater treatment facilities

A parcel or right of way within 500 feet containing any of the following:

- adult entertainment establishment
- electrical utility substation, whether active or not
- distribution facility
- factory or similar operation
- ~~frequently used railroad tracks~~
- ~~high traffic corridor~~
- jail or prison
- large swamp
- ~~power transmission lines and tower~~

Any of the following within 250 feet of a proposed project building:
- frequently used railroad tracks
- high traffic corridor
- power transmission lines and tower

3 points if there are no negative features, design challenges, physical barriers, or other unusual and problematic circumstances that would impede project construction or adversely affect future tenants, including but not limited to: 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)

3 points if the project would be visible to potential tenants using normal travel patterns and is within 500 feet of a building that is currently in use for residential, commercial, educational, or governmental purposes (excluding Blighted structures or Incompatible Uses)

3 points if traffic controls allow for safe access to the site; for example limited sight distance (blind curve) or having to cross three or more lanes of traffic going the same direction when exiting the site would not receive points.

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.

(d) Applicants may not increase the total number of units after submission of the preliminary application. After the deadline for completing market-related project revisions Applicants may not increase:

(i) rents, irrespective of a decrease in utility allowances,

(ii) the number of income targeted units in any bedroom type, or

(iii) the number of units in any bedroom type.

(e) 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).

(f) 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).

(g) Age-restricted (elderly) projects may not contain three or more bedroom units.

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

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 a 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.

2. TENANT RENT LEVELS (MAXIMUM 5 POINTS)

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

(a) If the project is in a High Income county: ~~F~~five (5) points will be awarded if at least twenty-~~five~~ percent (20~~5~~%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of ~~county~~ area median income.
~~Two (2) 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: ~~F~~five (5) points will be awarded if at least twenty-~~five~~ percent (20~~5~~%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of ~~county~~ area median income.
~~Two (2) 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, five (5) points will be awarded for projects in which at least ~~forty~~ twenty percent (420%) 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) Five (5) points will be awarded if the application does not list the state tax credit as a funding source. This option is mutually exclusive with those in subsections (a), (b), and (c) above.~~

C. PROJECT DEVELOPMENT COSTS, ~~AND~~ RPP LIMITATIONS, AND WHLP

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 20 POINTS)

(a) 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:

- all units are detached single family houses or duplexes,
- serving persons with severe mobility impairments,
- development challenges resulting from being within or adjacent to a central business district,
- public housing redevelopment projects, or
- building(s) with both steel and concrete construction and at least four 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 | |
|---|---|---|---|
| $62,000 | -10 | $73,000 | -10 |
| $71,000 | -20 | $87,000 | -20 |

(b) The Agency will consider an Applicant's past applications and final cost certifications in determining whether the listed costs are reasonable. For example, if an Applicant has a history of developing projects with a cost-certified line 5 per unit cost of $70,000 but has submitted an application with $59,000 per unit, the Agency may require an explanation. If the justification is inadequate the Agency may either require an increased amount or determine the application is ineligible for award.

(c) 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 must submit the Agency's "Notice of Real Property Acquisition" form with the preliminary application and may not:

(i) request RPP 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, 2004,

(iv) request less than $150,000 or more than $800,000 per project,

(v) have a commitment of funds from a local government under terms that will result in more repayment than ~~the RPP loan (see description in~~determined under subsection (C)(2)(b) below~~)~~, or

(vi) have a federally insured loan or one which would require the RPP loan to have a term of more than 20 years or limits repayment.

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) An application may be ineligible for RPP funds due to one or more of the listed parties (including but not limited to members/partners, general contractor, and management agent) having failed to comply with the Agency's requirements on a prior loan.

3. WORKFORCE HOUSING LOAN PROGRAM

(a) Other than those in counties listed below, projects with 9% Tax Credits which meet the Agency's loan criteria are eligible for the Workforce Housing Loan Program (WHLP). These criteria support the financing of projects similar to those created under the legacy state tax credit program. Applications in the following counties may not list WHLP as a funding source:

| | | | | |
|---|---|---|---|---|
| Alamance | Cabarrus | Durham | Henderson | New Hanover |
| Alexander | Caldwell | Forsyth | Iredell | Pitt |
| Buncombe | Catawba | Gaston | Madison | Transylvania |
| Burke | Cumberland | Guilford | Mecklenburg | Wake |

(b) A loan will not be closed until the outstanding balance on the first-tier construction financing exceeds the principal amount and the entire loan must be used to pay down a portion of the then existing construction debt.

(c) The terms will be zero percent (0%) interest, thirty year balloon (no payments). The Agency will take all eligible sources into consideration in setting the amount. The following percent of eligible basis will be the initial limit, and in no event will the amount exceed the statutory maximums.

| County Income Designation | Percent of Eligible Basis | Statutory Maximum |
|---|---|---|
| High | 2% | $250,000 |
| Moderate | 6% | $750,000 |
| Low | 10% | $1,000,000 |

Requesting a WHLP loan may result in an application being ineligible under Section VI(B)(6)(d) if the Agency has inadequate funds.

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE (MAXIMUM 5 POINTS)

(a) In order to be eligible for an award of 9% Tax Credits, at least one Principal must have successfully developed, operated and maintained in compliance one Tax Credit project in North Carolina ~~(excluding any Applicant eligible in the 2012 cycle by virtue of a waiver)~~. The project must have been placed in service between ~~December~~ January 1, 2008~~7~~ and January 1, 201~~43~~. Such Principal must:

(i) be identified in the preliminary application as the Applicant under Section III(C)(5),

(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).

(d) Five (5) points will be awarded if the Principal meeting the eligibility requirement in subsection (D)(1)(a) either:

(i) was a Principal in seven~~ten~~ awards of 9% Tax Credits in North Carolina from 2008~~7~~ through 2014~~3~~, or

(ii) has her/his/its principal office in North Carolina (see **Appendix J** for guidance).

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 Agency approves a change~~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 20143 for which either the equity investment has not closed as of the full application deadline or the "10% test" has not been met;

(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

(k) has either sold or requested a qualified contract for a North Carolina tax credit property; or

(kl) 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 2015 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 either
   - 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, or
   - there is 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~~.
2. New construction 9% Tax Credit projects may not exceed one hundred and twenty (120) units.
3. New construction tax-exempt bond 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. GENERAL CONTRACTOR (MAXIMUM 2 POINTS)

   Two (2) points will be awarded if the general contractor listed in the full application has its principal office in North Carolina (see **Appendix J** for guidance).

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). If laws or codes do not require mobility impaired units for a project, a total of

ten percent (10%) of the units must be fully accessible. 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 15~~7~~, 2016~~5~~ 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. 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.

6. 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.

(a) First Tiebreaker: The project requesting the least amount of federal tax credits plus RPP per unit based on the Agency's equity needs analysis. The tax credit amount considered for this calculation will be the ten year total.

(b) 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).

(c) 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 30 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 five (5) 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 twenty five (25) 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 twenty five (25) 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(A), a project must:

(a) have either (i) received a tax credit allocation and be in the extended use period 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, 19987,

(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 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 years, and

(i) have total replacement costs of less than $120,000 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(A) 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 (f) 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 most distressed housing with a tax credit allocation, 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 public housing 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% Tax 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. 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.
2. Rehabilitation applications must:
   (a) have been placed in service on or before December 31, 1997,
   (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 years, and
   (e) not be deteriorated to the point of requiring demolition.
3. The inducement resolution must be submitted with the full application.
4. In order to be eligible for an award of tax-exempt bond volume, at least one Principal must have successfully developed, operated and maintained in compliance either one 9% Tax Credit project in North Carolina or one tax-exempt bond project. The project(s) must have been placed in service between ~~December~~ January 1, 200~~7~~ and January 1, 201~~3~~. Such Principal must:
   - be identified in the preliminary application as the Applicant under Section III(C)(5),
   - become a general partner or managing member of the ownership entity, and
   - 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.

**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 Historic 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)(1)(a), 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. REQUIRED REPORTS~~ENVIRONMENTAL HAZARDS~~

All projects involving use of existing structures must submit the following:

(a) For projects built prior to 1978, 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.

(b) A report assessing the structural integrity of the building(s) being renovated from an architect or engineer. Report must be dated no more than six (6) months from the full application deadline.

(c) A current termite inspection report. Report must be dated no more than six (6) months from the full application deadline.

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. Applicants 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.

8. SMOKE-FREE HOUSING

Owners must prohibit smoking in all indoor common areas, individual living areas (including patios and balconies), and within 25 feet of building entries or ventilation intakes. A non-smoking clause must be included in the lease for each household.

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

(a) 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. The Agency will announce these amounts

by the deadline for market analysts to mail studies. The tax credit rates used for underwriting will be those in effect for the months before the preliminary and full application deadlines.

(b) 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 tax-exempt bond 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 extended 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:

(a) the entire amount will be paid within fifteen 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 fifteen (15) 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 fifteen years.

   (b) For all projects proposing public permanent financing, binding commitments are required to be submitted by 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 fifteen (15) 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 up to $13,000~~$12,500~~ per unit for new construction projects and twenty-eight percent point five (28.5%) of PDC line item 4 for rehabilitation projects, both being set at award.

   (b) Notwithstanding the amount calculated in subsection (7)(a), the developer fee for any project shall be a maximum of $1,100,000 (the maximum for projects with tax-exempt bonds is $1,700,000).

   (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 new construction 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. Applications must provide letters from local provider(s) documenting either the amounts or if no fees will be charged.

## VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. ALLOCATION TERMS AND REVOCATION

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, terms, 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).

If an increase in uses or design alteration is due to a local government requirement, owners do not need prior approval but rather must provide the Agency with prompt written notice. Failure to comply with a requirement of this subsection 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. 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.
3. A federal form 8609 will not be issued until:
   (a) submission of a Final Cost Certification that complies with the Agency's requirements~~, including a listing of the name and address for all contractors and subcontractors~~;
   (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;
   (e) the Agency determines the project has adhered to all representations made in the approved application and will meet all relevant Plan requirements;~~ and~~
   (f) documentation of the ownership entity having paid all applicable state and local taxes for the most recent year due; and
   (g) documentation from the ownership entity certifying all contractors and subcontractors have followed all applicable employment rules and regulations. The documentation must include a listing of the name and address for all contractors and subcontractors who worked on the project as well as a certification signed by each contractor/subcontractor.
4. 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.
5. 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.
6. 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,
   (c) provision and maintenance of amenities for the benefit of the tenants, and

(d) not incurring a penalty under N.C.G.S. § 105-236 for failure to file a return, failure to pay taxes, or having a large tax deficiency (as defined under N.C.G.S. § 105-236). The Agency may request documentation demonstrating all project related taxes have been paid.

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. [reserved]~~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 fifty percent (50%) of the 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.

4% Tax Credit: Low-income housing tax credits available pursuant to Section 42(h)(4) of the Code.

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.

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 considered under Section III(C)(5).

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.

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.

**APPENDIX B**

**Design Quality Standards and Requirements**

The terms of this Appendix B are the minimum requirements for any project awarded tax credits in 2015. 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 (hard copy and CD in PDF format) and receive written approval before commencing site work 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 (stapled together) 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 dimensional (architectural) shingles with a minimum 30-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. Weep holes must be below finished slab elevation and not covered with sod, mulch, finished grade or landscaping.

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 must have an exterior storage closet (interior for congregate) 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. Carpets in Type A units must be glue-down type without padding.
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 doors are prohibited.
8. Bi-fold, pocket, louvered, and by-pass doors are prohibited.
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. Interior closets must have either carpet, sheet vinyl or VCT flooring. Exterior storage closets may have sealed, painted concrete floors.
14. Signage for designated common areas and all apartment units must be in Braille and meet ANSI standards.
15. The following areas must contain moisture resistant drywall: ceilings and walls of bathrooms, laundry rooms, mechanical closets, exterior storage closets, and behind kitchen sink base.
~~15.~~16. One (1) elevator must be provided for every 60 units on a per building basis. The elevator(s) must be centrally located within a given building.

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 all 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 70 CFM (minimum) 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 domestic water line cut off valves must have metal handles, not plastic.
10. 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 and within code required reach ranges by the seat. An additional diverter must be installed to provide water to a shower head on the short shower wall in front of the seat, mounted 80 inches above finished floor.
11. In Type A accessible units, an emergency pull station is required in all bathrooms.
12. Offset toilet flanges are prohibited.

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/ice dispenser rough-in boxes must be installed with cold water supply line in the wall. If provided, ~~W~~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 separate 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 to the floor. Walls behind or directly beside ranges must be covered with a splash panel. The panel should span from the range to the hood and be plastic, laminate or aluminum. Ranges must be installed to fit flush to the wall.

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. Washer water shutoff valves must be installed right side up with the hose connection below the shutoff handle.
4. In Type A and Type B units, each clothes washer and dryer must be centered for a side approach only 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 both sides 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").
5. Lighted or contrasting color door bell button connected to an audible and strobe alarm installed in each bathroom, bedroom and common area is required for each sight and hearing impaired unit.

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. All rental 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 .61efficiency.
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 unless a primed p-trap is installed. 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 bathroom 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 interior air handlers must be enclosed from return air grille to blower motor/filter.
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 unless a primed p-trap is installed.
11. Exterior clothes dryer vents must be mechanically secured to siding and/or brick veneers.

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. No sidewalks may exceed a 2% cross slope regardless of where located. 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" 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/Data.html 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 meet the standards and requirements of ENERGY STAR 2.0 as verified by an independent, third-party expert who assists with project design, verify construction quality, and tests completed units. Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

**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 new construction projects are required to include a minimum of six (6) tenant amenities. There are three (3) amenities that are mandatory and the additional three (3) can be selected from the list below. The required amenities vary by project type:

| Family | ElderlySenior |
|---|---|
| Playground | Indoor or Outdoor Sitting Areas (minimum of 3 locations) |
| Multi-Purpose Room (250 sq. ft.) | Multi-Purpose Room (250 sq. ft.) |
| Covered Picnic Area (150 sq. ft. with 2 tables and grill) | Tenant Storage Areas |
| Outdoor Sitting Areas with Benches (min. of 3 locations) | |

In addition to the required amenities, projects must also include at least three (3) of the following additional amenities and be on an accessible route:

- 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.)
- outdoor sitting areas with benches (minimum of 3 locations)
- 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) served by a water stand pipe for watering plants
- gazebo (100 sq. ft.; door must accommodate a 36" minimum clear opening)
- 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)
- resident computer center (minimum of 2 computers)
- sunroom with chairs (150 sq. ft.)
- screened porch (150 sq. ft.)
- tot lot (family projects only)
- walking trails (4 ft. wide paved and continuous around property)

Dimensions listed are the minimum required. Amenities must be located on the project site. Swimming pools are prohibited for 9% credit projects.

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.
4. For Type A and Type B units the mailboxes may not be installed higher than 48" above finished floor.

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. The entrance must have a minimum roof covering of 20 square feet.
4. 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.
5. 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.
6. 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.
7. The laundry room must have adequate entrance lighting that is on from dusk to dawn.
8. 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).
9. 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 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)~~ one 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.

5. Handicap ramps may not protrude into parking lot. Handicap parking spaces and access isles may not exceed 2% slope in any direction.

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. Pipe bollards or 8 inch x 8 inch treated timber must be installed behind dumpsters.
6. All projects must include a separate pad for tenant recycling receptacles 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 bi-fold 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. For properties built prior to 1978, a~~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. Report must be dated no more than six (6) months from the full application deadline.

3. A current termite inspection report. Report must be dated no more than six (6) months from the full application deadline.

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. Applicants must submit the following:

1. ~~Hazardous Materials:~~ For structures built prior to 1978, ~~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.

2. A report assessing the structural integrity of the building(s) being renovated from an architect or engineer. Report must be dated no more than six (6) months from the full application deadline.

~~1.~~3. A current termite inspection report. Report must be dated no more than six (6) months from the full application deadline.

**VIII. 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,
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). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. In congregate buildings served by an elevator, these units must be on each residential floor.

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.

***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 NC Office of the Commissioner of Banks intends to adopt the rule cited as 04 NCAC 03D .0105 and amend the rules cited as 04 NCAC 03D .0201 and .0302-.0304.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** *http://www.nccob.org/Public/FinancialInstitutions/Banks/TrustRules.aspx*

**Proposed Effective Date:** *February 1, 2015*

**Public Hearing**:
**Date:** *November 19, 2014*
**Time:** *9:00 a.m.*
**Location:** *Office of the Commissioner of Banks, 316 W. Edenton Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *Session Law 2012-56 repealed Articles 1 through 10, 12, and 13 of Chapter 53 and created a new Chapter 53C entitled 'Regulation of Banks." The Office of the Commissioner of Banks (the "OCOB") in conjunction with stakeholders have reviewed the existing trust rules under Subchapter 03D and have determined that some of the rules need to be amended and a new rule needs to be adopted to conform with Chapter 53C. With the repeal of portions of Chapter 53 and the creation of Chapter 53C the statutory authority for the rules must be corrected to reflect the proper authority under Chapter 53C. Rule 04 NCAC 03D .0105 is being proposed for adoption to move the definitions to the front of the subchapter and update definitions to reflect changes in the industry. Rules 04 NCAC 03D .0201 and .0301-.0304 are being amended to improve readability and to reflect changes in the statutes and authority by the repeal of parts of Chapter 53 and the creation of Chapter 53C.*

**Comments may be submitted to:** *Lonnie Christopher, Rules Coordinator, 4309 Mail Service Center, Raleigh, NC 27699-4309, phone (919) 715-7438, fax (919) 733-6918, email lchristopher@nccob.gov*

**Comment period ends:** *January 2, 2015*

**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**
☐ **Substantial economic impact (≥$1,000,000)**
☒ **No fiscal note required by G.S. 150B-21.4**

**CHAPTER 03 – BANKING COMMISSION**

**SUBCHAPTER 03D – BANKS ACTING IN A FIDUCIARY CAPACITY**

**SECTION .0100 - LICENSING**

**04 NCAC 03D .0105 DEFINITIONS**
As used in this Subchapter:
(1) "Board of Directors" shall have the same meaning as defined in G.S. 53-301(a)(6a).
(2) "Collective investment fund" shall mean any fund established pursuant to 12 C.F.R. 9.18, including later amendments and editions.
(3) "State trust entity" shall mean a "state bank" or "state trust company" as defined in G.S. 53-301(a)(43) and (45).
(4) "Trust business" shall have the same meaning as defined in G.S. 53-301(a)(50).

*Authority G.S. 53C-2-5; 53-366.*

**SECTION .0200 - REPORTS REQUIRED BY COMMISSIONER OF BANKS**

**04 NCAC 03D .0201 REPORTS OF CONDITION OF STATE TRUST ENTITIES**
~~The board of directors of each~~ Each state ~~bank with a~~ trust ~~department,~~ entity, on a form or forms provided by the Office of the Commissioner of Banks, shall submit ~~annually the results of a required examination of the trust department of a state bank conducted by an examining committee appointed by the bank's board of directors. The form contains a balance sheet and a~~

questionnaire covering various statutory and regulatory requirements.reports of condition which shall include information on operations, statutory and regulatory requirements, supervisory standards, and assets under management. The form or forms shall be obtained from and filed with:

Office of the Commissioner of Banks
316 West Edenton Street
4309 Mail Service Center
Raleigh, North Carolina 27699-4309.

Forms 29TC, 29A, and TARS© may be submitted electronically at:
http://www.nccob.gov/Public/financialinstitutions/banks/banksff.aspx

*Authority G.S. 53C-2-5; 53C-8-3; 53-366; 53-367.*

**SECTION .0300 – TRUST DEPARTMENT**

**04 NCAC 03D .0302 ADMINISTRATION OF TRUST BUSINESS**

(a) The trust department shall be separate and apart from every other department of the bank. The trust department may A state trust entity shall conduct its trust business separate and apart from any other business it conducts. A state trust entity may, however, utilize personnel and facilities of other departments of the bank state trust entity and other departments of the bank state trust entity may utilize the its trust personnel and facilities of the trust department only to the extent not prohibited by law.

(b) Board of Directors

(1) The Board of directors is responsible for the proper exercise of fiduciary powers by the bank. All matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all officers, employees, and committees utilized by the bank in the exercise of its fiduciary powers, are the responsibility of the Board.trust business of a state trust entity shall be managed by or under the direction of its board of directors. In discharging this responsibility, the Board board of directors may assign, by action duly entered in the minutes, the administration of such of the bank's fiduciary powers state trust entity's trust business as it may consider proper to assign to such director(s), officers(s), or employee(s), who are qualified and competent to administer fiduciary duties and responsibilities, as trust business, and it may designate and may appoint such committees of director(s) and/or officer(s) as it deems advisable to supervise the trust department. business.

(2) No fiduciary account trust business shall be accepted without the prior approval of the Board, board of directors,or of the director(s), officer(s), or committee(s) to whom the Board board of directors may have designated the performance of that responsibility. A written record shall be made of such acceptances and of the relinquishment or closing out of all fiduciary accounts.each account. Upon the acceptance of an account for which the bank state trust entity has investment responsibility, a prompt review of the assets shall be made. The Board board of directors shall also ensure that at least once during every calendar year thereafter, and within 15 months of the last review, all the assets held in or for each fiduciary such account where that the bank state trust entity has investment responsibilities are reviewed to determine the advisability of retaining or disposing of such assets.

(c) All officers and employees taking part in the operation of the trust department administration of trust business shall be adequately bonded.

(d) Every bank exercising fiduciary powers state trust entity shall designate, employ, or retain competent legal counsel who shall be readily available to pass upon fiduciary matters and to advise the bank and its trust department. advise on the trust business it conducts.

(e) Trust assets of a negotiable nature Negotiable and tangible assets held by the bank state trust entity in its own vaults shall be placed in the joint custody of at least two or more bonded officers or employees designated by the Board board of directors.

(f) Funds received or held by a bank as state trust entity in a fiduciary capacity awaiting investment or distribution shall be promptly invested, pursuant to the provisions of G.S. 36A-63 and G.S. 53-43(6). 53-163.1.

(g) Investments Trust business investments by a bank as fiduciary in a savings account or accounts or in its certificate or certificates of deposit shall be secured by the pledge of securities in the same manner and to the same extent as required by Subsection (f) of this Rule for demand deposits. state trust entity in its own depository accounts must be secured in the manner and to the extent required by G.S. 53-163.1 and G.S. 53-163.3.

(h) Agency accounts shall not be overdrawn nor advances made thereto unless the instrument establishing the agency specifically authorizes the bank as agent to borrow money. Advances, or overdrafts, to trusts or agencies shall not be made from funds belonging to other trusts or agencies. Where it is deemed necessary in the proper administration of a trust to make temporary advances, such advances shall be made from funds belonging to the bank and shall at no time exceed 50 percent of the estimated income of that trust for a six months' period. Any advance exceeding this amount shall be made in the form of a loan from the bank or otherwise, and such loan shall be expressly authorized by the trust instrument or properly approved by the courts.

(i) Funds received or held by a bank as fiduciary shall not be invested by it in stock or obligation of, or property acquired from, the bank or its directors, officers, or employees, or their interests, or in stock or obligations of, or property acquired from, affiliates of the bank. This requirement contemplates that the

~~bank will not invest trust funds in the obligations of any organizations in which officers, directors, or employees of the bank have such an interest as might affect the exercise of the best judgment of the management of the bank in investing trust funds.~~

~~(j) Unless expressly approved by the Court, a trustee, pursuant to G.S. 36A-66, may not purchase or sell property from a trust from or to itself.~~

~~(k) Transactions between fiduciary accounts held by a trustee may occur to the extent permitted by G.S. 36A-68.~~

~~(l) A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and liabilities of the trust department of each bank engaging in trust business, and to report to the Board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examination by a certified public accountant, or by the auditing department of the bank. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signatures of at least three members of such committee, shall forthwith be filed with the Commissioner of Banks.~~

~~(m) Funds received or held by a bank as fiduciary shall not be invested collectively except as provided in Rule .0304 of this Subchapter.~~

*Authority G.S. 53C-2-5; 53C-4-6; 53-163.1; 53-163.3; 53-356; 53-366.*

**04 NCAC 03D .0303 BOOKS AND RECORDS**

~~(a)~~ Books and Records. Each ~~bank engaging in trust business must keep in the trust department:~~ state trust entity shall keep the following:

(1) a separate and distinct set of books and records showing ~~in proper detail~~ all receipts and disbursements of funds, receipts, purchases and sales of assets, and other transactions engaged in, in connection with trust business; and showing at all times the ownership of all moneys, funds, investments and property in that connection held by the ~~bank;~~ state trust entity;

(2) files containing the original instruments creating each trust or ~~properly~~ authenticated copies ~~thereof;~~ thereof; and

(3) a permanent record of minutes for each committee, showing ~~clearly~~ its ~~action.~~actions. All minutes shall be signed by the committee's chairman and ~~the Secretary and shall be read and approved at the next meeting of the committee.~~ its secretary.

~~(b) Surcharges. Banks engaging in a trust business must also keep in the trust department a permanent record of surcharges. Any surcharge of one thousand dollars ($1,000) or more must be expressly approved by the Trust Committee.~~

*Authority G.S. 53C-2-5; 53-320(a); 53-366; 53-367.*

**04 NCAC 03D .0304 COLLECTIVE INVESTMENT**

(a) Funds held for trust business accounts by a ~~bank as fiduciary~~ state trust entity may be invested collectively in one or more ~~common trust funds.~~collective investment funds to the extent permissible for the accounts. Such funds shall be organized and administered in accordance with the provisions of 12 C.F.R. 9.18, the same which is herein incorporated by reference except that any reference in the aforesaid statute to the Comptroller of the Currency shall, for the purposes of ~~banks organized under the laws of North Carolina,~~ state trust entities be deemed to refer to the ~~Commissioners~~ Commissioner of Banks.

(b) Pursuant to G.S. 150B-21.6, any reference to 12 C.F.R. 9.18 shall automatically include any later amendment ~~and~~ to or edition ~~to~~ of that regulation.

*Authority G.S. 53C-2-5; 53-163.7; 53-366.*

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Office of the Commissioner of Banks intends to adopt the rules cited as 04 NCAC 03F .0203, .0305; amend the rules cited as 04 NCAC 03F .0201, .0301, .0402, .0504, .0506, .0509; and repeal the rule cited as 04 NCAC 03F .0507.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** *http://www.nccob.org/Public/financialinstitutions/mt/mtrules.aspx*

**Proposed Effective Date:** *February 1, 2015*

**Public Hearing**:
**Date:** *December 1, 2014*
**Time:** *9:00 a.m.*
**Location:** *Office of the Commissioner of Banks, 316 W. Edenton Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *The Office of Commissioner of Banks (the "OCOB") is responsible for drafting regulations related to the operation of virtual currency providers in North Carolina. The North Carolina Money Transmitters Act, N.C. Gen. Stat. § 53-208, et seq. (the "MTA") is broadly written to encompass entities engaged in the business of transferring virtual currencies in and out of real currency, as well as entities engaged in the business of processing payments between virtual currency wallets. The rules in Subchapter F-Licensees Under the MTA need to be amended in order to clarify requirements for entities involved in virtual currency under the Act.*

***04 NCAC 03F .0201** – Proposed for amendment to modernize language currently used in the industry including new terms*

***04 NCAC 03F .0203** – Proposed for adoption to clarify the limits of permissible investments by a licensee as it relates to virtual currency*

***04 NCAC 03F .0301** – Proposed for amendment to improve readability and correct citation*

***04 NCAC 03F .0305** – Proposed for adoption to clarify how agents of a payee can apply for exemption under the Money Transmitter Act*

***04 NCAC 03F .0402** – Proposed for amendment to incorporate language from rule 04 NCAC 03F .0507*

***04 NCAC 03F .0504** – Proposed for amendment to improve readability and modernize language currently used in the industry*
***04 NCAC 03F .0506** – Proposed for amendment to clarify the amount of time a regulated entity has to notify the OCOB regarding the revocation or cancellation of their surety bond*
***04 NCAC 03F .0507** – Proposed for repeal because the language in the rule has been combined in rule 04 NCAC 03F .0402 and is unnecessary*
***04 NCAC 03F .0509** – Proposed for amendment to improve readability and remove the undefined term "immediately"*

**Comments may be submitted to:** *Lonnie Christopher, Rules Coordinator, 4309 Mail Service Center, Raleigh, NC 27699-4309; phone (919) 715-7438; fax (919) 733-6918; email lchristopher@nccob.gov*

**Comment period ends:** *January 2, 2015*

**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**
☐ **Substantial economic impact (≥$1,000,000)**
☒ **No fiscal note required by G.S. 150B-21.4**

**CHAPTER 03 – BANKING COMMISSION**

**SUBCHAPTER 03F – LICENSEES UNDER MONEY TRANSMITTERS ACT**

**SECTION .0200 - ADMINISTRATIVE**

**04 NCAC 03F .0201 DEFINITIONS**
(a) As used in this Subchapter, unless the context clearly requires otherwise:

~~(1) "Agent" shall mean a person, partnership, corporation, or other entity authorized by a licensee to sell or issue checks of the licensee in this State as a service or for a fee or other consideration on the behalf of the licensee;~~

(1) "Agent of Payee" shall mean a person appointed by a payee to collect and process payments as the legal agent of the payee, where:
(A) there exists a written agreement between the payee and agent directing the agent to collect and process payments on the payee's behalf;
(B) the payee, in writing, directs buyers of its goods or services to tender payment to the agent; and
(C) payment is treated as received by the payee on receipt by the agent.

(2) "Applicant" shall mean a person who applies for a license under the Money Transmitters ~~Act;~~ Act.

(3) "Engage in the business of money transmission," as used in G.S. 53-208.3(a), shall include acting as a virtual currency transmitter.

~~(3)~~(4) "Controlling person" shall mean any ~~person~~ person, as defined in G.S. ~~53-208.2(16)~~ 53-208.2(16), who ~~owns or holds with the power to vote 10% or more of the equity securities of the applicant or licensee, or who has the power to direct the management and policy of the applicant or licensee;~~ has the power, directly or indirectly, to direct the management or policy of the licensee or person subject to the Money Transmitters Act, through ownership of, or the direct or indirect power to vote, 10 percent or more of the outstanding voting securities of a licensee. Any person that is a director, general partner, executive officer, or managing member is presumed to be a controlling person of the licensee or person subject to the Money Transmitters Act.

~~(4)~~(5) "Executive officer" shall ~~have the same meaning as set forth in Regulation "O," promulgated by the Board of Governors of the Federal Reserve System and codified in the Code of Federal Regulations at Title 12, Chapter II, Subchapter A, Part 215.2;~~ mean the chief executive officer, chief operating officer, chief financial officer, chief compliance officer, chief technology officer, or any other individual the Commissioner identifies who exercises significant influence over, or participates in, major policy making decisions of the applicant or licensee without regard to title, salary, or compensation.

(6) "In the business of" shall mean for compensation or gain, or in expectation of compensation or gain, either directly or indirectly, to make available monetary transmission services to North Carolina consumers primarily for personal, family, or household purposes.

~~(5)~~(7) "Location" shall mean any place of business within this State operated by the licensee or the licensee's ~~agent~~ authorized delegate at ~~which checks of the licensee are issued or sold;~~ which the licensee or authorized delegate engage in the business of monetary transmission.

~~(6)~~(8) "Money Transmitters Act" shall mean the Money Transmitters Act codified at Chapter 53, Article 16A of the North Carolina General Statutes (G.S. ~~53-208.1,et seq.);~~ 53-208.1, et seq.).

~~(7)~~(9) "State" shall mean the State of North ~~Carolina;~~ Carolina.

~~(8) Terms defined in G.S. 53-208.2 shall have the same meaning in this Subchapter.~~

(10) "Virtual currency" shall mean a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States Government.

(11) "Virtual currency transmitter" shall mean any person in the business of:

(A) receiving virtual currency for transmission to a third party; or

(B) holding funds incidental to the transmission of virtual currency to a third party.

(b) Terms defined in G.S. 53-208.2 shall have the same meaning in this Subchapter.

~~(b)~~(c) An application for a license, amendment to the application, annual statement, notice, or any other document which is required by law or rule to be filed with the Commissioner shall be addressed as follows:

Mailing Address:
Office of the Commissioner of Banks
4309 Mail Service Center
Raleigh, North Carolina 27699-4309.

Street Address:
Office of the Commissioner of Banks
316 West Edenton Street
Raleigh, North Carolina 27603

*Authority G.S. 53-208.27.*

**04 NCAC 03F .0203 PERMISSIBLE INVESTMENTS**

Permissible investments include virtual currency owned by the licensee, but only to the extent of outstanding transmission obligations received by the licensee in like-kind virtual currency.

*Authority G.S. 53-208.2; 53-208.6.*

**SECTION .0300 - LICENSING**

**04 NCAC 03F .0301 APPLICATION FOR A LICENSE**

(a) Any person who wishes to ~~sell or issue checks~~ engage in the business of monetary transmission in this State pursuant to the Money Transmitters Act ~~must~~ shall first obtain a license issued by the Commissioner. An application for a license can be obtained from and shall be filed pursuant to Rule ~~.0201(b)~~ .0201(c) of this Subchapter.

(b) An application for a Money Transmitters' license shall include information required by G.S. 53-208.5 through G.S. 53-208.10 of Chapter 53, Article 16A. The application ~~must~~ shall be submitted on a form provided by the Commissioner.

(c) In addition to the documents and information listed in Paragraph (b) of this Rule, the Commissioner may require additional information necessary to complete an investigation pursuant to G.S. 53-208.10.

(d) Incomplete application files shall be closed and deemed denied without prejudice when the applicant has not submitted information requested by the Commissioner within 30 days of such request.

*Authority G.S. 53-208.3; 53-208.27.*

**04 NCAC 03F .0305 REQUEST FOR EXEMPTION**

Any person who wishes to engage in the business of monetary transmission in this State as an agent of a payee shall request an exemption from licensure under the Money Transmitters Act by submitting a written request for exemption to the Commissioner. Such request shall include sufficient evidence to establish that the person is entitled to the exemption, including a copy of the written agreement between the payee and agent and a certification from the payee or other documentation to substantiate that the consumer's financial obligation to the payee has been satisfied once the agent has received payment by the consumer, in a form acceptable to the Commissioner.

*Authority G.S. 53-208.3; 53-208.27.*

**SECTION .0400 – OPERATIONS**

**04 NCAC 03F .0402 SURRENDER OF LICENSE**

A licensee shall notify the Commissioner in writing within 10 days of its decision to cease operations in this State under the Money Transmitters Act, and shall surrender its license to the Commissioner no later than 30 days after it has ceased operations in this State.

*Authority G.S. 53-208.27.*

**SECTION .0500 – REPORTING AND NOTIFICATIONS**

**04 NCAC 03F .0504 ACTIVITY REPORTS**

A licensee shall file each quarter of the calendar year, a quarterly report of ~~agent~~ monetary transmission activity no later than 60 days after the quarter has ended. The quarterly report shall contain the following information:

(1) The licensee's total number of ~~agents~~ authorized delegates or ~~subagents~~ sub-delegates in this ~~State;~~ State;

(2) The total number and dollar amount of ~~the checks sold or issued~~ monetary transmission activity, designated by activity type, by the licensee and by each ~~agent~~ of the licensee's

authorized delegates or ~~subagent~~ sub-delegates in this ~~State.~~ State; and

(3) Such other information as may be required by the Commissioner to evaluate the licensee's money transmission activities.

*Authority G.S. 53-208.12; 53-208.15; 53-208.27.*

**04 NCAC 03F .0506 REVOCATION OR CANCELLATION OF SURETY BOND**

(a) No later than 30 days after the renewal of its surety bond, a licensee shall file pursuant to Rule .0201(b) of this Subchapter:

(1) a certificate of continuation of the surety bond required by G.S. 53-208.8; or

(2) evidence of continued compliance with G.S. 53-208.8(b) which shall consist of a safekeeping receipt received directly from the trustee of securities with a par value equal to the amount of the surety bond in G.S. 53-208.8.

(b) A licensee shall notify the Commissioner in writing of revocation or cancellation of its surety bond furnished pursuant to G.S. ~~53-208.8.~~ 53-208.8, no later than 10 business days after revocation or cancellation.

*Authority 53-208.8; 53-208.27.*

**04 NCAC 03F .0507 CEASING OPERATIONS**

~~A licensee shall immediately notify the Commissioner in writing of its decision to cease operations in this State under the Money Transmitters Act.~~

*Authority G.S. 53-208.27.*

**04 NCAC 03F .0509 DISHONOR OR DEFAULT**

A licensee shall ~~immediately~~ notify the Commissioner in writing within two business days if it dishonors or defaults in ~~the payment of any check sold or issued~~ any monetary transmission because it lacks the funds to honor the ~~check.~~ transmission.

*Authority G.S. 53-208.15; 53-208.27.*

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**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02N .0304 and .0903-.0904.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** *http://portal.ncdenr.org/web/wm/ust/whatsnew*

**Proposed Effective Date:** *June 1, 2015*

**Public Hearing**:
**Date:** *December 4, 2014*
**Time:** *4:00 p.m.*

**Location:** *Green Square Building, Room 1210, 217 West Jones Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *The proposed rule changes are necessary to comply with a directive from the North Carolina General Assembly to amend certain secondary containment requirements contained in 15A NCAC 02N. The proposed rules must be substantively identical to the provisions of Session Law 2011-394 and Session Law 2013-413.*

**Comments may be submitted to:** *Ruth Strauss, NCDENR Division of Waste Management, 1637 Mail Service Center, Raleigh, NC 27699-1637*

**Comment period ends:** *January 2, 2015*

**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**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **No fiscal note required by G.S. 150B-21.4**

**CHAPTER 02 – ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 02N – UNDERGROUND STORAGE TANKS**

**SECTION .0300 – UST SYSTEMS: DESIGN, CONSTRUCTION, INSTALLATION, AND NOTIFICATION**

**15A NCAC 02N .0304 IMPLEMENTATION SCHEDULE FOR PERFOMANCE STANDARDS FOR NEW UST SYSTEMS AND UPGRADING REQUIREMENTS FOR EXISTING UST SYSTEMS LOCATED IN AREAS DEFINED IN RULE .0301(D)**

(a) The following implementation schedule shall apply only to owners and operators of UST systems located within areas defined in Rule .0301(d) of this Section. This implementation schedule shall be used by the Department for tank owners and

operators to comply with the secondary containment requirements contained in Rule .0301(d) for new UST systems and the secondary containment requirements contained in Rule .0302(a) for existing UST systems.

(1) All new UST systems and replacements to an UST system shall be provided with secondary containment as of April 1, 2001.

(2) All steel or metal connected piping and ancillary equipment of an UST regardless of date of installation, shall be provided with secondary containment as of January 1, 2005.

(3) All fiberglass or non-metal connected piping and ancillary equipment of an UST regardless of date of installation, shall be provided with secondary containment as of January 1, 2008.

(4) All UST systems installed on or before January 1, 1991 shall be provided with secondary containment as of January 1, 2008.

(5) All ~~UST systems~~ USTs installed after January 1, ~~1991~~ 1991, and prior to April 1, 2001, shall be provided with secondary containment as of January 1, ~~2016.~~ 2020. Owners of certain USTs subject to this requirement, may seek a variance in accordance with Paragraphs (d) through (g) of this Rule.

(b) All owners and operators of UST systems shall implement the following enhanced leak detection monitoring as of April 1, 2001. The enhanced leak detection monitoring must consist of the following:

(1) Install an automatic tank gauging system (ATG) for each UST;

(2) Install an electronic line leak detector (ELLD) for each pressurized piping system;

(3) Conduct at least one 0.1 gallon per hour (gph) test per month or at least one 0.2 gph test per week on each UST system;

(4) Conduct a line tightness test capable of detecting a leak rate of 0.1 gph, at least once per year for each suction piping system. No release detection is required for suction piping that is designed and constructed in accordance with 40 CFR 280.41(b)(2)(i) through (iv);

(5) If the UST system is located within 500 feet of a public water supply well or within 100 feet of any other well supplying water for human consumption, sample the supply well at least once per year. The sample collected from the well must be analyzed for the constituents of petroleum using the following methods:

(A) EPA Methods 601 and 602, including methyl tertiary butyl ether, isopropyl ether and xylenes;

(B) EPA Method 625; and

(C) If a waste oil UST system is present which does not meet the requirements for secondary containment in accordance with 40 CFR 280.42(b)(1) through (4), the sample shall also be analyzed for lead and chromium using Standard Method 3030C preparation.

(6) The first sample collected in accordance with Subparagraph (b)(5) of this Rule shall be collected and the results received by the Division by October 1, 2000 and yearly thereafter.

(c) An UST system or UST system component installation completed on or after November 1, 2007 to upgrade or replace an UST system or UST system component described in Paragraph (a) of this Rule shall meet the performance standards of Section .0900 of this Subchapter.

(d) The Director may grant a variance from the secondary containment upgrade requirements in Subparagraph (a)(5) of this Rule for USTs located within 100 to 500 feet of a public water supply well, if the well serves only a single facility and is not a community water system. Any request for a variance shall be in writing by the owner of the UST for which the variance is sought. The Director shall grant the variance if the Director finds facts to support the following conclusions:

(1) Such variance will not endanger human health and welfare or groundwater; and

(2) UST systems are operated and maintained in compliance with all applicable federal laws and regulations and state laws and rules.

(e) The Director may require the variance applicant to submit such information as the Director deems necessary to make a decision to grant or deny the variance. The Director may impose such conditions on a variance as the Director deems necessary to protect human health and welfare and groundwater. The findings of fact supporting any variance under this rule shall be in writing and made part of the variance.

(f) The Director may rescind a variance that was previously granted if the Director finds that the conditions of the variance are not met or that the facts no longer support the conclusions in Subparagraphs (d)(1) and (2) of this Rule.

(g) An owner of a UST system who is aggrieved by a decision of the Director to deny or rescind a variance, may commence a contested case by filing a petition under G.S. 150B-23 within 60 days after receipt of the decision.

*Authority G.S. 143-215.3(a)(15); 143B-282(a)(2)(h).*

## SECTION .0900 – PERFORMANCE STANDARDS FOR UST SYSTEM OR UST SYSTEM COMPONENT INSTALLATION OR REPLACEMENT COMPLETED ON OR AFTER NOVEMBER 1, 2007

### 15A NCAC 02N .0903 TANKS

(a) Tanks must be protected from external corrosion in accordance with 40 CFR 280.20(a)(1), (2), (3) or (5).

(b) Owners and operators of tanks installed in accordance with 40 CFR 280.20(a)(2), must comply with all applicable requirements for corrosion protection systems contained in this Subchapter.

~~(b)~~(c) The exterior surface of a tank shall bear a permanent marking, code stamp or label showing the following information:

(1) The engineering standard used;

(2) The diameter in feet;
(3) The capacity in gallons;
(4) The materials of construction of the inner and outer walls of the tank including any external or internal coatings;
(5) Serial number or other unique identification number designated by the tank manufacturer;
(6) Date manufactured; and
(7) Identity of manufacturer.

~~(c) Whenever an existing tank is removed prior to installation of a new tank, piping that does not meet the standards of this Section shall also be removed. The replacement tank shall not be connected to piping that does not meet the standards of this Section.~~

(d) Tanks that will be reused must be certified by the tank manufacturer prior to re-installation and must meet all of the requirements of this Section. Tank owners and operators must submit proof of certification to the Division along with a notice of intent (Rule .0902).

(e) Tanks shall be tested before and after installation in accordance with the following requirements:

(1) Pre- Installation Test - Before installation, the primary containment and the interstitial space shall be tested in accordance with the manufacturers written guidelines and PEI/RP100, "Recommended Practice for Installation of Underground Liquid Storage Systems." PEI/RP100, "Recommended Practice for Installation of Underground Liquid Storage Systems" is hereby incorporated by reference including subsequent amendments and editions. A copy can be obtained from Petroleum Equipment Institute, P.O. Box 2380, Tulsa, Oklahoma 74101-2380 at a cost of ninety-five dollars ($95.00). The presence of soap bubbles or water droplets during a pressure test, any change in vacuum beyond the limits specified by the tank manufacturer during a vacuum test, or any change in liquid level in an interstitial space liquid reservoir beyond the limits specified by the tank manufacturer, shall be considered a failure of the integrity of the tank.
(2) Post-installation Test – The interstitial space shall be checked for a loss of pressure or vacuum, or a change in liquid level in an interstitial space liquid reservoir. Any loss of pressure or vacuum beyond the limits specified by the tank manufacturer, or a change in liquid level beyond the limits specified by the tank manufacturer, shall be considered a failure of the integrity of the tank.
(3) If a tank fails a pre-installation or post-installation test, tank installation shall be suspended until the tank is replaced or repaired in accordance with the manufacturer's specifications. Following any repair, the tank shall be re-tested in accordance with Subparagraph (e)(1) of this Rule if it failed the pre-installation test and in accordance with Subparagraph (e)(2) of this Rule if it failed the post-installation test.

(f) The interstitial spaces of tanks that are not monitored using vacuum, pressure or hydrostatic methods must be tested for tightness before UST system start-up, between six months and the first anniversary of start-up and every three years thereafter. The interstitial space shall be tested using an interstitial tank tightness test method that is capable of detecting a 0.10 gallon per hour leak rate with a probability of detection (Pd) of at least 95 percent and a probability of false alarm (Pfa) of no more than five percent. The test method must be evaluated by an independent testing laboratory, consulting firm, not-for-profit research organization or educational institution using the most recent version of the United States Environmental Protection Agency's (EPA's) "Standard Test Procedures for Evaluating Leak Detection Methods." EPA's "Standard Test Procedures for Evaluating Leak Detection Methods" is hereby incorporated by reference including subsequent amendments and additions. A copy may be obtained by visiting EPA's Office of Underground Storage Tank web site: www.epa.gov/OUST/pubs/protocol.htm at a cost of zero dollars ($0.00). The independent testing laboratory, consulting firm, not-for-profit research organization or educational institution must certify that the test method can detect a 0.10 gallon per hour leak rate with a Pd of at least 95 percent and a Pfa of no more than five percent for the specific tank model being tested. If a tank fails an interstitial tank tightness test, it must be replaced or repaired by the manufacturer or the manufacturer's authorized representative in accordance with manufacturer's specifications. Tank owners and operators shall report all failed interstitial tank tightness tests to the Division within 24 hours. Following any repair, the tank interstitial space shall be re-tested for tightness. The most recent interstitial tightness test record must be maintained at the UST site or the tank owner's place of business and must be available for inspection.

*Authority G.S. 143-215.3(a)(15); 143B-282(a)(2)(h).*

**15A NCAC 02N .0904 PIPING**

(a) Piping, with the exception of flexible connectors and piping connections, shall be pre-fabricated with double-walled construction. Any flexible connectors or piping connections that do not have double-walled construction shall be installed in containment sumps that meet the requirements of 15A NCAC 02N .0905.

(b) Piping must be constructed of non-corroding materials. Metal flexible connectors and piping connections shall be installed in containment sumps that meet the requirements of 15A NCAC 02N .0905.

(c) Piping must comply with the UL 971 standard "Nonmetallic Underground Piping for Flammable Liquids;" that is in effect at the time the piping is installed. UL 971 standard "Nonmetallic Underground Piping for Flammable Liquids" is hereby incorporated by reference including subsequent amendments and editions. A copy may be obtained from Underwriters Laboratories, 333 Pfingsten Road, Northbrook, Illinois 60062-2096 at a cost of four hundred forty-five dollars ($445.00).

(d) Piping that is buried underground must be constructed with a device or method that allows it to be located once it is installed.
(e) Piping that conveys regulated substances under pressure must also be equipped with an automatic line leak detector that meets the requirements of 40 CFR 280.44(a).
~~(f) When existing piping is replaced or extended, the entire piping system shall meet the standards of this Section. However, if only existing riser pipes, flexible connectors, fittings, flanges, valves or pumps are replaced, then only the replacement equipment must meet the standards of this Section.~~
~~(g)~~(f) At the time of installation, the primary containment and interstitial space of the piping shall be initially tested, monitored during construction and finally tested in accordance with the manufacturers written guidelines and PEI/RP100, "Recommended Practice for Installation of Underground Liquid Storage Systems." The presence of soap bubbles or water droplets or any loss of pressure beyond the limits specified by the piping manufacturer during testing shall be considered a failure of the integrity of the piping. If the piping fails a tightness test, it must be replaced or repaired by the manufacturer or the manufacturer's authorized representative in accordance with the manufacturer's written specifications. Following any repair, the piping must be re-tested for tightness in accordance with the manufacturers written guidelines and PEI/RP100, "Recommended Practice for Installation of Underground Liquid Storage Systems."
~~(h)~~(g) Piping that is not monitored continuously for releases using vacuum, pressure or hydrostatic methods, must be tested for tightness every three years following installation. The primary containment and interstitial space of the piping shall be tested in accordance with the manufacturers written guidelines and PEI/RP100 "Recommended Practice for Installation of Underground Liquid Storage Systems." If the piping fails a tightness test, it must be replaced or repaired by the manufacturer or the manufacturer's authorized representative in accordance with the manufacturer's specifications. Following any repair, the piping must be re-tested for tightness. The most recent periodic tightness test record must be maintained at the UST site or the tank owner or operator's place of business and must be readily available for inspection.

*Authority G.S. 143-215.3(A)(15); 143B-282(A)(2)(H).*

## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

## CHAPTER 32 – NORTH CAROLINA MEDICAL BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Board intends to adopt the rule cited as 21 NCAC 32S .0224; amend the rules cited as 21 NCAC 32S .0201, .0212-.0213, .0215, .0217; and repeal the rules cited as 21 NCAC 32S .0211, .0214.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** *www.ncmedboard.org/about_the_board/rule_changes*

**Proposed Effective Date:** *May 1, 2015*

**Public Hearing**:
**Date:** *January 15, 2015*
**Time:** *10:00 a.m.*
**Location:** *North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609*

**Reason for Proposed Action:** *To clarify that the purpose of the rules related to the supervisory relationship between physician assistants and their supervising physicians is to fulfill the board's directive to regulate, supervise and discipline physician assistants and their supervising physicians, and for no other purpose.*

**Comments may be submitted to:** *Wanda Long, Rules Coordinator, NC Medical Board, P.O. Box 20007, Raleigh, NC 27619; fax (919) 326-0036; email rules@ncmedboard.org*

**Comment period ends:** *January 16, 2015*

**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**
☐ **Substantial economic impact (≥$1,000,000)**
☒ **No fiscal note required by G.S. 150B-21.4**

## SUBCHAPTER 32S – PHYSICIAN ASSISTANTS

### SECTION .0200 – PHYSICIAN ASSISTANT REGISTRATION

**21 NCAC 32S .0201 DEFINITIONS**
The following definitions apply to this Subchapter:
(1) "Board" means the North Carolina Medical Board.
(2) "Examination" means the Physician Assistant National Certifying Examination.
(3) "Family member" means a spouse, parent, grandparent, child, grandchild, sibling, aunt, uncle or first cousin, or persons to the same degree by marriage.

(4) "Physician Assistant" means a person licensed by the Board under the provisions of G.S. 90-9.3.

(5) "Physician Assistant License" means approval for the physician assistant to perform medical acts, tasks, or functions under North Carolina law.

(6) "Physician Assistant Educational Program" is the educational program set out in G.S. 90-9.3(a)(1).

(7) "License Renewal" means paying the annual fee and providing the information requested by the Board as outlined in this Subchapter.

(8) ~~"Supervising"~~ "Supervise," or "Supervision" means the physician's function of overseeing the ~~activities of, and accepting the responsibility for, the~~ medical ~~services rendered~~ acts performed by a physician assistant.

(9) "Supervisory Arrangement" is the written statement that describes the medical acts, tasks and functions delegated to the physician assistant by the primary supervising physician appropriate to the physician assistant's education, qualification, training, skill and competence.

(10) "Supervising Physician" ~~means a physician who is licensed by the Board and who is not prohibited by the Board from supervising physician assistants.~~ means the licensed physician who shall provide on-going supervision, consultation evaluation of the medical acts performed by the physician assistant as defined in the in the Supervisory Arrangement. The physician may serve as a primary supervising physician or as a back-up supervising physician.

(a) "Primary Supervising Physician" is the physician who ~~accepts full responsibility~~ is accountable to the Board for the physician assistant's medical activities and professional conduct at all times, whether the physician personally is providing supervision or the supervision is being provided by a Back-up Supervising Physician. The Primary Supervising Physician shall assure the Board that the physician assistant is qualified by education, training and competence to perform all medical acts required of the physician assistant ~~and is responsible for the physician assistant's performance~~ in the particular field or fields ~~in which~~ that the physician assistant is expected to perform medical acts. The Primary Supervising Physician shall also be accountable to the Board for his or her physician assistant's compliance with the rules of this Subchapter.

(b) "Back-up Supervising Physician" means the physician who is ~~responsible~~ accountable to the Board for supervision of the physician assistant's activities in the absence of the Primary Supervising Physician and while actively supervising the physician assistant.

(11) "Volunteer practice" means performance of medical acts, tasks, or functions without expectation of any form of payment or compensation.

*Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1.*

**21 NCAC 32S .0211 AGENCY**

~~Physician assistants are the agents of their supervising physicians in the performance of all medical practice related activities, including the ordering of diagnostic, therapeutic and other medical services.~~

*Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1.*

**21 NCAC 32S .0212 PRESCRIPTIVE AUTHORITY**

A physician assistant may prescribe, order, procure, dispense and administer drugs and medical devices subject to the following conditions:

(1) The physician assistant complies with all state and federal laws regarding prescribing including G.S. 90-18.1(b);

(2) Each supervising physician and physician assistant incorporates within his or her written supervisory arrangements, as defined in Rule ~~.0201(8)~~ .0201(9) of this Subchapter, instructions for prescribing, ordering, and administering drugs and medical devices and a policy for periodic review by the physician of these instructions and policy;

(3) In order to compound and dispense drugs, the physician assistant complies with G.S. 90-18.1(c);

(4) In order to prescribe controlled substances,

(a) the physician assistant must have a valid Drug Enforcement Administration (DEA) registration and prescribe in accordance with DEA rules;

(b) all prescriptions for substances falling within schedules II, IIN, III, and IIIN, as defined in the federal Controlled Substances Act, shall not exceed a legitimate 30 day supply; and

(c) the supervising physician ~~must~~ shall possess the same schedule(s) of controlled substances as the physician assistant's DEA registration;

(5) Each prescription issued by the physician assistant contains, in addition to other information required by law, the following:
   (a) the physician assistant's name, practice address and telephone number;
   (b) the physician assistant's license number and, if applicable, the physician assistant's DEA number for controlled substances prescriptions; and
   (c) the ~~responsible~~ authorizing supervising physician's, either primary or back-up, ~~physician's (primary or back-up)~~ name and telephone number;

(6) The physician assistant documents prescriptions in writing on the patient's record, including the medication name and dosage, amount prescribed, directions for use, and number of refills;

(7) A physician assistant who requests, receives, and dispenses medication samples to patients complies with all applicable state and federal regulations; and

(8) A physician assistant shall not prescribe controlled substances, as defined by the state and federal controlled substances acts for:
   (a) the physician assistant's own use;
   (b) the use of the physician assistant's supervising physician;
   (c) the use of the physician assistant's immediate family;
   (d) the use of any person living in the same residence as the physician assistant; or
   (e) the use of any anyone with whom the physician assistant is having a sexual relationship.

As used in this Paragraph, "immediate family" means a spouse, parent, child, sibling, parent-in-law, son-in-law or daughter-in-law, brother-in-law or sister-in-law, step-parent, step-child, or step-sibling.

*Authority G.S. 90-18(c)(13); 90-18.1; 90-18.2A; 90-171.23(14); 21 C.F.R. 301.*

**21 NCAC 32S .0213 PHYSICIAN SUPERVISION OF PHYSICIAN ASSISTANTS**

(a) A physician wishing to serve as a primary supervising physician shall exercise supervision of the physician assistant in accordance with rules adopted by the Board.

~~(a)~~(b) A physician assistant may perform medical acts, tasks, or functions only under the supervision of a physician. Supervision shall be continuous but, except as otherwise provided in the rules of this Subchapter, shall not be construed as requiring the physical presence of the supervising physician at the time and place that the services are rendered.

~~(b)~~(c) Each team of physician(s) and physician assistant(s) shall ensure: ~~ensure~~
   (1) ~~that~~ the physician assistant's scope of practice is identified;
   (2) ~~that~~ delegation of medical tasks is appropriate to the skills of the supervising physician(s) as well as the physician assistant's level of competence;
   (3) ~~that~~ the relationship of, and access to, each supervising physician is defined; and
   (4) ~~that~~ a process for evaluation of the physician assistant's performance is established.

~~(c)~~(d) Each supervising physician and physician assistant shall sign a statement, as defined in Rule ~~.0201(8)~~ .0201(9) of this Subchapter, that describes the supervisory arrangements in all settings. ~~Written prescribing instructions are required for each approved site.~~ The physician assistant shall maintain written prescribing instructions at each site. This statement shall be kept on file at all practice sites, and ~~must~~ shall be available upon request by the Board.

~~(d)~~(e) A primary supervising physician and a physician assistant in a new practice arrangement shall meet monthly for the first six months to discuss practice relevant clinical issues and quality improvement measures. Thereafter, the primary supervising physician and the physician assistant shall meet at least once every six months. A written record of these meetings shall be signed and dated by both the supervising physician and the physician assistant, and shall be available for inspection upon request by the Board agent. The written record shall include a description of the relevant clinical issues discussed and the quality improvement measures taken.

*Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1.*

**21 NCAC 32S .0214 SUPERVISING PHYSICIAN**

~~A physician wishing to serve as a primary supervising physician must exercise supervision of the physician assistant in accordance with rules adopted by the Board. The physician shall retain professional responsibility for the care rendered by the physician assistant within the scope of the supervisory arrangement.~~

*Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1.*

**21 NCAC 32S .0215 RESPONSIBILITIES OF PRIMARY SUPERVISING PHYSICIANS IN REGARD TO BACK-UP SUPERVISING PHYSICIANS**

(a) The primary supervising physician shall ensure that a supervising physician, either primary or back-up, is ~~readily~~ accessible for the physician assistant to consult whenever the physician assistant is performing medical acts, tasks, or functions.

(b) A back-up supervising physician ~~must~~ shall be licensed to practice medicine by the Board, not prohibited by the Board from supervising a physician assistant, and approved by the primary supervising physician as a person willing and qualified to ~~assume responsibility for the care rendered~~ oversee the medical acts performed by the physician assistant in the absence of the primary supervising physician. ~~An ongoing~~ A current list

of all approved back-up supervising physicians, signed and dated by each back-up supervising physician, the primary supervising physician, and the physician assistant, ~~must~~ shall be retained as part of the Supervisory Arrangement.

*Authority G.S. 90-18(c)(13); 90-18.1.*

**21 NCAC 32S .0217 VIOLATIONS**

~~The Board may take disciplinary action against a supervising physician or a physician assistant, pursuant to G.S. 90-14.~~ It is unprofessional ~~or dishonorable~~ conduct for a physician assistant to violate the rules of this Subchapter, or to represent him/herself as a physician. The Board may take disciplinary action against a supervising physician or a physician assistant, pursuant to G.S. 90-14(a)(6)(7), for violations of the rules of this Subchapter.

*Authority G.S. 90-9.3; 90-14; 90-14.2.*

**21 NCAC 32S .0224 SCOPE OF RULES**

The rules in the Subchapter are intended for the purpose of fulfilling the Board's statutory directive with regard to the regulation, supervision and disciplining of physician assistants and their supervising physicians, and for no other purpose.

*Authority G.S. 90-5.1(a)(2)(3); 90-18.1.*

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

*Rules approved by the Rules Review Commission at its meeting on September 18, 2014.*

| | | | **REGISTER CITATION TO THE NOTICE OF TEXT** |
|---|---|---|---|
| **BANKS, OFFICE OF THE COMMISSIONER OF** | | | |
| Application | 04 | NCAC 03C .0101 | 28:21 NCR |
| Examination by Commissioner | 04 | NCAC 03C .0102 | 28:21 NCR |
| Report to Banking Commission | 04 | NCAC 03C .0103 | 28:21 NCR |
| Review by Banking Commission | 04 | NCAC 03C .0104 | 28:21 NCR |
| Bank Certificate | 04 | NCAC 03C .0107 | 28:21 NCR |
| National Bank Conversion | 04 | NCAC 03C .0111 | 28:21 NCR |
| Elimination of Director Liability | 04 | NCAC 03C .0112 | 28:21 NCR |
| Establishment of Branches | 04 | NCAC 03C .0201 | 28:21 NCR |
| Investigation | 04 | NCAC 03C .0403 | 28:21 NCR |
| Order | 04 | NCAC 03C .0404 | 28:21 NCR |
| Review by the Banking Commission | 04 | NCAC 03C .0405 | 28:21 NCR |
| Waiver by Commissioner | 04 | NCAC 03C .0407 | 28:21 NCR |
| Books and Records | 04 | NCAC 03C .0901* | 28:21 NCR |
| Required Accounts | 04 | NCAC 03C .0902* | 28:21 NCR |
| Retention: Reproduction and Disposition of Bank Records | 04 | NCAC 03C .0903* | 28:21 NCR |
| Letters of Credit | 04 | NCAC 03C .0904* | 28:21 NCR |
| Investment Authority | 04 | NCAC 03C .0905* | 28:21 NCR |
| Loan Documentation | 04 | NCAC 03C .1001* | 28:21 NCR |
| Leasing of Personal Property | 04 | NCAC 03C .1002* | 28:21 NCR |
| Basis for Computation and Maintenance | 04 | NCAC 03C .1402* | 28:21 NCR |
| Fees, Copies and Publication Costs | 04 | NCAC 03C .1601* | 28:21 NCR |
| Establishment of a Non-Branch Banking Business Office (NBBO) | 04 | NCAC 03C .1702* | 28:21 NCR |
| Establishment of Courier Services | 04 | NCAC 03C .1801* | 28:21 NCR |
| Compliance and Disclosure Requirements | 04 | NCAC 03C .1802 | 28:21 NCR |
| **ELECTIONS, STATE BOARD OF** | | | |
| Instruction for Filing a Petition for Rule-making | 08 | NCAC 15 .0101* | 28:20 NCR |
| Declaratory Rulings: Availability | 08 | NCAC 15 .0102* | 28:20 NCR |
| Multipartisan Assistance Teams | 08 | NCAC 16 .0101* | 28:20 NCR |
| Team Members | 08 | NCAC 16 .0102* | 28:20 NCR |
| Training and Certification of Team Members | 08 | NCAC 16 .0103* | 28:20 NCR |
| Visits by Multipartisan Assistance Teams | 08 | NCAC 16 .0104* | 28:20 NCR |
| Removal of Team Members | 08 | NCAC 16 .0105* | 28:20 NCR |

| | | |
|---|---|---|
| **INSURANCE, COMMISSIONER OF** | | |
| Approval of Courses | 11 NCAC 06A .0809* | 28:24 NCR |
| Definitions | 11 NCAC 11F .0501 | 28:04 NCR |
| Individual Annuity or Pure Endowment Contracts | 11 NCAC 11F .0502 | 28:04 NCR |
| Group Annuity or Pure Endowment Contracts | 11 NCAC 11F .0503 | 28:07 NCR |
| Application of the 1994 GAR Table | 11 NCAC 11F .0504 | 28:07 NCR |
| Model Rule for Recognizing a New Annuity Mortality Table ... | 11 NCAC 11F .0505* | 28:04 NCR |
| **COASTAL RESOURCES COMMISSION** | | |
| Purpose | 15A NCAC 07H .2601* | 28:20 NCR |
| Approval Procedures | 15A NCAC 07H .2602* | 28:20 NCR |
| General Conditions | 15A NCAC 07H .2604* | 28:20 NCR |
| Specific Conditions | 15A NCAC 07H .2605* | 28:20 NCR |
| **TRANSPORTATION, DEPARTMENT OF** | | |
| Eligibility for Program | 19A NCAC 02E .0219* | 28:21 NCR |
| Solicitation and Award of Contract | 19A NCAC 02E .0702* | 28:21 NCR |
| Prequalifying to Award - Professional Services Firms | 19A NCAC 02E .0703* | 28:21 NCR |
| **PODIATRY EXAMINERS, BOARD OF** | | |
| Temporary License for Clinical Residency/Fellowship | 21 NCAC 52 .0213* | 28:22 NCR |
| Forms and Applications | 21 NCAC 52 .0611* | 28:22 NCR |
| **RESPIRATORY CARE BOARD** | | |
| Board Office | 21 NCAC 61 .0102 | n/a G.S. 150B-21.5(a)(4) |

These rules are subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

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|---|---|---|
| **PUBIC SAFETY, DEPARTMENT OF** | | |
| Rotation Wrecker Service Regulations | 14B NCAC 07A .0116* | 28:16 NCR |

**TITLE 04 – DEPARTMENT OF COMMERCE**

**04 NCAC 03C .0101 APPLICATION**
**04 NCAC 03C .0102 EXAMINATION BY COMMISSIONER**
**04 NCAC 03C .0103 REPORT TO BANKING COMMISSION**
**04 NCAC 03C .0104 REVIEW BY BANKING COMMISSION**

*History Note: Authority G.S. 53C-2-5; 53C-3-1(a); 53C-3-1(b); 53C-3-4; 53C-3-5; 53C-3-6; 53-137; 53-333;*
*Eff. February 1, 1976;*
*Amended Eff. January 1, 2013; September 1, 2006; September 1, 1990; November 1, 1982; July 24, 1979; August 1, 1978;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0107 BANK CERTIFICATE**

*History Note: Authority G.S. 53C-2-5; 53C-3-7;*
*Eff. February 1, 1976;*

*Amended Eff. January 1, 2013;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0111 NATIONAL BANK CONVERSION**

*History Note: Authority G.S. 53C-2-5; 53C-7-301;*
*Eff. September 26, 1979;*
*Amended Eff. January 1, 2013; September 1, 2006; September 1, 1990; August 1, 1988;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0112 ELIMINATION OF DIRECTOR LIABILITY**

*History Note: Authority G.S 53C-2-5; 53C-4-6; 55-2-02(b)(3); 55-8-30;*
*Eff. June 1, 1995;*
*Amended Eff. January 1, 2013;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0201 ESTABLISHMENT OF BRANCHES**

*History Note: Authority G.S. 53C-2-5; 53C-6-15;*
*Eff. February 1, 1976;*
*Amended Eff. January 1, 2013; September 1, 2006; June 1, 1995; July 1, 1991; October 1, 1990; November 1, 1982;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0403 INVESTIGATION**
**04 NCAC 03C .0404 ORDER**
**04 NCAC 03C .0405 REVIEW BY THE BANKING COMMISSION**

*History Note: Authority G.S. 53C-2-5; 53C-7-202; 53C-7-203; 53C-7-209;*
*Eff. February 1, 1976;*
*Amended Eff. January 1, 2013; September 1, 1990;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0407 WAIVER BY COMMISSIONER**

*History Note: Authority G.S. 53C-2-5; 53C-2-1; 53C-9-101;*
*Eff. November 1, 1982;*
*Amended Eff. January 1, 2013;*
*Repealed Eff. October 1, 2014.*

**04 NCAC 03C .0901 BOOKS AND RECORDS**

(a) Each bank, each affiliate of the bank, and the bank's parent holding company, shall keep, and make available for examination by the representatives of the Commissioner of Banks, books and records that reflect all the transactions of the bank in its true financial condition. Such records shall be kept so as to permit and facilitate a speedy examination, by the representatives of the Commissioner of Banks. Without implying that these are the only books and records to be kept, the following books and records shall be kept at the bank, or at its parent holding company, unless another storage site is approved by the Commissioner of Banks in writing by letter or other written agreement:

(1) Alphabetical direct and indirect liability ledgers. Each bank shall keep an alphabetical direct and indirect liability ledger. The alphabetical direct liability ledger shall show a customer's direct obligations owed to the bank by loan name or account number and the balance outstanding under each account. The alphabetical indirect liability ledger shall show a customer's indirect obligations owed to the bank by loan name or account number and the balance outstanding under each account. The alphabetical direct liability ledger shall be kept in balance with the general ledger control. The alphabetical indirect liability ledger shall be updated at least monthly. Where the aggregate total of a customer's direct and indirect obligations to the bank do not exceed twenty thousand dollars ($20,000), the indirect obligations of that customer may be omitted from the alphabetical indirect liability ledger. In a bank whose automated record system is not able to produce an alphabetical liability ledger, the bank shall produce an alphabetical listing of borrowers showing all of a customer's loan or account numbers and the amount outstanding under each number when called upon by representatives of the Commissioner of Banks. Each bank shall have the ability to produce both the direct and indirect liability ledgers in hard copy form upon request by representatives of the Commissioner of Banks.

(2) Monthly reconciliation of accounts with correspondent banks. A record shall be kept, showing the monthly reconciliation of each account with correspondent banks. A signed review of such reconciliations shall be made by an officer or employee of the bank other than the person responsible for preparing the reconciliation.

(3) Purchases and sales of securities. A record shall be kept of purchases and sales of securities. The record shall include the following:

(A) dates of purchases and sales;
(B) interest rates;
(C) maturities;
(D) par value;
(E) cost value;
(F) all write-ups or write-downs;
(G) a full description of the security;
(H) from whom purchased;
(I) to whom sold;
(J) purchase price;
(K) selling price; and
(L) when, where, and why pledged or deposited.

This record shall be maintained in balance with the general ledger control.

(4) Charge-offs. A record shall be kept of all items charged off and of all recoveries. All charge-offs shall be authorized or approved by the executive committee or by the board of directors and such action recorded in their minutes. The charge-off record shall show the date of the charge-off, a description of the asset, and the amount of the charge-off. The record shall be supported by the actual charged-off items, or the final disposition of any charged-off item. The record of recoveries shall show the date and amount of each recovery.

(5) Records of real estate. A record shall be kept on all parcels owned, including the banking house. The record shall show when the property was acquired, how the property was acquired, the cost of the property, the book value of the property, and detailed income and expense reports relating to the property. This record shall be supported by appraisals, title certificates showing assessed value, tax receipts, and hazard insurance policies relating to the property.

(6) Meeting minutes and consent to action. Minutes of all board of directors meetings, board committee meetings, and stockholders meetings (including each consent to action without a meeting), shall be kept showing any action resulting from the meeting. All minutes shall be signed by the chairman and the secretary of such meeting.

(7) Cash items held over. A daily record shall be kept of all cash items held over from the day's business, including all checks that would cause an overdraft if handled in the regular way. This record shall be kept in balance with the general ledger control and shall identify the account on which the item is drawn or is obligated for payment, the reason the item is being held, the date the item was placed in the cash items account, and the amount of the item.

(8) Record of income and expenses. A detailed record of income and expenses shall be kept and balanced monthly. A report of this record shall be made to the executive committee or board of directors, and the receipt of same noted in their minutes.

(9) Industrial bank reports of condition. Each industrial bank, when preparing a report of condition and income, shall include and make a part of its report a list of those whose aggregate direct and indirect obligations to the bank, including paper purchased by the bank, are in excess of ten percent of the industrial bank's capital, surplus, and undivided profits. In lieu of this list, the industrial bank may maintain a direct and indirect liability ledger in accordance with Subparagraph (a)(1) of this Rule.

(b) Unless another storage site is approved by the Commissioner of Banks in writing by letter or other written agreement, a bank's books and records and the books and records of the bank's parent holding company shall be kept at the bank or at the bank's parent holding company; and the books and records of an affiliate of the bank shall be kept at the affiliate, the bank, or the bank's parent holding company.

(c) Based upon the condition of a bank as determined by examination or otherwise, the Commissioner of Banks may require a bank to prepare or maintain different or additional books, records, and reports.

*History Note: Authority G.S. 53C-8-6;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; June 1, 1995; May 1, 1992; October 1, 1990; September 1, 1983.*

**04 NCAC 03C .0902 REQUIRED ACCOUNTS**

To ensure that the books and records of the bank properly reflect all of its liabilities, the following reserve accounts shall be set up and maintained by all banks:

(1) Reserve for Interest Due Depositors. This reserve shall be set up and proper entries made at least once each month. As interest is paid to depositors, payments shall be charged to this account. Each month, as credits are made to this reserve, the amount shall be charged to interest paid to depositors' accounts.

(2) Reserve for Unearned Interest on Loans. All interest collected on notes shall be credited to this account on the day it is collected. At least once each month, earned interest shall be computed, charged to this account, and credited to earned interest account. This Subparagraph shall not apply to loans where interest is accounted for through an income-earned-not-collected account.

(3) Bond Income Earned; Not Collected. At least once each month, the income on bonds earned during the month shall be charged to this account and credited to the bond income account. As coupons are collected, they shall be credited to this account.

*History Note: Authority G.S. 53C-8-1; 53C-8-6;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; September 1, 1990.*

**04 NCAC 03C .0903 RETENTION: REPRODUCTION AND DISPOSITION OF BANK RECORDS**

(a) Each bank, at a location with secured access, shall keep and retain books, ledgers, records, and documents set forth for the periods specified.

| | Bank Records to be Retained | Minimum Retention Period |
|---|---|---|
| | ACCOUNTING | |
| 1. | Daily Reserve Calculation and Averages | 3 years |
| 2. | Difference Records (Over/Short) | 2 years |
| 3. | Paid Bills and Invoices | 3 years |
| 4. | Quarterly Report of Condition and Income and Supporting Work Papers | 5 years |
| | ADMINISTRATIVE | |
| 1. | Documentation of Charged-off Assets | 10 years |
| 2. | Escheat Reports and Records | 10 years |
| 3. | Minutes of Meetings of Stockholders, Directors, and Board Committees | Permanent |
| | AUDIT | |
| 1. | Audit Reports (Internal and External) | 3 years |
| 2. | Audit Work Papers (Internal) | 3 years |
| | BANK PROPERTIES | |
| 1. | Fixed Assets-Evidence of Ownership (After Acquisition) | 5 years |
| 2. | Fixed Assets-Leases (After Termination) | 5 years |
| 3. | Real Estate-Construction Records | 5 years |
| 4. | Real Estate-Deeds | Until conveyed |
| 5. | Real Estate-Leases (After Termination) | 5 years |
| | CAPITAL | |
| 1. | Capital Stock Certificate Books, Stubs, or Interleaves | Permanent |
| 2. | Capital Stock Ledger | Permanent |
| 3. | Capital Stock Transfer Register | Permanent |
| 4. | Proxies | 3 years |
| | COLLECTIONS | |
| 1. | Collection Registers (Incoming and Outgoing) | 3 years after item paid or returned |
| 2. | Receipts and Advices (After Closed) | 1 year |
| | CREDIT CARDS | |
| 1. | Borrowing Authority Resolutions (After Closed) | 3 years |
| 2. | Customer Application (After Closed) | 1 year |
| 3. | Disclosure and Compliance Documents | 25 months |
| 4. | Merchants' Agreement (After Closed) | 2 years |
| 5. | Posting or Transaction Journal | 2 years |
| 6. | Sales Tickets or Drafts | 3 years |
| 7. | Statement of Account | 5 years |
| | DEMAND DEPOSIT AND TRANSACTION ACCOUNTS | |
| 1. | Checks and Debits | 5 years |
| 2. | Daily Report on Overdrafts | 2 years |
| 3. | Deposit Resolutions (After Closed) | 3 years |

| | | |
|---|---|---|
| 4. | Deposit Tickets and Credits | 5 years |
| 5. | Ledgers, Statements, or Stubs | 5 years |
| 6. | Letters of Administration | 5 years |
| 7. | Posting or Transaction Journals | 5 years |
| 8. | Powers of Attorney | 5 years after closing |
| 9. | Return Item Records | 1 year |
| 10. | Signature Cards (After Closed) | 5 years |
| 11. | Stop Payment Orders | 1 year |
| 12. | Undelivered Statements | 1 year |
| 13. | Unidentified or Unclaimed Deposit Records | Until escheated |

DUE FROM BANKS

| | | |
|---|---|---|
| 1. | Advice of Entry (After Cleared) | 3 months |
| 2. | Drafts (After Paid) | 5 years |
| 3. | Draft Register | Until paid |
| 4. | Reconcilements | 5 years |
| 5. | Statements | 3 years |

GENERAL LEDGER

| | | |
|---|---|---|
| 1. | Daily Statement of Condition | 5 years |
| 2. | General Journal (If Book of Original Entries, with Descriptions) | 15 years |
| 3. | General Ledgers | 15 years |
| 4. | General Ledger Tickets | 5 years |

INSURANCE

| | | |
|---|---|---|
| 1. | Bankers Blanket Bond and Excess | 5 years |
| 2. | General Casualty Liability Policies Expired | 5 years |

INTERNATIONAL

| | | |
|---|---|---|
| 1. | Bankers Acceptances | 3 years |
| 2. | Collection Records | 3 years after item paid or returned |
| 3. | Letters of Credit and Documents | 3 years after expiration |
| 4. | Transfer Orders (Wire or Written) | 1 year |

INVESTMENTS

| | | |
|---|---|---|
| 1. | Accrual and Bond Amortization or Accretion Records (After Period Ends) | 3 years |
| 2. | Brokers' Confirmations, Invoices, Statements | 3 years |
| 3. | Ledgers | 3 years |
| 4. | Records of Purchases and Sales of Securities | 5 years |

LEASE RECEIVABLES (OTHER THAN REAL ESTATE)

| | | |
|---|---|---|
| 1. | Lease Agreements and Documents (After Termination) | 5 years |
| 2. | Rental Payment Records | 5 years |
| 3. | Record of Disposition of Property | 5 years |

LEGAL JUDICIAL AUTHORIZATION

| | | |
|---|---|---|
| 1. | Attachments or Garnishments | 10 years |
| 2. | Court Case Records (After Final Disposition) | 10 years |
| 3. | Probate Court Appointment (After Closed) | 10 years |

LOANS (COMMERCIAL, CONSUMER, MORTGAGE)

| | | |
|---|---|---|
| 1. | Appraisals, Financing Statements, and Title Opinions Pertaining to Collateral | Until paid |
| 2. | Borrowing Resolutions | 3 years after payment of debt |
| 3. | Credit Files (Financial Statements, Applications, Correspondence) (After Paid) | 2 years |
| 4. | Collateral Records (After Released) | 5 years |
| 5. | Interest Rebate Records | 1 year |
| 6. | Liability Cards or Ledgers (After Closed) | 3 years |
| 7. | Loan Ledger Cards or History Sheets (After Paid) | 3 years |
| 8. | Loan Proceeds Disbursement Records | Until paid |
| 9. | Loans Paid Record | 3 years |
| 10. | Mortgage Files and Supporting Documents (After Paid) | 2 years |
| 11. | Note or Loan Register (After Paid) | 3 years |
| 12. | Posting or Transaction Journal | 2 years |

MAIL

| | | |
|---|---|---|
| 1. | Insurance Records of Registered and Certified | 1 year |
| 2. | Registered and Certified Records (In and Out) | 1 year |
| 3. | Return Receipt Record | 1 year |

MISCELLANEOUS

| | | |
|---|---|---|
| 1. | Cash and Security Vault Records-Opening, Closing | 6 months |
| 2. | Taxes-Returns and Supporting Papers | 3 years or until cleared by IRS and Dept. of Revenue |
| 3. | Travelers Checks-Applications | 1 year |

MONEY TRANSFER

| | | |
|---|---|---|
| 1. | Copy of Incoming and Outgoing Transfers | 1 year |
| 2. | General Correspondence | 1 year |
| 3. | Receipts and Advices (After Closed) | 1 year |
| 4. | Transfer Request Records | 1 year |

NIGHT DEPOSITORY

| | | |
|---|---|---|
| 1. | Customer Agreement (After Closed) | 1 year |
| 2. | Customer Receipt | 1 year |
| 3. | Daily Inventory | 1 year |

OFFICIAL CHECKS

| | | |
|---|---|---|
| 1. | Official Checks (Dividend, Cashiers, Expense, Loan) and Money Orders (After Paid) | 5 years |
| 2. | Official Check Register or Carbon Copy | Until paid or escheated |
| 3. | Certified Checks or Receipts (After Paid) | 5 years |
| 4. | Certified Check Register or File Copy | Until paid or escheated |
| 5. | Affidavits and Indemnity pertaining to Issuance of Duplicate Checks | Permanent |

PROOF AND TRANSIT

| | | |
|---|---|---|
| 1. | Advice of Correction | 6 months |
| 2. | Cash Tickets | 6 months |
| 3. | Outgoing Cash Letters and Accompanying Items (Microfilm) | 2 years |
| 4. | Proof Sheets, Tapes, and Listings | 2 years |

SAFE DEPOSIT

| | | |
|---|---|---|
| 1. | Access Records (After Closed) | 3 years |
| 2. | Box History Card | Permanent |
| 3. | Contracts and Agreements (After Closed) | 3 years |
| 4. | Forced Entry Records | 10 years |

SAFEKEEPING AND CUSTOMER SECURITIES

| | | |
|---|---|---|
| 1. | Broker Confirmations, Invoices, Statements | 3 years |
| 2. | Buy and Sell Orders | 3 years |
| 3. | Customer Contracts and Agreements (After Closed) | 3 years |
| 4. | In and Out Records (Movement of Securities) | 3 years |
| 5. | Safekeeping Receipts (After Closed) | 3 years |

SAVINGS AND TIME DEPOSITS

| | | |
|---|---|---|
| 1. | Certificates of Deposit Paid | 5 years |
| 2. | Certificates of Deposit Records (Register, Ledger, Copy) | Until paid or escheated |
| 3. | Daily Report of Overdrafts | 2 years |
| 4. | Debits and Withdrawals | 5 years |
| 5. | Deposit and Credit Tickets | 5 years |
| 6. | Deposit Resolution (After Closed) | 3 years |
| 7. | Ledgers or Statements | 5 years |
| 8. | Posting or Transaction Journal | 1 year |
| 9. | Signature Cards, Contracts, and Agreements (After Closed) | 5 years |
| 10. | Undelivered Statements | 1 year |
| 11. | Unidentified or Unclaimed Deposit Records | Until escheated |

TELLERS

| | | |
|---|---|---|
| 1. | Balance Sheets, Recaps, or Records | 1 year |
| 2. | Cash Item Report | 1 year |
| 3. | Machine Tapes, Cash Ticket Copies, Posting or Transaction Journals | 6 months |
| 4. | Daily Record of Cash Items Held Over | 1 year |

TRUST (Corporate)

| | | |
|---|---|---|
| 1. | Account Ledger or Record | 7 years after account closed |
| 2. | Posting or Transaction Journal | 7 years |
| 3. | Bonds of Indemnity | Permanent |
| 4. | Stock Certificates (Cancelled) | until returned to corporation |
| 5. | Dividend Checks – Paid | 5 years |
| 6. | Dividend Check Register or Carbon Copy | Until paid |
| 7. | Bonds and Coupons – Cancelled or Cremation Certificates | 7 years after paid or until returned to corporation |
| 8. | Resolutions and Authorizations | 7 years after account closed |

TRUST (Employee Benefit)

| | | |
|---|---|---|
| 1. | Accountings | 6 years after account closed |
| 2. | Agreements, Authorizations, and Resolutions | 6 years after account closed |
| 3. | Account Ledger or Record | 6 years after account closed |
| 4. | Disbursement Checks | 6 years |
| 5. | Check Register or Carbon Copy | Until Paid |
| 6. | Bonds of Indemnity | Permanent |

TRUST (Personal)

| | | |
|---|---|---|
| 1. | Accountings | 3 years after account closed |
| 2. | Agreements and Authorizations | 5 years after account closed |

| | | |
|---|---|---|
| 3. | Account Ledger or Record | 7 years after account closed |
| 4. | Minutes of Committee Meetings | Permanent |
| 5. | Receipts for Assets Delivered | 3 years after account closed |
| 6. | Tax Return | 10 years or until IRS clears |
| 7. | Disbursement Checks | 5 years |
| 8. | Check Register or Carbon Copy | Until paid |
| 9. | Bonds of Indemnity | Permanent |

(b) Nothing in these Rules shall prohibit any bank or branch thereof from keeping and maintaining any and all of its records for a longer period of time than set forth by the minimum retention period.
(c) Paragraph (a) of this Rule sets forth state minimum records retention requirements and does not include nor cover records required to be kept by federal agencies such as federal bank supervisory agencies, and other federal agencies. Banks shall also observe the requirements of such federal agencies in retention of records required by such agencies.
(d) Nothing in these Rules shall prohibit any bank or branch from causing any or all of its records, whether permanent records or records designated to be retained for a minimum period of time, to be maintained pursuant to G.S. 53C-6-14.

*History Note: Authority G.S. 53C-2-5; 53C-6-14; 53C-8-1;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; January 1, 2013; May 1, 1992; September 1, 1990; January 1, 1985.*

**04 NCAC 03C .0904 LETTERS OF CREDIT**

The bank shall maintain supporting records on all letters of credit issued and outstanding, except for letters of credit sold for cash, and shall show the following information:

(1) the name of the account party for whom the letter of credit is established;
(2) the name of the beneficiary;
(3) the amount;
(4) the expiration date; and
(5) the terms under which payment is authorized.

*History Note: Authority 53C-8-1;*
*Eff. April 21, 1979;*
*Amended Eff. October 1, 2014.*

**04 NCAC 03C .0905 INVESTMENT AUTHORITY**

A bank may invest in mutual funds to the same extent and within the same limitation as permitted for national banks by statute, regulation, or interpretation of the applicable federal regulator, as reflected in the U.S. Office of the Comptroller of Currency "Investment Securities: Comptroller's Handbook" (Section 203) or their written interpretations that is hereby incorporated by reference and shall include any later amendments and editions of the referenced material. This information may be obtained from the Office of the Comptroller of Currency website at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/investsecurities1.pdf at no cost at the time of adoption of this Rule.

*History Note: Authority G.S. 53C-5-2;*
*Eff. October 1, 2014.*

**04 NCAC 03C .1001 LOAN DOCUMENTATION**

Unless otherwise provided, each bank shall maintain on file the following loan documentation:

(1) Financial Statements. Financial statements shall be required from any person who is a maker, co-maker, guarantor, endorser, or surety on any unsecured loans or other unsecured extensions of credit in an amount of fifty thousand dollars ($50,000) or more in the aggregate. Financial statements required by this Item shall:
   (a) be signed or otherwise properly executed;
   (b) be dated within 18 months preceding the origination date of the credit obligation;
   (c) be renewed within 18 months after the date of the last financial statement on file;
   (d) be addressed to, or made for the lending bank; and
   (e) include information reflecting the assets, liabilities, net worth, and income of the borrower.
(2) Financial Statement Exceptions. A bank may waive the financial statement required by Item (1) of this Rule for credit granted under a credit card. For an individual whose unsecured obligations consist of consumer loans scheduled to be repaid in at least quarterly installments, a bank may substitute a current credit bureau report for the financial statement required by Item (1) of this Rule. A credit bureau report shall be current if not more than 18 months have passed from its date of issue.
(3) Personal Property Appraisals. Appraisals on personal property used as collateral for a loan shall be obtained and shall be completed as follows:
   (a) Except as otherwise provided below, a written appraisal of personal property used to collateralize any loan shall be made or approved by the executive committee or loan committee of the bank or any branch

thereof, branch, or other reliable persons familiar with the value of the property. Except as provided, all appraisals shall be renewed every 24 months.

(b) Requirements. The appraisal required by this Item shall include:
- (i) the name of the borrower;
- (ii) the date the appraisal was made;
- (iii) the value of the collateral;
- (iv) the signatures of at least two persons making the appraisal;
- (v) a brief description of the property;
- (vi) the amount of any prior lien and holder of the lien, if any; and
- (vii) the original amount or outstanding balance of the loan which the property is used to secure.

(c) Appraisal Exceptions. No appraisal shall be required under the following circumstances:
- (i) on collateral to notes of less than fifty thousand dollars ($50,000);
- (ii) on loans fully secured by obligations of the United States or the State of North Carolina;
- (iii) on loans fully secured by deposits in the bank maintaining the loan account;
- (iv) on loans fully secured by the cash surrender or loan value of life insurance policies;
- (v) on loans fully secured by bonded warehouse receipts;
- (vi) on floor plan loans to dealers fully secured by motor vehicles;
- (vii) on discounted notes for a dealer where the note is given as the purchase price of a motor vehicle or other consumer goods; or
- (viii) on loans fully secured by listed securities, unless such loans are within the provisions of the Securities Exchange Act of 1934 as defined by Regulation "U," as amended from time to time by the Board of Governors of the Federal Reserve System. On loans secured by such collateral, the appraisal shall be made and kept on file until the loan is paid in full.

(d) Renewal Exceptions. Appraisals need not be renewed biennially where a motor vehicle or mobile home is the sole or partial collateral for a loan.

(e) Single Signature Exception. An appraisal may be performed and signed by only one person where a motor vehicle or mobile home is the sole collateral for a loan.

(4) Real Estate Appraisals. Unless otherwise provided, all real estate taken as security for loans shall be appraised in the form and manner set forth in Sub-item (4)(a) through (4)(c) of this Rule. In addition, the appraisal shall be independent in that the appraiser shall not be involved in the loan transaction secured by the property being appraised and shall have no interest, financial or otherwise, in the property.

(a) The bank may elect to waive the requirement for an appraisal of real estate given as security for loans of fifty thousand dollars ($50,000) or less.

(b) Appraisals of real estate given as security for loans over fifty thousand dollars ($50,000), but not exceeding two hundred fifty thousand dollars ($250,000), whether directly or indirectly pledged as collateral shall be prepared by one of the following methods:
- (i) Two members of the executive or loan committee who are familiar with real estate values in the community where the property is located;
- (ii) Two bank employees who are familiar with real estate values in the community where the property is located, provided that one of the two employees shall not be involved in the loan transaction secured by the property being appraised;
- (iii) A state-licensed real estate appraiser or state-certified real estate appraiser, or a person certified as a real estate appraiser by an appraisal trade organization

approved by the bank to perform the appraisal; or

(iv) In lieu of an appraisal as provided by Sub-items 4(b)(i) through (iii) of this Rule, for loans less than two hundred fifty thousand dollars ($250,000), a bank may elect to accept a copy of the most recent real property tax notice from the tax administrator's office in the county in which the property is located provided that such notice states the assessed ad valorem tax value of the real estate, and any improvements thereon, separate from the personal property; and the loan officer shall include with the tax notice a memorandum to file that he or she has obtained the notice from the county tax administrator and is of the opinion that such notice reflects the real property values.

(c) Except as noted, appraisals required by Sub-items (4)(b)(i), (ii), and (iii) of this Rule shall be in writing, and signed and dated by the person or persons making the appraisal. Additionally, the appraisal shall identify the loan transaction for which it was made; identify the current balance of any prior lien and the identity of the holder of the lien, if any; segregate values of improvements from values of the land; and describe the property so as to make it easily identifiable. If a professional appraisal form is used that does not include this information, the bank shall complete and attach to such appraisal its own appraisal summary form disclosing the required information. The appraisal shall state the basis or approach used to determine the value of the property. Acceptable approaches to determining the value of real property are:

(i) the current cost of replacing a property, less depreciation relating to deterioration from functional or economic obsolescence;

(ii) the value indicated by recent sales of comparable properties in the market and other market factors such as listings and offers to sell; or

(iii) the value that the property's net earning power will support, based on a capitalization of net income.

(d) All real estate given as security for loans in an amount over two hundred fifty thousand dollars ($250,000), whether directly or indirectly pledged as collateral shall be appraised and such appraisal shall be subject to the provisions of 12 C.F.R. 323.1 through 12 C.F.R. 323.7, which are hereby incorporated by reference and includes subsequent amendments or additions. This information is available at the U.S. Printing Office website at http://www.ecfr.gov/cgi-bin/text-idx?SID=cb59b820da3e668ebb333139d429ce0c&node=pt12.5.323&rgn=div5 at no cost at the time of adoption of this Rule.

(5) Certificate of Title. A title opinion furnished by an attorney at law, a title report or title insurance policy issued by a company licensed by the Commissioner of Insurance, or other insurance coverage that provides the bank similar protection against loss from title defects, errors or omissions at closing, or other loan-related risks, shall be obtained in connection with each deed of trust or mortgage given as security on each real estate-secured loan when:

(a) the loan is primarily secured by real property and only secondarily by the borrower's general credit-worthiness; and

(b) the amount of the loan secured by the real property is fifty thousand dollars ($50,000) or more.

(6) Stock Certificate and Stock Powers. Where stock certificates, or similar negotiable securities, are accepted as collateral for a loan, each certificate shall be endorsed and witnessed in ink, or accompanied by a stock power signed and witnessed in ink. Where such collateral is in the name of someone other than the maker or endorser of the note, there shall be on file in the bank written authority from the collateral owner permitting the hypothecation of the collateral.

(7) Corporate Resolutions. A loan made directly to a corporation shall be supported by a certified copy of a resolution of the board of

directors of the corporation, authorizing the loan transaction.

(8) Partnership Declaration. A loan made directly to a partnership shall be supported by a declaration of the general partners showing the composition of the partnership and unless all partners sign the note, the authority of the partner(s) executing the note to bind the partnership.

(9) Limited Liability Company Certification. A loan made directly to a limited liability company shall be supported by a certification of a manager thereof that the loan has been duly authorized by the limited liability company.

(10) Unlisted Securities. Full credit information on all unlisted securities, now owned or hereafter acquired, shall be kept on file in the bank.

*History Note: Authority G.S. 53C-6-1; 53C-8-1;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; December 1, 2011; April 1, 2007; June 1, 1995; May 1, 1992; September 1, 1990; September 1, 1983.*

**04 NCAC 03C .1002 LEASING OF PERSONAL PROPERTY**

Each bank acquiring and leasing personal property or, acquiring personal property that is subject to an existing lease together with the lessor's interest therein and incurring such additional obligations as may be incident to becoming an owner and lessor of such property, may do so only when subject to the following restrictions:

(1) Before the acquisition, upon the specific request and for the use of the customer, the prospective lessee shall execute an agreement to lease such property;

(2) During the minimum period of the lease, the terms of the lease shall require payment to the bank by the lessee of rentals that, in the aggregate shall exceed the total expenditures by the bank for or in connection with the ownership, maintenance, and protection of the property. In determining the total expenditures under this Rule, a bank may deduct a realistic residual value in determining the rentals to be charged during the term of a lease agreement. Any unguaranteed portion of the estimated residual value relied upon by the bank to calculate total expenditures under this Rule may not exceed 25 percent of the original cost of the property to the lessor. The amount of any estimated residual value guaranteed by a manufacturer, the lessee, or a third party that is not an affiliate of the bank may exceed 25 percent of the original cost of the property where the bank determines and provides supporting documentation that the guarantor has the resources to meet the guarantee;

(3) The total leasing obligations or rentals to any bank of any person, partnership, association, corporation, or limited liability company shall at no time exceed the legal limit permitted by G.S. 53C-6-1;

(4) The overall investment of the bank in such property leased to all lessees shall at no time exceed 200 percent of its capital;

(5) The bank shall at all times maintain protection by way of insurance or indemnity provided by the lessee;

(6) No lease or other agreement shall obligate the bank to maintain, repair, or service personal property in connection with any lease held by it;

(7) No personal property acquired pursuant to the ownership or lease of personal property shall be included in the computable investment in fixed assets under G.S. 53C-5-2;

(8) Rental payments collected by the bank under lease arrangements shall be rent and shall not be deemed to be interest or compensation for the use of money loaned;

(9) Upon expiration of any lease, whether by virtue of the lease agreement or by virtue of the retaking of possession by the bank, such personal property shall be re-let, sold, otherwise disposed of, or charged off within one year from the time of expiration of such lease; and

(10) Upon written request, the Commissioner of Banks may waive or modify any of the foregoing restrictions. In evaluating such a request, the Commissioner of Banks shall consider the following factors:

(a) the bank's size, profitability, capital sufficiency, risk profile, market, and operational capabilities, especially with a view towards the bank's involvement in lease financing;

(b) current best practices of financial institutions engaged in lease financing;

(c) the nature, size, duration, aggregate amount, and other risks attendant to the bank's lease financing transactions; and

(d) the risk of significant loss to the bank if the Commissioner of Banks does not grant the request.

*History Note: Authority G.S. 53C-2-5; 53C-5-2; 53C-8-1;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; January 1, 2013; April 1, 2007; September 1, 1990; September 1, 1983; May 1, 1982.*

**04 NCAC 03C .1402 BASIS FOR COMPUTATION AND MAINTENANCE**

Required reserves shall be computed on the basis of the daily average deposit balance during a 14-day period ending every second Monday (the "computation period"). The method for determining the amount of reserve required is set forth in Rule .1401 of this Section. The reserves that are required to be maintained shall be maintained during a corresponding 14-day period (the "maintenance period") that begins on the second Thursday following the end of a given computation period and ends on the second Wednesday thereafter. For non-business days, deposit figures of the prior banking day shall be used.

*History Note: Authority 53C-4-11;*
*Eff. February 1, 1976;*
*Amended Eff. October 1, 2014; July 1, 1990; August 6, 1981.*

**04 NCAC 03C .1601 FEES, COPIES AND PUBLICATION COSTS**

(a) For applications, petitions, and other proceedings to be filed with the Commissioner of Banks, the following fees shall be paid to the Commissioner of Banks at the time of filing:

| | | |
|---|---|---|
| (1) | Application for the Formation of a New Bank or State Trust Institution | $8,000.00 |
| (2) | Application to Merge or Consolidate Banks, State Trust Institutions, or Bank Holding Companies (fee is per institution) | $5,000.00 |
| (3) | Application for Reorganization Into a Bank Holding Company Through an Interim Bank | $3,000.00 (fee is per bank) |
| (4) | Application for Bank or Bank Holding Company Change in Control | $5,000.00 |
| (5) | Application for Conversion of a National Bank to State Charter | $2,500.00 |
| (6) | Application for Voluntary Liquidation | $3,000.00 |
| (7) | Application for Conversion of a Savings and Loan Association or a Savings Bank to a State Bank | $2,500.00 |

(b) The fees set forth in Paragraph (a) of this Rule are for standard applications, petitions, and other proceedings filed and considered in the ordinary course of business. Any application, petition, or other proceeding that in the opinion of the Commissioner of Banks requires extraordinary review, investigation, or special examination shall be subject to the actual costs of additional expenses and the hourly rate for the staff's time to be determined annually by the Banking Commission. The Commissioner of Banks shall advise an applicant or petitioner in advance of any additional work required and the hourly rate for the same. The hourly rate shall be:

| | | |
|---|---|---|
| (1) | For Senior Administrative staff | $75.00 |
| (2) | For Senior Examination Staff | $50.00 |
| (3) | For Financial Program Manager | $35.00 |
| (4) | For Financial Examiner | $25.00 |

(c) Unless otherwise stated, publications externally printed may be obtained at a cost equal to the actual cost of printing plus shipping and handling. All other publications or public record copies are available at the "actual cost" as defined in G.S. 132-6.2(b) for making the copy and mailing cost if applicable. The Office of the Commissioner of Banks shall provide its "actual cost" on the agency's website.

*History Note: Authority G.S. 53C-3-1; 53C-5-2; 53C-7-101; 53C-7-201; 53C-7-207; 53C-7-301; 53C-10-102; 53C-10-103; 53C-10-201; 54B-34.2; 54C-47;*
*Eff. July 1, 1990;*
*Amended Eff. October 1, 2014; June 1, 2004; June 1, 1995; May 1, 1992; July 1, 1991.*

**04 NCAC 03C .1702 ESTABLISHMENT OF A NON-BRANCH BANK BUSINESS OFFICE (NBBO)**

(a) A bank may establish or relocate a NBBO as defined in G.S. 53C-1-4(46) upon giving written notice to the Commissioner of Banks. The notice shall acknowledge:

(1) The NBBO may be used to solicit loans, assemble credit information, make property inspections and appraisals, complete loan applications, perform preliminary paper work in preparation for the making of loans, and provide banking related services and products, other than the taking of deposits;
(2) Loans may not be approved and loan proceeds may not be disbursed through the NBBO;
(3) The NBBO may not be used to accept deposits; and
(4) The NBBO may be inspected by the Commissioner of Banks for compliance with the written notice, and the cost of the inspection shall be borne by the bank.

(b) The bank shall provide written notice to the Commissioner of Banks when relocating or closing any NBBO.
(c) If required by the Secretary of State, the NBBO shall obtain a certificate of authority to do business in North Carolina.

*History Note: Authority G.S. 53C-1-4(46); 53C-6-18; 53C-8-2(3);*
*Eff. June 1, 1995;*
*Amended Eff. October 1, 2014.*

**04 NCAC 03C .1801 ESTABLISHMENT OF COURIER SERVICES**

A bank may provide a courier or messenger service to its customers only if:

(1) the bank complies with the requirements imposed by the Private Protective Services Act G.S. 74C-1. Et. Seq.; and
(2) a written agreement between the bank and the customers contains the following:
    (a) a statement that the courier is the agent of the customer and not the agent of the bank;
    (b) a statement that deposits collected by the courier or messenger are received by the bank when the deposits have been delivered to a teller at the bank's premises or a location that is eligible

and designated by the bank to receive deposits;

(c) a statement that negotiable instruments collected by the courier or messenger are paid at the bank when delivered to the courier or messenger; and

(d) an acknowledgment by the customer that transactions conducted by a courier service are not insured by the FDIC.

*History Note: Authority G.S. 53C-5-1; 53C-8-1;*
*Eff. June 1, 1995;*
*Amended Eff. October 1, 2014.*

**04 NCAC 03C .1802 COMPLIANCE AND DISCLOSURE REQUIREMENTS**

*History Note: Authority G.S. 53C-5-1; 53C-8-1;*
*Eff. June 1, 1995;*
*Repealed Eff. October 1, 2014.*

## TITLE 08 – STATE BOARD OF ELECTIONS

**08 NCAC 15 .0101 INSTRUCTIONS FOR FILING A PETITION FOR RULE-MAKING**

(a) Any person may petition the State Board of Elections to adopt a new rule, or amend or repeal an existing rule, by submitting a rule-making petition to the office of the State Board of Elections. The petition shall be titled "Petition for Rule-making" and include the following information:

(1) the name and address of the person submitting the petition;

(2) a citation to any rule for which an amendment or repeal is requested;

(3) a draft of any proposed rule or amended rule;

(4) an explanation of why the new rule or amendment or repeal of an existing rule is requested and the effect of the new rule, amendment, or repeal on the procedures of the State Board of Elections; and

(5) any other information the person submitting the petition considers relevant.

(b) The State Board of Elections shall decide whether to grant or deny a petition for rule-making within 120 days of receiving the petition. In making its decision, the Board shall consider the information submitted with the petition.

(c) When the State Board of Elections denies a petition for rule-making, it shall send written notice of the denial to the person who submitted the request. The notice shall state the reason for the denial. When the State Board of Elections grants a rule-making petition, it shall initiate rule-making proceedings and send written notice of the proceedings to the person who submitted the request.

*History Note: Authority G.S. 150B-20;*
*Eff. October 1, 2014.*

**08 NCAC 15 .0102 DECLARATORY RULINGS: AVAILABILITY**

(a) The State Board of Elections may issue declaratory rulings pursuant to G.S. 150B-4. All requests for declaratory rulings shall be in writing and submitted to the office of the State Board of Elections.

(b) A request for a declaratory ruling shall include the following information:

(1) the name and address of the petitioner;

(2) the reference to the statute or rule in question;

(3) a statement as to why the petitioner is a person aggrieved; and

(4) the consequences of a failure to issue a declaratory ruling.

(c) A declaratory ruling shall not be issued on a matter requiring an evidentiary proceeding.

*History Note: Authority G.S. 150B-4;*
*Eff. October 1, 2014.*

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**08 NCAC 16 .0101 MULTIPARTISAN ASSISTANCE TEAMS**

(a) Each County Board of Elections shall assemble and provide training to a Multipartisan Assistance Team ("Team") to respond to requests for voter assistance for any primary, general election, referendum, or special election.

(b) For every primary or election listed in Paragraph (a) of this Rule, the Team shall be made available in each county to assist patients and residents in every covered facility in that county in requesting or casting absentee ballots as provided by Subchapter VII of Chapter 163 of the General Statutes. For the purposes of this Rule, a "covered facility" is any hospital, clinic, nursing home, or rest home that provides residential healthcare in the State that is licensed or operated pursuant to Chapter 122C, Chapter 131D, or Chapter 131E of the General Statutes; or by the federal government or an Indian tribe.

(c) The Team may assist voters in requesting mail-in absentee ballots, serve as witnesses to mail-in absentee voting, and otherwise assist in the process of mail-in absentee voting as provided by Subchapter VII of Chapter 163 of the General Statutes. Upon the voter's request, the Team shall assist voters who have affirmatively communicated, either verbally or nonverbally, a request for assistance.

*History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, s. 4.6(b);*
*Temporary Adoption Eff. January 1, 2014;*
*Eff. October 1, 2014.*

**08 NCAC 16 .0102 TEAM MEMBERS**

(a) For purposes of this Chapter, the County Board of Elections shall compose the Team as follows:

(1) At least two registered voters shall be on each Team. The two political parties having the highest number of affiliated voters in the State, as reflected by the registration statistics published by the State Board of Elections on

January 1 of the current year, shall each be represented by at least one Team member of the party's affiliation. If the Team consists of more than two members, voters who are unaffiliated or affiliated with other political parties recognized by the State of North Carolina may be Team members.

(2) If a County Board of Elections finds an insufficient number of voters available to comply with Subparagraph (a)(1) of this Rule, the County Board, upon a unanimous vote of all of its sworn members, may appoint an unaffiliated voter to serve instead of the Team member representing one of the two political parties as set out in Subparagraph (a)(1) of this Rule.

(b) Team members shall not be paid or provided travel reimbursement by any political party or candidate for work as Team members.

*History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, s. 4.6(b);*
*Temporary Adoption Eff. January 1, 2014;*
*Eff. October 1, 2014.*

**08 NCAC 16 .0103 TRAINING AND CERTIFICATION OF TEAM MEMBERS**

(a) The State Board of Elections shall provide uniform training materials to each County Board of Elections. The training shall review the Rules of this Chapter as well as G.S. 163-226.3, 163-230.1, 163-230.2, and 163-231, including the statutory deadlines associated with absentee voting, and provide information to help Team members interact with persons who have disabilities. Every Team member shall confirm in writing that he or she has reviewed and understands the content of the training. Each County Board of Elections shall administer training for every Team member as directed by the State Board of Elections in this Rule.

(b) Every Team member shall sign a declaration provided by the County Board of Elections that includes the following statements:

(1) the Team member will provide voter assistance in a nonpartisan manner, will not attempt to influence any decision of a voter being provided any type of assistance, and will not wear any clothing or pins with political messages while assisting voters;

(2) the Team member will adhere to the rules of this Chapter and the General Statutes listed in Paragraph (a) of this Rule, and the Team member will refer to County Board of Elections staff in the event the Team member is unable to answer any question;

(3) the Team member will not use, reproduce, or communicate to anyone other than County Board of Elections staff any information or document handled by the Team member, including the voting choices of a voter, a voter's date of birth, or a voter's signature;

(4) the Team member will not accept payment or travel reimbursement by any political party or candidate for work as a Team member;

(5) the Team member does not hold any elective office under the United States, this State, or any political subdivision of this State;

(6) the Team member is not a candidate for nomination or election, as defined in G.S. 163-278.6(4), for any office listed in Subparagraph (b)(5) of this Rule;

(7) the Team member does not hold any office in a State, congressional district, or county political party or organization, and is not a manager or treasurer for any candidate or political party. For the purposes of this Subparagraph, a delegate to a convention shall not be considered a party office;

(8) the Team member is not an owner, manager, director, or employee of a covered facility where a resident requests assistance;

(9) the Team member is not a registered sex offender in North Carolina or any other state; and

(10) the Team member understands that submitting fraudulent or falsely completed declarations and documents associated with absentee voting is a Class I felony under Chapter 163 of the General Statutes, and that submitting or assisting in preparing a fraudulent or falsely completed document associated with absentee voting may constitute other criminal violations.

(c) Upon completion of training and the declaration, the County Board of Elections shall certify the Team member. Only certified Team members may provide assistance to voters. The certification shall be good for two years, or until the State Board of Elections requires additional training, whichever occurs first.

*History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, s. 4.6(b);*
*Temporary Adoption Eff. January 1, 2014;*
*Eff. October 1, 2014.*

**08 NCAC 16 .0104 VISITS BY MULTIPARTISAN ASSISTANCE TEAMS**

(a) The State Board of Elections shall provide annual notice regarding availability of Teams in each county. The notice shall provide information for covered facilities, or patients or residents of the facilities, to contact the County Board of Elections to arrange a Team visit.

(b) If a facility, or a patient or resident of a facility, requests a visit by the Team, the County Board of Elections shall notify the Team and schedule the visit(s) within seven calendar days if it is able to do so. If the County Board of Elections is unable to schedule the visit within seven calendar days, the voter may obtain such assistance from any person other than:

(1) an owner, manager, director, employee of the hospital, clinic, nursing home, or rest home in which the voter is a patient or resident;

(2) an individual who holds any elective office under the United States, this State, or any political subdivision of this State;
(3) an individual who is a candidate for nomination or election to such office; or
(4) an individual who holds any office in a State, congressional district, county, or precinct political party or organization, or who is a campaign manager or treasurer for any candidate or political party; provided that a delegate to a convention shall not be considered a party office.

None of the persons listed in Subparagraphs (1) through (4) of this Paragraph may sign the application or certificate as a witness for the patient.

(c) On a facility visit, the composition of the visiting Team members shall comply with the requirements of Rule .0102(a)(1) or (a)(2) of this Section.

(d) All Team members shall remain within the immediate presence of each other while visiting or assisting patients or residents.

(e) At each facility visit, the Team shall provide the following assistance to patients or residents who request it:

(1) Assistance in requesting a mail-in absentee ballot: The Team shall collect any request forms submitted by voters and deliver those request forms immediately to the County Board of Elections office upon leaving the facility.
(2) Assistance in casting a mail-in absentee ballot: Before providing assistance in voting by mail-in absentee ballot, a Team member shall be in the immediate presence of another Team member whose registration is not affiliated with the same political party. Team members shall sign the return envelope as witnesses to the marking of the mail-in absentee ballot. If the Team members provide assistance in marking the mail-in absentee ballot, the Team members shall also sign the voter's return envelope to indicate that they provided assistance in marking the ballot.

(f) The Team shall make and keep a record containing the names of all voters who received assistance or cast an absentee ballot during a visit as directed by the County Board of Elections, and submit that record to the County Board of Elections.

*History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, s. 4.6(b);*
*Temporary Adoption Eff. January 1, 2014;*
*Eff. October 1, 2014.*

**08 NCAC 16 .0105 REMOVAL OF TEAM MEMBERS**

(a) The County Board of Elections shall revoke, pursuant to G.S. 163-33(2), a Team member's certification granted under Rule .0103 of this Section for the following reasons:

(1) violation of Chapter 163 of the General Statutes or one of the Rules contained in this Section;
(2) political partisan activity in performing Team duties;
(3) failure to respond to directives from the County Board of Elections; or
(4) failure to maintain certification pursuant to Rule .0103 of this Section.

(b) If the County Board of Elections revokes a Team member's certification, the person shall not participate on the Team.

*History Note: Authority G.S. 163-33(2), 163-226.3(a)(4); S.L. 2013-381, s. 4.6(b);*
*Temporary Adoption Eff. January 1, 2014;*
*Eff. October 1, 2014.*

## TITLE 11 – DEPARTMENT OF INSURANCE

**11 NCAC 06A .0809 APPROVAL OF COURSES**

(a) All providers of courses specifically approved under Rule .0803 of this Section shall pay the fee prescribed in G.S. 58-33-133(b) and shall provide to the Commissioner or Administrator copies of:

(1) program catalogs;
(2) course outlines; and
(3) advertising literature.

(b) All providers of courses not specifically approved under Rule .0803 of this Section shall do the following:

(1) Any individual, school, insurance company, insurance industry association, or other organization intending to provide classes, seminars, or other forms of instruction as approved courses shall:
(A) apply on forms provided by the Commissioner or Administrator, located on the N.C. Department of Insurance's website at http://www.ncdoi.com/ASD/ASD_CE_Ins_Providers.aspx;
(B) pay the fee prescribed in G.S. 58-33-133(b);
(C) provide outlines of the subject matter to be covered; and
(D) provide copies of handouts to be given.
(2) All providers of supervised individual study programs shall file copies of:
(A) the study programs;
(B) the examination; and
(C) the Internet course security procedures.

(c) The Commissioner shall indicate the number of ICECs that have been assigned to the approved course.

(d) If a course is not approved or disapproved by the Commissioner or his designee within 60 days after receipt of all required information, the course is deemed to be approved at the end of the 60-day period.

(e) If a course approval application is denied by the Commissioner or his designee, a written explanation of the reason for denial shall be furnished to the provider.

(f) Course approval applications shall include the following:

(1) a statement indicating for whom the course is designed;

(2) the course objectives;

(3) the names and duties of all persons who will be affiliated in an official capacity with the course;

(4) the course provider's tuition and fee refund policy;

(5) an outline that shall include:

(A) a statement of whether there will be a written examination, a written report, or a certification of attendance only;

(B) the method of presentation;

(C) a course content outline with instruction hours assigned to the major topics; and

(D) the schedule of dates, beginning and ending times, and places the course will be offered, along with the names of instructors for each course session, submitted at least 30 days before any subsequent course offerings.

(6) a copy of the course completion certificate;

(7) a course rating form;

(8) a course bibliography; and

(9) an electronic copy of the course content and course examination for Internet courses.

(g) A provider may request that its materials be kept confidential if they are of a proprietary nature.

(h) Courses awarded more than eight ICECs shall have an examination in order for the licensee to get full credit.

(i) A provider may request an exemption to the examination requirement in Paragraph (h) of this Rule when filing a long-term care partnership continuing education course of eight hours.

(j) A provider shall not cancel a course unless the provider gives written notification to all students on the roster and to the Commissioner or Administrator at least five days before the date of the course. This Paragraph does not apply to the cancellation of a course or class because of inclement weather.

(k) A provider shall submit course attendance records electronically to the Commissioner or Administrator within 15 business days after course completion.

(l) An error on the licensee's record that is caused by the provider in submitting the course attendance records shall be resolved by the provider within 15 days after the discovery of the error by the provider.

*History Note: Authority G.S. 58-2-40; 58-33-130; 58-33-132; 58-33-133;*
*Temporary Adoption Eff. June 22, 1990, for a period of 180 days to expire on December 19, 1990;*
*ARRC Objection Lodged July 19, 1990;*
*Eff. December 1, 1990;*
*Amended Eff. October 1, 2014; March 1, 2011; February 1, 2008; February 1, 1996; June 1, 1992.*

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**11 NCAC 11F .0501 DEFINITIONS**
**11 NCAC 11F .0502 INDIVIDUAL ANNUITY OR PURE ENDOWMENT CONTRACTS**
**11 NCAC 11F .0503 GROUP ANNUITY OR PURE ENDOWMENT CONTRACTS**
**11 NCAC 11F .0504 APPLICATION OF THE 1994 GAR TABLE**

*History Note: Authority G.S. 58-2-40; 58-58-50(k);*
*Temporary Adoption Eff. December 1, 1999;*
*Eff. July 1, 2000;*
*Repealed Eff. January 1, 2015.*

**11 NCAC 11F .0505 MODEL RULE FOR RECOGNIZING A NEW ANNUITY MORTALITY TABLE FOR USE IN DETERMINING RESERVE LIABILITIES FOR ANNUITIES**

(a) The North Carolina Department of Insurance incorporates by reference, including subsequent amendments and editions, the National Association of Insurance Commissioners Model No. 821, NAIC Model Rule (Regulation) for Recognizing a New Annuity Mortality Table for Use in Determining Reserve Liabilities for Annuities. Copies of Model No. 821 may be obtained from: The National Association of Insurance Commissioners, 1100 Walnut Street, Suite 1500, Kansas City, MO 64106-2197; the North Carolina Department of Insurance, Actuarial Services Division, 1201 Mail Service Center, Raleigh, NC 27699-1201; and from the Department of Insurance web page at http://www.ncdoi.com/.

(b) For purposes of this Rule, Subsection A of Section 4 of Model No. 821 shall read as follows:

> Except as provided in Subsections B and C of this section, the 1983 Table "a" is recognized and approved as an individual annuity mortality table for valuation and, at the option of the company, may be used for purposes of determining the minimum standard of valuation for any individual annuity or pure endowment contract issued on or after April 19, 1979.

(c) For purposes of this Rule, Subsection B of Section 4 of Model No. 821 shall read as follows:

> Except as provided in Subsection C of this section, either the 1983 Table "a" or the Annuity 2000 Mortality Table shall be used for determining the minimum standard of valuation for any individual annuity or pure endowment contract issued on or after January 1, 1987.

(d) For purposes of this Rule, Subsection C of Section 4 of Model No. 821 shall read as follows:

> Except as provided in Subsection D of this section, the Annuity 2000 Mortality Table shall be used for determining the minimum standard of valuation for any individual annuity or pure endowment contract issued on or after January 1, 2000.

(e) For purposes of this Rule, Subsection D of Section 4 of Model No. 821 shall read as follows:

> Except as provided in Subsection E of this section, the 2012 IAR Mortality Table shall be used for determining

the minimum standard of valuation for any individual annuity or pure endowment contract issued on or after January 1, 2015.

(f) For purposes of this Rule, Subsection E of Section 4 of Model No. 821 shall read as follows:

The 1983 Table "a" without projection is to be used for determining the minimum standards of valuation for an individual annuity or pure endowment contract issued on or after January 1, 2000, solely when the contract is based on life contingencies and is issued to fund periodic benefits arising from:

(1) Settlements of various forms of claims pertaining to court settlements or out of court settlements from tort actions;

(2) Settlements involving similar actions such as worker's compensation claims; or

(3) Settlements of long term disability claims where a temporary or life annuity has been used in lieu of continuing disability payments.

(g) For purposes of this Rule, Subsection A of Section 6 of Model No. 821 shall read as follows:

Except as provided in Subsections B and C of this section, the 1983 GAM Table, the 1983 Table "a" and the 1994 GAR Table are recognized and approved as group annuity mortality tables for valuation and, at the option of the company, any one of these tables may be used for purposes of valuation for an annuity or pure endowment purchased on or after April 19, 1979, under a group annuity or pure endowment contract.

(h) For purposes of this Rule, Subsection B of Section 6 of Model No. 821 shall read as follows:

Except as provided in Subsection C of this section, either the 1983 GAM Table or the 1994 GAR Table shall be used for determining the minimum standard of valuation for any annuity or pure endowment purchased on or after January 1, 1987, under a group annuity or pure endowment contract.

(i) For purposes of this Rule, Subsection C of Section 6 of Model No. 821 shall read as follows:

The 1994 GAR Table shall be used for determining the minimum standard of valuation for any annuity or pure endowment purchased on or after January 1, 2000, under a group annuity or pure endowment contract.

(j) For purposes of this Rule, Section 1, Section 8, and Section 9 of Model No. 821 are not applicable.

*History Note: Authority G.S. 58-2-40; 58-58-50(k); Eff. January 1, 2015.*

## TITLE 14B – DEPARTMENT OF PUBLIC SAFETY

### 14B NCAC 07A .0116 ROTATION WRECKER SERVICE REGULATIONS

(a) The Troop Commander shall include on the Patrol Rotation Wrecker List only those wrecker services which agree in writing to adhere to the following provisions:

(1) A wrecker service desiring to be included on the Highway Patrol Rotation Wrecker List shall complete a wrecker application on a form designated by the Patrol. All applications shall be submitted to the appropriate District First Sergeant.

(2) In order to be listed on a rotation wrecker list within a zone, a wrecker service must have a full-time business office within that Rotation Wrecker Zone that is staffed and open during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays, and a storage facility. The Wrecker service must have someone available to accept telephone calls from the Patrol, and to allow access to towed vehicles, or to retrieve towed vehicles by the registered owner, operator, or legal possessor during business hours. The business office may not be the same physical address as the owner's residence unless zoned for commercial purposes and advertised as a business property. A representative from the wrecker service shall be available on call on a 24-hour basis, for emergencies. The wrecker service shall allow vehicles to be retrieved between the hours of 8:00 a.m. to 5:00 p.m., seven days a week, excluding holidays. An individual (registered owner, legal possessor, or operator) shall not be charged a storage fee for days that he/she could not retrieve his/her vehicle as a result of an action or omission on the part of the wrecker service (such as where the wrecker service was not open, did not answer the telephone or a representative was not available to release the vehicle).

(3) Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list. A storage facility for a small wrecker shall be located within the assigned zone. For wrecker services with large wreckers the storage facility for vehicles towed with the large wrecker may be located anywhere within the county. To be listed on the large rotation wrecker list, a wrecker service must have at least one large wrecker. To be listed on the small rotation wrecker list, a wrecker service must have at least one small wrecker. In any case where husband and wife or other family members are engaged in the business of towing vehicles and desire to list each business separately on the Patrol wrecker rotation list, the wrecker service shall establish that it is a separate legal entity for every purpose, including federal and state tax purposes.

(4) Each wrecker must be equipped with legally required lighting and other safety equipment to protect the public and the equipment must be in good working order.

(5) Each wrecker on the Patrol Rotation Wrecker List must be equipped with the equipment required on the application list and the equipment must, at all times, be operating properly.

(6) The wrecker service operator must remove all debris, other than hazardous materials, from the highway and the right-of-way prior to leaving the incident/collision scene. This service must be completed as a part of the required rotation service and shall not be charged as an extra service provided. Hazardous materials consist of those materials and amounts that are required by law to be handled by local Hazardous Materials Teams. Hazardous Materials or road clean-up other than debris may be billed in quarter hour increments after the first hour on scene.

(7) The wrecker service must be available to the Patrol for rotation service on a 24-hour per day basis and accept collect calls (if applicable) from the Patrol. Calls for service must not go unanswered for any reason.

(8) The wrecker service shall respond, under normal conditions, in a timely manner. Failure to respond in a timely manner may result in a second rotation wrecker being requested. If the second wrecker is requested before the arrival of the first rotation wrecker, the initial requested wrecker shall forfeit the call and shall immediately leave the collision/incident scene.

(9) For Patrol-involved incidents, the wrecker service shall respond only upon request from Patrol authority or at the request of the person in apparent control of the vehicle to be towed.

(10) The wrecker service, when responding to rotation wrecker calls, shall charge reasonable fees for services rendered. Towing, storage and related fees charged for rotation services may not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. Wrecker services may secure assistance from another rotation wrecker service when necessary, but only one bill shall be presented to the owner or operator of the vehicle for the work performed. A price list for recovery, towing and storage shall be established and kept on file at the place of business. A price list for all small wreckers and rollbacks with a GVWR of less than 26,001 pounds shall be furnished, in writing on a Patrol form, to the District First Sergeant upon request. The District First Sergeant shall approve all price lists submitted within their respective District if they are determined to be reasonable, consistent with fees charged by other Highway Patrol rotation wrecker services within the District and do not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. The District First Sergeant shall retain a copy of all approved price lists in the appropriate wrecker service file located in the district office. Storage fees shall not begin to accrue until the next calendar day following the initial towing of the vehicle. Wrecker service towing fees for recovery and transport of vehicles after 5:00 p.m. and on weekends may not exceed the towing fees for recovery and transport of vehicles charged during regular "Business Hours" by more than 10 percent. A mileage fee may only be charged if the customer requests the vehicle to be towed to a location outside of the assigned wrecker zone or county. If a mileage fee is warranted, the wrecker driver shall inform the owner, operator or legal possessor of the vehicle of any additional charge for mileage prior to towing. Each Troop Commander shall designate a Troop Lieutenant to serve as a Rotation Wrecker Liaison for their respective Troop. The individual price list for each respective wrecker service shall be made available to customers upon request. Copies of the approved price list shall be maintained within each wrecker and shall be given to the owner, operator or legal possessor of a vehicle being towed as a result of a Highway Patrol rotation wrecker call by the wrecker driver, if the owner, operator or legal possessor of the vehicle being towed is present at the scene. Prices indicated on this form shall be the maximum amount that will be charged for a particular service; however, this does not prevent charges of a lesser amount for said service.

(11) All wrecker operators shall have a valid driver's license for the type of vehicles driven; a limited driving privilege is not allowed.

(12) Wrecker owners, operators and employees shall not be abusive, disrespectful, or use profane language when dealing with the public or any member of the Patrol and shall cooperate at all times with members of the Patrol.

(13) The wrecker service shall adhere to all Federal and State laws and local ordinances and regulations related to registration and operation of wrecker service vehicles and have insurance as required by G.S. 20-309(a).

(14) The wrecker service shall employ only wrecker operators who demonstrate an ability

to perform required services in a safe, timely, efficient and courteous manner and who satisfy all of the requirements for wrecker drivers established or referenced herein.

(15) The wrecker service must notify the District First Sergeant of any insurance lapse or change. Wrecker Services shall ensure the NC Highway Patrol is listed as "Certificate Holder" on the Certificate of Liability Insurance, in c/o the District First Sergeant, complete with the current mailing address for the Highway Patrol District Office tasked with the responsibility for ensuring compliance with Highway Patrol policy regarding the respective wrecker service.

(16) The wrecker service shall notify the Patrol whenever the wrecker service is unable to respond to calls.

(17) Notification of rotation wrecker calls shall be made to the owner/operator or employee of the wrecker service. Notification shall not be made to any answering service, pager or answering machine.

(18) Wrecker service vehicles shall be marked on each side by printing the wrecker service name, city and state in at least three inch letters. No magnetic or stick-on signs shall be used. Decals are permissible. The wrecker service operator shall provide a business card to the investigating officer or person in apparent control of the vehicle before leaving the scene.

(19) Each wrecker service vehicle must be registered with the Division of Motor Vehicles in the name of the wrecker service and insured by the wrecker service. Dealer tags shall not be displayed on wreckers that respond to rotation calls.

(20) Wrecker Services shall secure all personal property at the scene of a collision to the extent possible, and preserve personal property in a vehicle which is about to be towed.

(21) Upon application to the Patrol Rotation Wrecker List, the owner shall ensure that the owner and each wrecker driver has not been convicted of, pled guilty to, or received a prayer for judgment continued (PJC):

(A) Within the last five years of:

(i) A first offense under G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;

(ii) Any misdemeanor involving an assault, an affray, disorderly conduct, being drunk and disruptive, larceny or fraud;

(iii) Misdemeanor Speeding to Elude Arrest; or

(iv) A violation of G.S. 14-223, Resist, Obstruct, Delay.

(B) Within the last ten years of:

(i) Two or more offenses in violation of G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;

(ii) Felony speeding to elude arrest; or

(iii) Any Class F, G, H or I felony involving sexual assault, assault, affray, disorderly conduct, being drunk and disruptive, fraud, larceny, misappropriation of property or embezzlement.

(C) At any time of:

(i) Class A, B1, B2, C, D, or E felonies;

(ii) Any violation of G.S. 14-34.2, Assault with deadly weapon on a government officer or employee, 14-34.5, Assault with firearm on a law enforcement officer; or G.S. 14-34.7, Assault on law enforcement officer inflicting injury;

(iii) Any violation of G.S. 20-138.5, Habitual DWI. For convictions occurring in federal court, another state or country or for North Carolina convictions for felonies which were not assigned a class at the time of conviction, the North Carolina offense which is substantially similar to the federal or out of state conviction or the class of felony which is substantially similar to the North Carolina felony shall be used to determine whether the owner or driver is eligible. Any question from the owner of a Wrecker Service concerning a criminal record shall be discussed with the First Sergeant or his designee; or

(iv) Three felony offenses in any federal or state court or combination thereof. The commission of a felony is not considered to be a second or subsequent felony unless it is committed after

the conviction or guilty plea to the previous felony.

(22) Upon employment or upon the request of the District First Sergeant, the owner of the wrecker service shall supply the Patrol with the full name, current address, date of birth, and photo copy of drivers license, valid work VISA, or other INS Documentation for all wrecker drivers and owner(s) in order for the Patrol to obtain criminal history information. The Wrecker Service shall also provide a certified copy of the driving record for the owner and each driver authorized to drive on rotation upon initial application, upon the hiring of a driver if hired after initial application, and at the time of periodic wrecker inspections. The wrecker service shall inform the District First Sergeant if the owner or a driver is charged with, convicted of, enters a plea of guilty or no contest to, or receives a prayer for judgment continued (PJC) for any of the crimes listed in Subparagraph (21) of this Paragraph. Upon notification that a driver or owner was charged with any of the crimes listed in this Rule, the Patrol may conduct an independent administrative investigation. Willful failure to notify the District First Sergeant as required herein shall result in removal from the rotation wrecker service for a minimum of 12 months.

(23) Upon request or demand, the rotation wrecker shall return personal property stored in or with a vehicle, whether or not the towing, repair, or storage fee on the vehicle has been or will be paid. Personal property, for purposes of this provision, includes any goods, wares, freight, or any other property having any value whatsoever other than the functioning vehicle itself.

(24) The wrecker service shall tow disabled vehicles to any destination requested by the vehicle owner or other person with apparent authority, after financial obligations have been finalized.

(25) Unless the vehicle is being preserved by the Patrol as evidence, the wrecker service shall allow insurance adjusters access to and allow inspection of the vehicle at any time during normal working hours.

(26) Being called by the Patrol, to tow a vehicle, does not create a contract with or obligation on the part of Patrol or Patrol personnel to pay any fee or towing charge except when towing a vehicle owned by the Patrol, a vehicle that is later forfeited to the Patrol, or if a court determines that the Patrol wrongfully authorized the tow and orders the Patrol to pay transportation and storage fees.

(27) Being placed on the Patrol Rotation Wrecker List does not guarantee a particular number or quantity of calls, does not guarantee an equivalent number of calls to every wrecker service on the rotation wrecker list, nor entitle any wrecker service to any compensation as a consequence for not being called in accordance with the list or when removed from the rotation wrecker list.

(28) The failure to respond to a call by the Patrol shall result in the wrecker service being placed at the bottom of any rotation wrecker list and the wrecker service shall then be "automatically by-passed" when that wrecker service comes up for its next rotation call.

(29) The District First Sergeant or his designee shall subject rotation wreckers and facilities to inspections during normal business hours.

(30) A rotation wrecker service, upon accepting a call for service from the Patrol, must use its wrecker. Wrecker companies shall not refer a call to another wrecker company or substitute for each other.

(31) If a rotation wrecker service moves its business location or has a change of address, the owner of the wrecker service must notify the District First Sergeant of the new address or location. Notification shall be made in writing, no later than ten days prior to the projected move. The wrecker service is not entitled to receive rotation calls prior to inspection of the new facility.

(32) A wrecker service may dispatch either a wrecker or a car carrier "rollback" in response to a Patrol rotation wrecker call, except where the wrecker service is advised that a particular type of recovery vehicle is needed due to existing circumstances.

(33) A rotation wrecker driver or employee shall not respond to a Patrol related incident with the odor of alcohol on his/her breath or while under the influence of alcohol, drugs or any impairing substance.

(34) A wrecker service shall have in effect a valid hook or cargo insurance policy issued by a company authorized to do business in the State of North Carolina in the amount of fifty thousand dollars ($50,000) for each small wrecker and one hundred fifty thousand dollars ($150,000) for each large wrecker or as otherwise required by Federal regulation, whichever is greater. In addition, each wrecker service shall have a garage keeper's insurance policy from an insurance company authorized to do business in the State of North Carolina covering towed vehicles in the amount of one hundred thousand dollars ($100,000).

(b) The District First Sergeant shall conduct an investigation of each wrecker service desiring to be placed on the Patrol Rotation Wrecker List and determine if the wrecker service meets the requirements set forth in this Rule. If the District First Sergeant determines that a wrecker service fails to satisfy one or more of the requirements set forth in this Rule, the First Sergeant shall notify the wrecker service owner of the reason(s) for refusing to place it on the rotation wrecker list. Any wrecker service that fails to comply with the requirements of this Rule may be removed from the rotation wrecker list.
(c) The Troop Commander or designee shall ensure that a wrecker service will only be included once on each rotation wrecker list.
(d) If the Troop Commander or designee chooses to use a contract, zone, or other system administered by a local agency, the local agency rules govern the system.
(e) If a wrecker service responds to a call it shall be placed at the bottom of the rotation wrecker list unless the wrecker service, through no fault of its own, is not used and receives no compensation for the call. In that event, it shall be placed back at the top of the rotation list.

*History Note: Authority G.S. 20-184; 20-185; 20-187; 20-188;*
*Temporary Adoption Eff. June 9, 2000;*
*Eff. April 1, 2001;*
*Amended Eff. April 1, 2010; July 18, 2008;*
*Transferred from 14A NCAC 09H .0321 Eff. June 1, 2013;*
*Amended Eff. Pending Legislative Review.*

## TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

### 15A NCAC 07H .2601 PURPOSE

The general permit in this Section shall allow for the construction of mitigation banks and in-lieu fee mitigation projects. This permit shall be applicable only for activities resulting in net increases in aquatic resource functions and services. These activities include:

(1) restoration;
(2) enhancement;
(3) establishment of tidal and non-tidal wetlands and riparian areas;
(4) restoration and enhancement of non-tidal streams and other non-tidal open waters; and
(5) rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters.

This permit shall not apply within the Ocean Hazard System of Areas of Environmental Concern (AEC) or waters adjacent to these AECs with the exception of those portions of shoreline within the Inlet Hazard Area AEC that feature characteristics of Estuarine Shorelines. Such features include the presence of wetland vegetation, lower wave energy, and lower erosion rates than in the adjoining Ocean Erodible Area.

*History Note: Authority G.S. 113A-107; 113A-118.1;*
*Eff. October 1, 2004;*
*Amended Eff. October 1, 2014.*

### 15A NCAC 07H .2602 APPROVAL PROCEDURES

(a) The applicant shall contact the Division of Coastal Management and request approval for development. The applicant shall provide information in writing on site location, a mitigation plan outlining the proposed mitigation activities, and the applicant's name and address.
(b) The applicant shall provide either confirmation that a written statement has been obtained and signed by the adjacent riparian property owners indicating that they have no objections to the proposed work, or confirmation that the adjacent riparian property owners have been notified by certified mail of the proposed work. Such notices shall instruct adjacent property owners to provide any comments on the proposed development in writing for consideration to the Division of Coastal Management within 10 days of receipt of the notice and indicate that no response shall be interpreted as no objection.
(c) The Division of Coastal Management shall review all comments received from adjacent property owners and determine, based on their relevance to the potential impacts of the proposed project, if the proposed project meets the requirements of the rules in this Section.
(d) No work shall begin until a meeting is held with the applicant and the Division of Coastal Management and written authorization to proceed with the proposed development is issued in compliance with this Rule. Construction of the mitigation site shall start within 365 days of the issue date of the general permit or the general permit shall expire and it shall be necessary to re-examine the proposed development for any changes to determine if the general permit shall be reissued.

*History Note: Authority G.S. 113A-107; 113A-118.1;*
*Eff. October 1, 2004;*
*Amended Eff. October 1, 2014.*

### 15A NCAC 07H .2604 GENERAL CONDITIONS

(a) The permit in this Section authorizes only those activities associated with the construction of mitigation banks and in-lieu fee mitigation projects.
(b) Individuals shall allow representatives of the Department of Environment and Natural Resources to make periodic inspections at any time deemed necessary in order to be sure that the activity being performed under authority of this general permit is in accordance with the terms and conditions of the rules of this Section.
(c) There shall be no interference with navigation or use of the waters by the public. No attempt shall be made by the permittee to prevent the use by the public of all navigable waters at or adjacent to the development authorized pursuant to the rules of this Section.
(d) This permit shall not be applicable to proposed construction where the Division of Coastal Management has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality, air quality, coastal wetlands, cultural or historic sites, wildlife, fisheries resources, or public trust rights.
(e) At the discretion of the Division of Coastal Management, review of individual project requests shall be coordinated with

the Department of Environment and Natural Resources to determine if a construction moratorium during periods of significant biological productivity or critical life stages of fisheries resources is necessary to protect those resources.
(f) This permit shall not eliminate the need to obtain any other required state, local, or federal authorization.
(g) Development carried out under this permit shall be consistent with all local rules, regulations, laws, or land use plans of the local government in which the development takes place.

*History Note: Authority G.S. 113A-107; 113A-118.1;*
*Eff. October 1, 2004;*
*Amended Eff. October 1, 2014.*

**15A NCAC 07H .2605 SPECIFIC CONDITIONS**
(a) The general permit in this Section shall be applicable only for the construction of mitigation banks or in-lieu fee mitigation projects.
(b) No excavation or filling of any submerged aquatic vegetation shall be authorized by this general permit.
(c) The crossing of wetlands in transporting equipment shall be avoided or minimized to the maximum extent practicable. If the crossing of wetlands with mechanized or non-mechanized construction equipment is necessary, track and low pressure equipment or temporary construction mats shall be utilized for the area(s) to be crossed. The temporary mats shall be removed immediately upon completion of construction.
(d) No permanent structures shall be authorized by this general permit, except for signs, fences, water control structures, or those structures needed for site monitoring or shoreline stabilization.
(e) This permit does not convey or imply approval of the suitability of the property for compensatory mitigation for any particular project. The use of any portion of the site as compensatory mitigation for future projects shall be determined in accordance with applicable regulatory policies and procedures.
(f) The development authorized pursuant to this general permit shall result in a net increase in coastal resource functions and values.
(g) The entire mitigation bank or in-lieu fee project site shall be protected in perpetuity in its mitigated state through conservation easement, deed restriction or other appropriate instrument attached to the title for the subject property and shall be owned by the permittee or its designee.
(h) The Division of Coastal Management shall be provided copies of all monitoring reports prepared by the permittee or its designee for the authorized mitigation bank or in-lieu fee project site.
(i) If water control structures or other hydrologic alterations are proposed, such activities shall not increase the likelihood of flooding any adjacent property.
(j) Appropriate sedimentation and erosion control devices, measures or structures such silt fences, diversion swales or berms, sand fences, etc. shall be implemented to ensure that eroded materials do not enter adjacent wetlands, watercourses and property.
(k) If one or more contiguous acre of property is to be graded, excavated or filled, the applicant shall submit an erosion and sedimentation control plan with the Division of Energy, Mineral, and Land Resources, Land Quality Section. The plan shall be approved prior to commencing the land-disturbing activity.
(l) All fill material shall be free of any pollutants, except in trace quantities.

*History Note: Authority G.S. 113A-107; 113A-118.1;*
*Eff. October 1, 2004;*
*Amended Eff. October 1, 2014; August 1, 2012 (see S.L. 2012-143, s.1.(f)).*

## TITLE 19A – DEPARTMENT OF TRANSPORTATION

**19A NCAC 02E .0219 ELIGIBILITY FOR PROGRAM**
Businesses participating in the program shall comply with the following:

(1) The individual business installation whose name, symbol, or trademark appears on a business panel shall give in writing assurance of the business's conformity with all applicable laws concerning the provision of public accommodations without regard to race, religion, color, sex, age, disability, or national origin.

(2) An individual business under construction, may apply to participate in the program by giving written assurance of the business's conformity with all applicable laws and requirements for that type of service, by a specified date of opening to be within 60 days of the date of application. No business panel shall be displayed for a business that is not open for business and in full compliance with the standards required by the program. A business under construction shall not be allowed to apply for participation in the program if its participation would prevent an existing open business from participating, unless the existing business qualifies for or has a provisional contract.

(3) Businesses may apply for participation in the program on a first-come, first-served basis until the maximum number of panels on the logo sign for that service is reached. If a business's panel is removed and space is available on the sign, or one or more of the existing businesses have provisional contracts, the first fully qualifying business to contact the Department shall be allowed priority for the vacant space or the space occupied by a business with a provisional contract.

(4) The maximum distance that a "GAS," "FOOD," or "LODGING" service may be located from the fully controlled access highway shall not exceed three miles at rural interchange approaches and one mile at urban

interchange approaches in either direction via an all-weather road. Where no qualifying services exist within three miles (rural) or one mile (urban), provisional contracts are permitted where the maximum distance may be increased to six miles at rural interchange approaches and three miles at urban interchange approaches, provided the total travel distance to the business and return to the interchange does not exceed twelve miles. A "rural interchange" is defined as an interchange along a freeway (interstate or other fully-controlled access arterial highway) that is located either in a rural unincorporated area or within the corporate limits of a city or town with a population of fewer than 40,000. An "urban interchange" is defined as an interchange along a freeway (interstate or other fully-controlled access arterial highway) that is located either in or within one mile of the corporate limits of a city or town with a population equal to or greater than 40,000. Provisional contracts shall contain a clause that if a closer business applies, qualifies, and is within the three miles (rural) or one mile (urban) distance as applicable, and there is not otherwise room on the sign for the new business, then the provisional contract of the furthest business from the intersection shall be cancelled and the business panels shall be removed at the annual contract renewal date. The maximum distance for a "CAMPING" or "ATTRACTION" service shall not exceed 15 miles in either direction via an all-weather road.

(5) "GAS" and associated services. Criteria for erection of a business panel on a sign shall include:
- (a) licensing as required by law;
- (b) vehicle services for fuel (gas, diesel, or alternative fuels), motor oil, and water;
- (c) on-premise public restroom facilities;
- (d) an on-premise attendant to collect monies, make change, and make or arrange for tire repairs;
- (e) year-round operation at least 16 continuous hours per day, seven days a week; and
- (f) on-premise telephone available for emergency use by the public.

(6) "FOOD" service. Criteria for erection of a business panel on a sign shall include:
- (a) licensing as required by law, and a permit to operate by the health department;
- (b) businesses shall operate year-round at least eight continuous hours per day six days per week;
- (c) indoor seating for at least 20 persons;
- (d) on-premise public restroom facilities; and
- (e) on-premise telephone available for emergency use by the public.

(7) "LODGING" service. Criteria for erection of a business panel on a sign shall include:
- (a) licensing as required by law, and a permit to operate by the health department;
- (b) overnight sleeping accommodations consisting of a minimum of 10 units each, including bathroom and sleeping room, except a Lodging business operating as a "Bed and Breakfast" establishment with fewer than 10 units may participate. "Bed and Breakfast" businesses shall be identified on the Logo signs by the standard message "Bed and Breakfast." "Bed and Breakfast" businesses shall only be allowed to participate in the program if the maximum number of qualified Lodging businesses do not request participation in the program and occupy spaces on the Logo signs. All "Bed and Breakfast" businesses shall have provisional contracts;
- (c) adequate parking accommodations;
- (d) year-round operation; and
- (e) on-premise telephone available for emergency use by the public.

(8) "CAMPING" service. Criteria for erection of a business panel on a sign shall include:
- (a) licensing as required by law, including meeting all state and county health and sanitation codes and having water and sewer systems that have been duly inspected and approved by the local health authority (the operator shall present evidence of such inspection and approval);
- (b) at least 10 campsites with accommodations (including on-premise public restroom facilities in a permanent structure) for all types of travel-trailers, tents, and camping vehicles;
- (c) adequate parking accommodations;
- (d) continuous operation, seven days a week during the "business season", defined as the times of year the campground is open to the public:
- (e) removal or masking of said business panel by the Department during "non-business seasons", defined as the times of year the campground is not

open to the public, if operated on a seasonal basis; and

(f) on-premise telephone available for emergency use by the public.

(9) "ATTRACTION" service. Criteria for erection of a business panel on a sign for any business or establishment shall include:

(a) licensing as required by law;

(b) on-premise public restroom facilities in a permanent structure;

(c) continuously open to the motoring public without appointment at least eight hours per day, five days per week during its normal operating season or the normal operating season for the type of business; where room is available on the sign and a business exists that does not meet the qualifying hours and days of operations or distance, a provisional contract is permitted. Provisional contracts shall contain a clause that if a fully qualifying business applies and there is not otherwise room on the sign for the new business, then the provisional contract of the business last on the sign shall be cancelled and the business panel shall be removed at the annual contract renewal date. It is the responsibility of the businesses with provisional contracts to update their contracts to non-provisional contracts (if they meet all qualifications) prior to receiving notice of cancellation. The contract in place on the date the Department receives a completed application from a fully qualified business shall be the contract used for the decision making purpose;

(d) adequate parking accommodations;

(e) on-premise telephone available for emergency use by the public; and

(f) only facilities whose primary purpose is providing amusement, historical, cultural, or leisure activities to the public and are categorized as follows shall be allowed signing:

(i) Amusement Parks: Permanent areas open to the general public including at least three of the following activities: roller coasters, entertainment rides, games, swimming, concerts, and exhibitions;

(ii) Cultural Centers or Facilities: Locations for cultural events including museums, outdoor theaters, or a facility that exhibits or sells antiques or items painted or crafted by local artists;

(iii) Historic Sites: Buildings, structures, or areas listed on the national or state historic register and recognized by the Department as historic attractions or locations;

(iv) Leisure or Recreation Activity Areas: Attractions that provide tourists with opportunities such as golfing (excluding miniature golf, driving ranges, chip and putt areas, and indoor golf), horseback riding, wind surfing, skiing, bicycling, boating, fishing, picnicking, hiking, and rafting;

(v) Manufacturing Facilities: Locations that manufacture or produce products of interest to tourists and offer tours at least four times daily on a scheduled year-round basis such as candy, ice cream, cookie, or pickle manufacturing facilities. Facilities shall produce or manufacture, and exhibit or sell their products at the facilities.

(vi) Agricultural Facilities: Locations that provide tours and exhibit or sell their agricultural products or provide on site samples of their products, such as vineyards and regional farmers markets;

(vii) Zoological or Botanical Parks and Farms: Facilities that keep living animals or plants and exhibit them to the public;

(viii) Natural Phenomena: Naturally occurring areas that are of outstanding interest to the public, such as waterfalls or caverns; and

(ix) Motor Sports Facilities: Locations including museums, race tracks, and race team headquarters that exhibit or sell items related

to automobile or truck racing.

(10) Any other "ATTRACTION" not listed in Item (f) of this Rule shall be approved by the State Traffic Engineer.

(11) Ineligible Attractions include the following: shopping malls, furniture stores, drug stores, movie theaters; community business, historic, antique, or other districts; appliance stores, automobile or truck dealerships or garages, houses of worship, colleges, schools, real estate offices, sand and gravel facilities, produce stands, nurseries, grocery stores, restaurants, bars, lounges, adult establishments, and adult video, book, and novelty stores. An attraction is not eligible for both Travel Services (Logo) Signing and supplemental guide signing, such as Agriculture Tourism signing, at the same interchange.

*History Note: Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f);*
*Eff. April 1, 1982;*
*Amended Eff. August 1, 1998; April 1, 1994; October 1, 1993; December 1, 1992; October 1, 1991;*
*Temporary Amendment Eff. October 13, 2003;*
*Amended Eff. October 1, 2014; January 1, 2004.*

**19A NCAC 02E .0702 SOLICITATION AND AWARD OF CONTRACT**

(a) The Department shall maintain a "Directory of Transportation Firms" that have the necessary expertise and experience, and have expressed a desire to perform in professional engineering or other kinds of professional or specialized services for the Department in connection with transportation construction or repair. Prequalification pursuant to Rule .0703 of this Section shall be required for inclusion on the Directory or award of a contract under this Section.

(b) Upon authorization by the Secretary of Transportation for the DOT staff to use a professional or specialized firm, a Selection Committee shall be established by the branch manager consisting of at least three members from the DOT staff who are experienced in the type of services to be contracted. For contracts anticipated to exceed fifty thousand dollars $50,000, solicitation for proposals shall be by published advertisement. In addition, solicitation for interest may be by direct mail to all firms prequalified for the type of services to be contracted and selected from the Directory.

(c) The firm(s) to be employed shall be selected for each project by the Selection Committee.

(d) For contracts having a total cost over fifty thousand dollars ($50,000) and for supplemental agreements award shall be made by the Secretary of Transportation.

(e) Supplemental agreements that increase a cost of a project to more than fifty thousand dollars ($50,000) shall be approved by the Secretary.

(f) In an emergency situation, these Rules may be waived by the Secretary of Transportation or the Secretary's designee pursuant to G.S. 136-28.1(e). A qualified firm may be selected, negotiations conducted, and a contract executed by the Secretary of Transportation or the Secretary's designee as required to resolve the emergency conditions.

*History Note: Authority G.S. 136-28.1(e) and (f); 143B-350(f) and (g);*
*Temporary Rule Eff. June 11, 1982 for a Period of 51 Days to Expire on August 1, 1982;*
*Eff. August 1, 1982;*
*Amended Eff. October 1, 2014; December 1, 2012; December 29, 1993; October 1, 1991; April 1, 1986; February 1, 1983.*

**19A NCAC 02E .0703 PREQUALIFYING TO AWARD – PROFESSIONAL SERVICES FIRMS**

(a) In order to ensure that contracts awarded pursuant to G.S. 136-28.1(f) and G.S. 143-64.31 are awarded to responsible firms, prospective professional services firms shall comply with the rules set forth in this Section except as otherwise provided by law.

(b) In order to be eligible to contract with the Department pursuant to G.S. 136-28.1(f) and G.S. 143-64.31, all prospective professional services firms shall be prequalified with the Department to ensure that the firm is capable of performing the proposed contract.

(c) The requirements of prequalification are as follows:

(1) Applicants shall demonstrate the necessary experience, knowledge, and expertise to perform complete professional services contracts in which they submit or subcontract;

(2) Applicants shall demonstrate that they have sufficient financial resources, including available equipment and qualified personnel, and a financial statement (first time applicants and reinstatements only), to perform and complete professional services contracts in which they submit or subcontract;

(3) Applicants shall demonstrate that they have the necessary knowledge and expertise to comply with all state and federal laws relating to professional services contracts.

(d) Prospective professional services firms shall update their prequalification status annually to show changes in the staff and updated information regarding necessary company business licenses.

(e) Firms shall re-qualify every three years to show changes in the staff, updated information regarding necessary company business licenses, and updated project experience to ensure that prequalification remains based on recent experience of the staff that is not out of date.

(f) A requalified professional services firm shall maintain compliance with the rules in this section at all times in order to be eligible to contract with the Department pursuant to G.S. 136-28.1(f) and G.S. 143-64.31. If at any time a professional services firm fails to comply with these rules, the Department shall disqualify the professional services firm from any further

contracts until the firm is able to demonstrate compliance with these requirements by re-qualifying.

*History Note: Authority G.S. 136-28.1(e) and (f); 143-64.31; 143-B-350(f) and (g);*
*Eff. October 1, 2014.*

## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

## CHAPTER 52 – BOARD OF PODIATRY EXAMINERS

### 21 NCAC 52 .0213 TEMPORARY LICENSE FOR CLINICAL RESIDENCY/FELLOWSHIP

(a) The Board may issue a temporary license to practice podiatry to any podiatrist for licensure in accordance with this Rule while the podiatrist resides in North Carolina and is participating in a podiatric medical education and training clinical residency ("clinical residency") or fellowship located in North Carolina and approved by the Council of Podiatric Medical Education (CPME). Such CPME-approved clinical residency or fellowship shall be established and conducted in accordance with rules established in the most current version of "Standards and Requirements for Approval of Podiatric Medicine and Surgery Residencies" (CPME 320) and the "JJRC and CPME Residency Requirements" available from the CPME web site at http://www.cpme.org/residencies/content.cfm?ItemNumber=2444&navItemNumber=2245, or "Standards and Requirements for Approval of Podiatric Fellowships" (CPME 820) available from the CPME web site at http://www.cpme.org/fellowships/content.cfm?ItemNumber=2442&navItemNumber=2247. A list of approved clinical residencies is available from the CPME website at http://www.cpme.org/residencies/ResidenciesList.cfm?navItemNumber=2242. A list of approved fellowships is available from the CPME website at http://www.cpme.org/fellowships/content.cfm?ItemNumber=2441&navItemNumber=2246.

(b) In order to be approved by the Board for a temporary resident's or fellowship's training license, an applicant shall submit a completed temporary license application, available from the Board's website at http://www.ncbpe.org/content/licensure-exam. The application shall include the following:

(1) type of application (Regular, Temporary Military, or Temporary Clinical Residency or Fellowhip);
(2) date of application;
(3) Social Security Number;
(4) full name (last name, first name, and middle name, if applicable);
(5) mailing address;
(6) city, state, and zip code;
(7) telephone number (e.g., home, mobile, and business);
(8) email address;
(9) date of birth;
(10) whether or not a U.S. citizen;
(11) military service for self and spouse, if applicable;
(12) education (high school, college/university, graduate or professional, and residencies/internships/fellowships), including name and location of institution, dates attended, whether graduated or completed, major/minor, and type of degree;
(13) previous licensure in another state or territory, including date of issue, date of expiration, whether or not there were any disciplinary actions, and how license was obtained (examination, temporary, or reciprocity);
(14) whether the applicant has had any of the following situations and explain such instances:
    (A) had a license revoked, suspended, or cancelled;
    (B) denied a license;
    (C) denied the privilege of taking an examination;
    (D) dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled or requested to resign from any school, college, or university, or advised by any school or institution to discontinue studies therein;
    (E) been a defendant in a legal action involving professional liability (malpractice), been named in a malpractice suit, had a professional liability claim paid on the applicant's behalf or paid such a claim;
    (F) been a patient for treatment of mental illness;
    (G) been addicted to alcohol or drugs; or
    (H) been convicted of a felony;
(15) whether the applicant has taken the North Carolina licensure examination previously, and if so, the date;
(16) whether the applicant will need any special accommodations and what those needs are;
(17) the applicant's reasons for applying for temporary license and future plans for practicing in the state; and
(18) an attestation under oath before a notary that the information on the application is true and complete an authorization of the release to the Board of all information pertaining to the application.

(c) Such temporary application shall also require inclusion of the following additional documentation, which may be sent to the Board either together with the application or separately:

(1) documentation of legal name change, if applicable;
(2) a photograph, approximately two inches by two inches;

(3) proof of an education equivalent to four years of instruction in a high school (e.g., copy of the diploma or a letter from the high school);
(4) transcript of pre-podiatry college studies from an accredited college or university showing a minimum of two years of study;
(5) copy of college diploma;
(6) proof of graduation from a podiatry school accredited by CPME, a listing of such accredited podiatry schools is available from http://www.cpme.org/colleges/content.cfm?ItemNumber=2425&navItemNumber=2240 (e.g., a copy of the diploma or a letter from the school);
(7) official transcript of podiatry school studies sent directly from the institution to the Board;
(8) an appointment letter from the residency or fellowship program director, or his appointed agent, of the CPME-approved residency or fellowship program, listing the beginning and ending dates of the program;
(9) a signed consent on the application allowing a search of local, state, and national records for any criminal record;
(10) official copy of the grade letters from the National Board of Podiatric Medical Examiners (NBPME) sent directly from NBPME to the Board that the applicant has taken and passed within three attempts:
(A) APMLE Part I; and
(B) APMLE Part II; and
(11) upon request, supply any additional information the Board deems necessary to evaluate the applicant's competence and character, including appearing in person for an interview with the Board or its agent to evaluate the applicant's competence and character, if the Board needs more information to complete the application.

(d) Upon evaluation of the application, the Board shall either approve the application and issue a temporary license or deny the application within 30 days of receipt of the completed application based upon the information provided in accordance with this Rule, unless an interview is necessary. If the Board deems an interview necessary pursuant to Subparagraph (c)(11) of this Rule, the Board shall issue the decision to grant or deny the application within 30 days following the interview. If the Board denies the application, it shall notify the applicant the reasons for the denial.

(e) A temporary license is valid only while the licensee is participating in the clinical residency or fellowship program and shall not be extended beyond the length of training.

(f) A podiatrist holding a temporary license to practice in a clinical residency or fellowship program shall practice only within the confines of that program and under the supervision of its director.

*History Note Authority G.S. 90-202.5(b); 90-202.6; 93B-15.1;*
*Eff. October 1, 2014.*

**21 NCAC 52 .0611 FORMS AND APPLICATIONS**

(a) The Board shall issue the following items in accordance with applicable state statutes and this Chapter's administrative rules:
(1) Certificate of Licensure;
(2) Licensure Renewal Card;
(3) Temporary License Certificate; and
(4) Certificate of Corporate Registration.

(b) The Board shall provide and require use of the following application forms that may be obtained from the Board's web site, http://www.ncbpe.org:
(1) Licensure Renewal Application;
(2) Disclaimer Form;
(3) Corporate Registration Application;
(4) Corporate Registration Renewal;
(5) Specialty Credentialing Application; and
(6) CME (Continuing Medical Education) Submission Form.

*History Note: Authority G.S. 55B-10; 55B-11; 90-202.4(g); 90-202.6; 90-202.7; 90-202.9; 90-20.10; 90-202.11;*
*Eff. June 1, 2011;*
*Amended Eff. October 1, 2014*

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**CHAPTER 61 – RESPIRATORY CARE BOARD**

**21 NCAC 61 .0102 BOARD OFFICE**

The administrative offices of the North Carolina Respiratory Care Board (NCRCB) are located at: 125 Edinburgh South Drive, Suite 100, Cary, NC 27511**.** Office hours are 8:00 a.m. until 4:00 p.m., Monday through Friday, except North Carolina state holidays.

*History Note: Authority G.S. 90-652(2);*
*Temporary Adoption Eff. October 15, 2001;*
*Eff. August 1, 2002;*
*Amended Eff. October 1, 2014.*

*This Section contains information for the meeting of the Rules Review Commission on November 20, 2014 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** | **Appointed by House** |
|---|---|
| Margaret Currin (Chair) | Garth Dunklin (1st Vice Chair) |
| Jeff Hyde | Stephanie Simpson (2nd Vice Chair) |
| Jay Hemphill | Jeanette Doran |
| Faylene Whitaker | Ralph A. Walker |
| | Anna Baird Choi |

**COMMISSION COUNSEL**

| | |
|---|---|
| Abigail Hammond | (919)431-3076 |
| Amber Cronk May | (919)431-3074 |
| Amanda Reeder | (919)431-3079 |

**RULES REVIEW COMMISSION MEETING DATES**

| | |
|---|---|
| November 20, 2014 | December 18, 2014 |
| January 15, 2015 | February 19, 2015 |

***Note from the Codifier***

Corrections:
In Register Volume 29, Issue 06, September 15, 2014, Rule 21 NCAC 08 .0126 was listed incorrectly on the RRC Periodic Review Determinations report as necessary without substantive public interest. The correct designation for Rule 21 NCAC 08 .0126 is necessary with substantive public interest.

In NC Register Volume 29, Issue 08, October 15, 2014, Rules 18 NCAC 03 .0504 and 18 NCAC 05B .0104 were missing from the RRC Periodic Rule Review Determinations report. Rule 18 NCAC 03 .0504 should have been listed on the report designated as unnecessary and Rule 18 NCAC 05B .0104 should have been listed on the report designated as necessary without substantive public interest.

***AGENDA***
***RULES REVIEW COMMISSION***
***THURSDAY, NOVEMBER 20, 2014 10:00 A.M.***
***1711 New Hope Church Rd., Raleigh, NC 27609***

I. Ethics reminder by the chair as set out in G.S. 138A-15(e)

II. Approval of the minutes from the last meeting

III. Follow-up matters:
  A. Board of Agriculture – 02 NCAC 20B .0413 (Hammond)

IV. Review of Log of Filings (Permanent Rules) for rules filed between September 23, 2014 and October 21, 2014
- Child Care Commission (Hammond)
- Department of Environment and Natural Resources (Reeder)
- Department of Revenue (Hammond)
- Hearing Aid Dealers and Fitters Board (Hammond)
- Board of Occupational Therapy (Hammond)
- Building Code Council (Reeder)

V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting

VI. Existing Rules Review

1. 04 NCAC 14 – Department of Commerce (Hammond)
2. 11 NCAC 14 – Commissioner of Insurance (Reeder)
3. 11 NCAC 18 – Commissioner of Insurance (Reeder)
4. 11 NCAC 20 – Commissioner of Insurance (Reeder)
5. 11 NCAC 21 – Commissioner of Insurance (Reeder)
6. 11 NCAC 22 – Commissioner of Insurance (Reeder)
7. 13 NCAC 08 – Department of Labor (Hammond)
8. 13 NCAC 10 – Occupational Safety and Health Review Commission (Hammond)
9. 15A NCAC 01G – Department of Environment and Natural Resources (Hammond)
10. 15A NCAC 01H – Department of Environment and Natural Resources (Hammond)
11. 15A NCAC 12A – Department of Environment and Natural Resources (Hammond)
12. 15A NCAC 12B – Department of Environment and Natural Resources (Hammond)
13. 15A NCAC 12C – Department of Environment and Natural Resources (Hammond)
14. 15A NCAC 12D – Department of Environment and Natural Resources (Hammond)
15. 15A NCAC 12F – Department of Environment and Natural Resources (Hammond)
16. 15A NCAC 12G – Department of Environment and Natural Resources (Hammond)
17. 15A NCAC 12I – Department of Environment and Natural Resources (Hammond)
18. 15A NCAC 12J – Department of Environment and Natural Resources (Hammond)
19. 15A NCAC 12K – Department of Environment and Natural Resources (Hammond)
20. 21 NCAC 20 – Board of Registration for Foresters (Hammond)
21. 21 NCAC 21 – Board for Licensing of Geologists (Hammond)
22. 21 NCAC 28 – Landscape Contractors' Registration Board (Hammond)
23. 21 NCAC 69 – Board of Licensing of Soil Scientists (Hammond)
24. 24 NCAC 03 – Occupational Safety and Health Review Commission (Hammond)

VII. Commission Business

- Next meeting: Wednesday, December 17, 2014

**Commission Review**
***Log of Permanent Rule Filings***
***September 23, 2014 through October 20, 2014***

**CHILD CARE COMMISSION**

The rules in Chapter 9 are child care rules and include definitions (.0100); general provisions related to licensing (.0200); procedures for obtaining a license (.0300); issuance of provisional and temporary licenses (.0400); age and developmentally appropriate environments for centers (.0500); safety requirements for child care centers (.0600); health and other standards for center staff (.0700); health standards for children (.0800); nutrition standards (.0900); transportation standards (.1000); building code requirements for child care centers (.1300); space requirements (.1400); temporary care requirements (.1500); family child care home requirements (.1700); discipline (.1800); special procedures concerning abuse/neglect in child care (.1900); rulemaking and contested case procedures (.2000); religious-sponsored child care center requirements (.2100); administrative actions and civil penalties (.2200); forms (.2300); child care for mildly ill children (.2400); care for school-age children (.2500); child care for children who are medically fragile (.2600); criminal records checks (.2700); voluntary rated licenses (.2800); developmental day services (.2900); and NC pre-kindergarten services (.3000).

| | | | | |
|---|---|---|---|---|
| Infectious and Contagious Diseases | 10A | NCAC | 09 | .0804 |
| Amend/* | | | | |
| Safe Procedures | 10A | NCAC | 09 | .1003 |
| Amend/* | | | | |
| Transportation Requirements | 10A | NCAC | 09 | .1723 |
| Amend/* | | | | |
| Inclusion/Exclusion Requirements | 10A | NCAC | 09 | .2404 |
| Amend/* | | | | |

**ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF**

The rules in Chapter 28 are from the NC Aquariums and concern use of North Carolina Aquariums (.0100); scheduling activities for group use (.0200); unauthorized use of facilities, fees (.0300); firearms, fires, and smoking (.0400); conduct, alcoholic beverages, pets and proper dress (.0500); commercial activities, solicitations, etc. (.0600); and preservation of aquarium property (.0700).

Fee Schedule 15A NCAC 28 .0302
Amend/*

**REVENUE, DEPARTMENT OF**

The rules in Chapter 10 are from the Ad Valorem Tax Division and concern organization of the division (.0100); general provisions (.0200); exclusion for property used for pollution abatement (.0300); exclusion for personal property used for cotton dust prevention or reduction (.0400); and training/certification of county assessors and ad valorem tax appraisals (.0500).

Continuing Education Requirement of County Assessors 17 NCAC 10 .0504
Amend/*

**HEARING AID DEALERS AND FITTERS BOARD**

The rules in Subchapter 22A concern the organization of the board (.0100-.0200); definitions (.0300-.0400); and fees and applications (.0500).

Submission of Applications and Fees 21 NCAC 22A .0503
Amend/*

The rules in Subchapter 22F concern general examination and license provisions.

Communication of Results of Examinations 21 NCAC 22F .0107
Amend/*
Review of Examination 21 NCAC 22F .0108
Amend/*
Appeals and CE Program Modification 21 NCAC 22F .0206
Amend/*

The rules in Subchapter 22I concern professional affairs.

Change of Address 21 NCAC 22I .0114
Amend/*

**OCCUPATIONAL THERAPY, BOARD OF**

The rules in Chapter 38 cover organization and general provisions (.0100); application for license (.0200); licensing (.0300); business conduct (.0400); provisions concerning rulemaking (.0500); administrative hearing procedures (.0600); professional corporations (.0700); continuing competence activity (.0800); supervision, supervisory roles, and clinical responsibilities of occupational therapists and occupational therapy assistants (.0900); supervision of limited permittees (.1000); and supervision of unlicensed personnel (.1100).

Continuing Competence Requirements for Licensure 21 NCAC 38 .0802
Amend/*

**BUILDING CODE COUNCIL**

| | |
|---|---|
| 2011 NC Electrical Code/Supplemental Electrode Required | 250.53(A)(2) |
| Amend/* | |
| 2011 NC Electrical Code/Arc-Fault Circuit-Interrupter Pro... | 406.4(D)(4) |
| Amend/* | |
| 2011 NC Electrical Code/Bonding | 680.42(B) |
| Amend/* | |
| 2012 NC Fire Code/Group E in churches, private schools an... | 320 |
| Amend/* | |
| 2012 NC Plumbing Code/Shower Compartments | 417.4 |
| Amend/* | |

*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

Melissa Owens Lassiter
Don Overby
J. Randall May
A. B. Elkins II
Selina Brooks
Craig Croom
J. Randolph Ward

| AGENCY | CASE NUMBER | DATE | PUBLISHED DECISION REGISTER CITATION |
|---|---|---|---|
| **ALCOHOLIC BEVERAGE CONTROL COMMISSION** | | | |
| ABC Commission v. Noble 6 Enterprises LLC, T/A Peppermint Rabbit | 13 ABC 20226 | 08/13/14 | |
| ABC Commission v. Demetrius Earl Smith, T/A Smith's Convenient Store | 14 ABC 01354 | 08/18/14 | |
| Melody Locklear McNair v. ABC Commission | 14 ABC 02323 | 06/25/14 | |
| Marcus L. Bellamy T/A Bellas Grill v. ABC Commission | 14 ABC 03485 | 07/24/14 | |
| Kelvin M. Williams, dba Da Wave v. ABC Commission | 14 ABC 04723 | 09/12/14 | |
| ABC Commission v. Prescott Elliot Urban Environments LLC T/A Marquis Market | 14 ABC 04798 | 10/02/14 | |
| **DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY** | | | |
| Travis Earl Atkinson v. NC Victims Compensation Commission | 13 CPS 16304 | 09/02/14 | |
| Carl John Perkinson v. Department of Public Safety | 14 CPS 02245 | 06/24/14 | |
| Waheeda Ammeri v. Department of Public Safety | 14 CPS 03254 | 07/21/14 | |
| Jacorey Thomas v. NC DPS Victim Services | 14 CPS 05922 | 10/20/14 | |
| Rodger L. Ackerson v. Janice W. Carmichael, NC Crime Victims Compensation Commission | 14 CPS 06627 | 10/14/14 | |
| **DEPARTMENT OF HEALTH AND HUMAN SERVICES** | | | |
| M. Yaghi, DDS, P.A. v. DHHS | 11 DHR 11579 | 09/15/14 | |
| M. Yaghi, DDS, P.A. v. DHHS | 11 DHR 11580 | 09/15/14 | |
| Senior Home Care Services, Inc. v. DHHS | 12 DHR 09750 | 08/13/14 | |
| Johnson Allied Health Services, Inc. v. DHHS | 12 DHR 11536 | 09/02/14 | |
| Helen Graves v. Alamance County Department of Social Services and NC Department of Health and Human Services, Division of Health Service Regulation | 12 DHR 12411 | 09/02/14 | |
| AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare | 13 DHR 00115 | 01/06/14 | 29:02 NCR 202 |
| Albert Barron, Sr. v. Eastpointe Human Services Local Management Entity | 13 DHR 00784 | 04/22/14 | 29:04 NCR 444 |
| At Home Personal Care Services, Inc. v. DHHS, Division of Medical Assistance | 13 DHR 01922 | 03/20/14 | 29:07 NCR 834 |
| AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare | 13 DHR 08874 | 01/06/14 | 29:02 NCR 202 |
| Sheryl A. Lyons v. DHHS | 13 DHR 10228 | 05/12/14 | 29:05 NCR 559 |
| Cleveland Otis Dunston v. North Carolina Nurse Aide Registry | 13 DHR 10364 | 10/06/14 | |
| Kenneth Terrell Ford v. DHHS, Division of Facility Services | 13 DHR 10745 | 02/12/14 | 29:03 NCR 356 |
| Pamela Byrd v. DHHS | 13 DHR 12691 | 11/05/13 | 29:06 NCR 685 |
| Mary Lynne Nance v. DHHS, Division of Health Service | 13 DHR 13351 | 05/13/14 | 29:08 NCR 959 |

| | | | |
|---|---|---|---|
| Tricare Counseling and Consulting, Inc. v. DHHS, Division of Medical Assistance | 13 DHR 14221 | 12/31/13 | 29:04 NCR 460 |
| Neogenesis, LLC v. DHHS, Division of Medical Assistance and its agent Eastpointe Human Services Local Management Entity | 13 DHR 14222 | 06/09/14 | 29:09 NCR 1113 |
| J. Mark Oliver DDS, PLLC v. DHHS, Division of Medical Assistance | 13 DHR 14369 | 02/19/14 | 29:02 NCR 206 |
| Genesis Project 1 Inc. v. DHHS, Division of Medical Assistance and its agent, Mecklink Behavioral Healthcare | 13 DHR 17094 | 12/16/13 | 29:01 NCR 70 |
| Ervin Smith v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry | 13 DHR 17560 | 07/30/14 | |
| Ashley Renee Davis v. Department of Human Services | 13 DHR 17606 | 09/02/14 | |
| Estate of Earlene W. Alston, Lewis E. Alston v. DHHS, DMA | 13 DHR 17909 | 04/08/14 | 29:02 NCR 211 |
| Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina | 13 DHR 18127 | 06/23/14 | 29:07 NCR 842 |
| Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina | 13 DHR 18223 | 06/23/14 | 29:07 NCR 842 |
| Lawanda Suggs v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry | 13 DHR 18454 | 08/15/14 | |
| John A. Page v. DHHS | 13 DHR 19546 | 09/24/14 | |
| United Home Care, Inc. d/b/a Untied Home Health, Inc. d/b/a United Home Health v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Maxim Healthcare Services, Inc. | 13 DHR 19690 | 06/05/14 | 29:09 NCR 1122 |
| Susan Arrowood, OLPC v. DHHS, Division of Medical Assistance and its agent Partners Behavioral Health Management | 13 DHR 19981 | 01/08/14 | 29:03 NCR 366 |
| Rosemary Nwankwo v. DHHS | 13 DHR 20013 | 08/13/14 | |
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| Marilyn Sherrill v. DHHS | 13 DHR 20086 | 08/13/14 | |
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STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 OSP 5950

PETER DUANE DEAVER,
Petitioner,

v.

N.C. DEPARTMENT STATE BUREAU OF INVESTIGATION and NORTH CAROLINA DEPARTMENT OF JUSTICE
Respondents.

**DECISION**

This matter was heard by Temporary Administrative Law Judge James L. Conner II on April 2, 3 and 4, 2014 in Raleigh, North Carolina.

## APPEARANCES

For Petitioner:
Philip R. Isley
Philip R. Miller, III
Blanchard, Miller, Isley & Lewis, P.A.
1117 Hillsborough Street
Raleigh, NC 27603

For Respondent:
Charles G. Whitehead
Special Deputy Attorney General
Lars F. Nance
Special Deputy Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

## WITNESSES

**Witnesses called by Petitioner**

1. Robin Pendergraft
2. Marshall Tucker
3. Randy Myers
4. Bill Weis
5. Kevin West

**Witnesses called by Respondent**

1. Gregory S. McLeod
2. Kristi Jones Hyman

**EXHIBITS**

**Exhibits admitted on behalf of Petitioner**

1. Materials submitted to the Grievance Committee by Respondents-Bates numbers 1 to 382
2. Materials submitted to the Grievance Committee by Respondents-Bates numbers 383 to 1270
3. Petitioner's tax returns for 2010, 2011, 2012 and 2013 (submitted under seal)
4. April 1, 2011 Recommendation from Step 3 Internal Grievance Committee
5. April 19, 2011 final agency decision from Kristi Hyman
6. International Crime Investigative Analysis Fellowship ("ICIAF") Understudy Program, revised March 27, 2003
7. Petitioner's Petition for a Contested Case filed with OSP
8. Internal Grievance Supplemental materials
9. July 6, 2010 letter from Eric Hooks
10. NOT OFFERED
11. Videotaped Deposition of Kristi Jones Hyman and any exhibits thereto
12. NOT OFFERED

**Exhibits admitted on behalf of Respondent**

1. NOT OFFERED-Duplicative of Petitioner's Exhibit 1
2. NOT OFFERED-Duplicative of Petitioner's Exhibit 3
3. NOT OFFERED-Duplicative of Petitioner's Exhibit 5
4. February 23, 2011 Step 2 Grievance letter from Greg McLeod
5. February 2, 2011 Step 1 Grievance letter from Marshall Tucker
6. August 23, 2010 Bloodstain Analysis Internal Investigation letter from Erik Hooks
7. State Bureau of Investigation Policy and Procedure Manual, Policy 05 dated May1, 2008
8. Professional Services Agreement between NCDOJ and Jon Perry
9. Deposition of Duane Deaver and any exhibits thereto
10. NOT OFFERED
11. NOT OFFERED
12. Peter Duane Deaver projected income at the SBI for 2011, 2012, 2013 and the first three months of 2014

## PRELIMINARY MATTERS AND PRE-TRIAL MOTIONS

At the beginning of the hearing, the Petitioner made a motion to seal his tax returns, admitted as Petitioner's Exhibit 3. There was no objection. The court granted the motion and entered Petitioner's Exhibit 3 into evidence under seal.

Petitioner filed a motion *in limine* pursuant to N.C. Gen. Stat. §126-35 and N.C.R. Evid., Rule 403 requesting the court exclude any reference to the matter of *State v. Peterson*, and any subsequent proceedings in the appellate courts. Respondents opposed the motion *in limine* asserting that the North Carolina Court of Appeals decision affirming the lower court's findings that the Petitioner had given deliberately false and misleading testimony as a blood spatter expert witness for the State in a murder trial was relevant to Petitioner's damages including, back pay, reinstatement and attorney fees pursuant to N.C. Gen. Stat. §126-4(11); 25 NCAC 01B.0421, .0426, .0428 and .0431.

After hearing argument on the written motion, the court DENIED Petitioner's motion *in limine.*

Respondent filed a Request for Judicial Notice pursuant to N.C. Gen. Stat. § 8C-1, Rule 201 and 26 NCAC 03.0122 and .0127 asking the court to take judicial notice of the published North Carolina Court of Appeals decision *State v. Peterson*, 2013 N.C. App. LEXIS 756. Petitioner opposed the request for judicial notice asserting *State v. Peterson* was irrelevant and immaterial.

After hearing argument on the Request for Judicial Notice, the court GRANTED Respondent's request and took judicial notice of *State v. Peterson*, 2013 N.C. App. LEXIS 756 and the NC Court of Appeals findings and affirmations of the lower court decision. The court further ordered that the findings and affirmations in *Peterson* were not being judicially noticed for the purpose of determination of the just cause dismissal but were accepted for the issue of whether reinstatement is a proper remedy. The Office of Administrative Hearings is bound by the NC Court of Appeals' decision to the extent it bears upon matters before this Office. (T pp. 204-206)

## ISSUES

Did Respondent have just cause to dismiss Petitioner from employment for unacceptable personal conduct, pursuant to N.C. Gen. Stat. § 126-35 and the applicable regulations?

Alternatively, if Respondent did not have just cause to dismiss Petitioner from employment for unacceptable personal conduct, is Petitioner entitled to back pay, reinstatement and/or attorney fees?

## FINDINGS OF FACT

**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 Temporary Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts 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 consisted with all other believable evidence in the case.

### I. Introduction

1. This matter is properly before the Office of Administrative Hearings ("OAH"), which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.

2. On May 16, 2011, Petitioner Peter Duane Deaver ("Petitioner" or "Deaver") filed a Petition for a Contested Case Hearing with OAH, alleging that he was discharged without just cause from his position as an Assistant Special Agent in Charge ("ASAC") with the North Carolina State Bureau of Investigations ("SBI") on April 19, 2011. (P Ex. 5)

3. At all times relevant to this proceeding, Petitioner was a career state employee, as defined by N.C. Gen. Stat. § 126-1, and was subject to the provisions of the State Personnel Act.

### II. Petitioner's Work History

4. Petitioner began his employment with the SBI on December 1, 1985 in the Serology Section. Petitioner graduated from the 17th Special Agent Academy in July 1986 and worked in the Serology Section until January 1994. (P Ex. 1 pp. 339-340)

5. In 1994 Petitioner was transferred to the SBI Training Section where his duties included training and instruction in firearms, physical fitness and defensive tactics. (P Ex. 1 p. 340)

6. In January 2000, Petitioner transferred to the Diversion and Environmental Crimes Unit ("DECU"). In 2003 he transferred to the Clandestine Lab Unit. (P Ex. 1 p. 340)

7. In 2005 Petitioner applied for and was appointed to SBI Human Resources ("HR"). During this same time period he was promoted from Special Agent to ASAC. Petitioner's duties while working in HR included the hiring of SBI agents and background checks. (P Ex. 1 p. 340)

8. In approximately 2007, at the request of his supervisors, Petitioner began researching the possibility of starting a SBI behavioral analysis (criminal profiling) program. While working in HR, Petitioner began his certification process with the International Criminal Investigation

Analysis Fellowship ("ICIAF") including obtaining a mentor and sponsor (Jon Perry). In 2009, Petitioner was assigned to the SBI Training and Investigation Support Section, specifically assigned to the Behavioral Analysis Program. (P Ex. 1 p. 341)

## III. Termination of Petitioner's Employment

### a. Procedural History

9. In March 2010, in response to serology issues raised by the North Carolina Innocence Inquiry Commission ("NCIIC") in review of *State v. Taylor*, an independent external review of the SBI Serology Section was conducted ("Swecker Report"). Contemporaneous to the external review, an internal SBI audit of the Serology Section was also performed. (P Ex. 1 p. 340)

10. On August 13, 2010, in response to issues raised in the Swecker Report, Petitioner, along with several other SBI agents, was placed on "administrative duty." Petitioner was instructed "not to engage in criminal investigation activities, instruction of Bureau employees, crisis negotiations or any assignment not approved by a supervisor". (T p. 213; P Ex. 1 p. 66)

11. On August 4, 2010, Petitioner had also been notified that he was the subject of an internal SBI investigation regarding an allegation that in September 2009 he had perjured himself while testifying before the NCIIC in the matter of *State v. Taylor*, 91 CRS 71728. (T p. 215; P Ex. 1 p. 234)

12. On August 18, 2012, Petitioner was placed on "investigatory placement" with pay and instructed to remain away from all SBI facilitates and told that he should not be in contact with any staff affiliated with the SBI. (T p. 221; P Ex. 1 p. 67)

13. On August 23, 2012, Petitioner was notified that he was the subject of an internal investigation which had been initiated as a result of a review of the SBI Blood Stain Analysis program and the external review (Swecker Report) of the SBI Crime Laboratory practices between 1987 and 2003. The focus of the investigation was to include Petitioner's conduct, reporting and testimony; plus previous work in the Forensic Biology Section of the Crime Laboratory as it relates to reporting of analysis. (R Ex. 6)

14. On September 3, 2010, Petitioner's investigatory placement status was extended an additional 30 days to allow continued investigation concerning Petitioner's job performance and conduct deficiencies regarding Petitioner's professional responsibilities as an SBI ASAC. ( P Ex. 1 p. 6)

15. On October 7, 2010, the NCIIC served Petitioner with a Motion to Show Cause "why he should not be held in criminal contempt for providing false and misleading testimony" during the

commission hearing in *State v. Taylor* on September 3, 2009. *State of North Carolina v. Peter Duane Deaver*, 10 CRS 016362. (P Ex. 1 pp. 89-95)

16. On October 14, 2010, Petitioner's investigatory placement status was again extended an additional 30 days to allow for continued and ongoing investigation concerning Petitioner's job performance and conduct. (P Ex. 1 p. 69)

17. During the internal investigation of the SBI Blood Stain Analysis program it was discovered Petitioner had participated, on May 13, 2009, at the request of another SBI agent, in a videotaped re-construction test examining blood stain on a t-shirt in the matter of *State v. Turner*. Captured on the video, which was shown to the jury in Mr. Turner's murder trial, Petitioner is heard to proclaim, at the success of the re-creation, "Beautiful, that's a wrap, baby." (P Ex. 1 pp. 368, 378-379)

18. On October 25, 2010, while on investigatory leave, and without the approval or knowledge of his supervisors, Petitioner reviewed and corrected a complaint submitted by Jon Perry (Petitioner's ICIAF mentor and sponsor) to the ICIAF against a South Carolina Law Enforcement Division Special Agent, ("SLED") Bo Barton. The complaint alleged that Barton had prepared a second behavioral analysis (criminal profile) of a December 17, 2008 murder after Petitioner had already prepared a final behavioral analysis, in violation of the ICIAF Code of Professional Standards. Petitioner was aware that a copy of his behavioral analysis was going to be attached to the complaint and shared with the ICIAF. (P Ex. 1 pp. 9, 12-18)

19. On October 28, 2010, Petitioner returned to work with the SBI and met with his supervisor, Assistant Director Marshall Tucker. Petitioner did not inform Mr. Tucker of Perry's complaint against Barton or that a copy of his report had been disseminated to the ICIAF. (T p. 560; P Ex. 1 pp. 16, 70)

20. On November 8, 2010, Petitioner was notified that an internal investigation had been initiated related to Petitioner's violating policy by instigating, endorsing, encouraging or assisting in the filing of a complaint against another law enforcement officer without notifying his supervisor. (P Ex. 1 p. 27)

21. On January 4, 2011, Petitioner was served with a Notice of Pre-Disciplinary Conference concerning possible disciplinary action for unacceptable personal conduct. The Notice included six (6) situations or occurrences which were at issue:

> 1) While on investigatory placement (October 25, 2010) Petitioner corrected, reviewed, approved and endorsed the filing of a professional standards complaint and ethics violation against a law enforcement officer with an outside independent organization (ICIAF). The submission of the complaint included confidential SBI criminal investigative information.

2) In April 1992, in the matter of *State v. Carter,* Petitioner incorrectly reported that an item revealed the presence of blood. A review of the laboratory notes revealed that the item tested, in fact, yielded a negative confirmatory test for blood.

3) In October 1991, in the matter of *State v. Taylor,* Petitioner incorrectly reported certain items/slides indicated no sperm or semen when, in fact, semen was present. Petitioner also failed to list his findings for a blue pair of panties, which, upon re-examination, showed the presence of sperm.

4) At the February 12, 2010 meeting of the 3 judge panel of the NCIIC and again at the September 3, 2009 hearing before the entire NCIIC, Petitioner provided false and misleading testimony. On October 7, 2010 the NCIIC filed and served a Motion to Show Cause against the Petitioner requiring him to appear and show cause why he should not be held in criminal contempt.

5) In 2007, after responding to a homicide scene, Petitioner failed to complete an SBI report and open a case file.

6) On May 13, 2009, while assisting in a videotaped re-creation of blood stain pattern in *State v. Turner,* Petitioner was heard giving unprofessional comments. (P Ex. 1 pp. 71-75)

22. On January 5, 2011, Petitioner met with SBI Assistant Director ("AD") Marshall Tucker and Assistant Director F.D. Brown, Jr. for his pre-disciplinary conference. Petitioner was allowed to present information which related to the issues which had been outlined in the January 4, 2011 Pre-Disciplinary Conference Notice. (P Ex. 1 p. 76)

23. Prior to the issuance of the Pre-Disciplinary Conference Notice and after the January 5, 2011 meeting, Petitioner's supervisor and SBI management met to discuss the appropriate disciplinary action for Petitioner. (T pp. 235, 507-516)

24. On January 7, 2011, Petitioner received his Notice of Dismissal. The grounds which form the basis for the dismissal are, in pertinent part, as follows:

1) While on investigatory placement (October 25, 2010) Petitioner corrected, reviewed, approved and endorsed the filing of a professional standards complaint and ethics violation against a law enforcement officer with an outside independent organization (ICIAF). The submission of the complaint included confidential SBI criminal investigative information.

2) At the February 12, 2010 meeting of the 3 judge panel of the NCIIC and again at the September 3, 2009 hearing before the entire NCIIC, Petitioner provided false and misleading testimony. On October 7, 2010 the NCIIC filed and served a

Motion to Show Cause against the Petitioner requiring him to appear and show cause why he should not be held in criminal contempt.

3) On May 13, 2009, while assisting in a videotaped re-creation of blood stain pattern in *State v. Turner,* Petitioner was heard giving unprofessional comments.

The conduct exhibited by the Petitioner violated SBI policies and procedures. State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT. (P Ex. 1 pp. 76-88; R Ex. 7)

25. The three items (Nos. 2, 3 & 5) identified in the Pre-Disciplinary Conference Notice (P Ex. 1 pp. 71-75) involving Petitioner's reporting errors or failure to report were dropped from the final decision to terminate after careful consideration and discussion due to the age of the issues and the issues were related to "work product" errors . (T p. 236)

26. After thoughtful consideration and open discussion among the management at the SBI, the decision to dismiss Petitioner from his position with the SBI was made by SBI Director Gregory McLeod. (T pp. 235, 528-529, 533, 562-563)

27. The January 7, 2011 Notice of Dismissal advised Petitioner that he could appeal the decision, outlining the grievance process and attaching a copy of the NC Department of Justice Grievance Policy and Procedures. (P Ex. 1 pp. 76-88)

28. Petitioner elected to appeal the decision and the Step 1 grievance meeting was held on January 27, 2011 with Petitioner, AD Tucker and AD Erik Hooks. Petitioner provided additional information and argument. The decision to dismiss was upheld. Petitioner was advised he could continue with the grievance process. (R Ex. 5)

29. On February 16, 2011, a Step 2 grievance meeting was held with the Petitioner, Director McLeod and Special Agent in Charge ("SAC") Wendy Brinkley. Petitioner was, again, provided the opportunity to provide additional information and argument which was given due consideration; there was not sufficient information to overturn the decision to dismiss. Petitioner was advised he could continue with the grievance process. (R Ex. 4)

30. On March 17, 2011, the Step 3 Grievance Committee convened. The Committee consisted of Joseph Finarelli, Assistant Attorney General; Mellissa Trippe, Senior Deputy Attorney General; James Faggart, Special Agent, SBI; Ann Hamlin, SAC, SBI; Cynthia Vinson, Contract Manager, IT. The Grievance Committee heard presentations from the Petitioner and Director McLeod, received written materials as well as testimony from retired SBI ASAC Randy Myers and retired SBI Assistant Director William Weis. The witnesses did not provide sworn testimony, and it was not recorded. (T pp. 315-316, 359; P Ex. 4)

31. The Grievance Committee recommended the SBI decision to dismiss Petitioner be reversed. (P Ex. 4)

32. On April 19, 2011, NC Department of Justice Chief of Staff, Kristi Jones Hyman, in her capacity as the final agency decisionmaker for the SBI, issued her decision to uphold Petitioner's January 7, 2011 dismissal for the reasons stated in the dismissal memorandum. Ms. Hyman had reviewed the materials submitted to the Grievance committee, their findings and the dismissal memorandum. As the final agency decision maker, the final determination to uphold Petitioner's dismissal was made exclusively by Ms. Hyman and based entirely on the facts and circumstances related to Petitioner's dismissal. Ms. Hyman was closely questioned by Petitioner's counsel at the hearing as to outside influences on her decision. She was clear and emphatic that there had been none. (T pp. 313-318; R Ex. 3)

33. The April 19, 2011 final agency decision notified the Petitioner of his due process rights of appeal to the Office of Administrative Hearings ("OAH") and the deadlines for the appeal. (R Ex. 3)

34. On May 16, 2011, Petitioner filed a Petition for Contested Case with OAH challenging the SBI decision to dismiss him from his position as an ASAC with the SBI. (R Ex. 7)

**b. Just Cause Dismissal**

**i. ICIAF Complaint-Confidential Investigation Material**

35. The SBI Behavioral Analysis Program ("profiling") started in 2009. Petitioner was asked to participate in the program; he was the only SBI agent in the profiling program. Petitioner enlisted in the training program of the International Criminal Investigative Analysis Federation ("ICIAF"). Part of the training program included mentoring with an ICIAF member. Petitioner, through the SBI, contracted with ICIAF member Jon Perry to act as his mentor. (P Ex. 1 pp. 51-53) Perry signed a Personal Services Agreement with the Department of Justice and was considered "staff affiliated" with the Department of Justice. (R Ex. 8; T pp. 221, 276-277, 586)

36. Jon Perry is retired from both the Kansas City Police Department and the Virginia State Police and is a member in the ICIAF. The SBI contracted with Perry to "provide training" in the area of profiling and "review" criminal reports for the purpose of training. The contract further stated Perry would keep all information confidential and "not release" any "report" without the "written approval" by the SBI. Petitioner was designated the "contract administrator" and was "responsible for monitoring" Perry's performance. At the time of his dismissal, Petitioner had not obtained ICIAF member status. (P Ex. 1 pp. 44-45; R Ex. 8 pp. 2-3)

37. On December 11, 2008, a young woman in Henderson County, North Carolina was murdered in front of her home. Special Agent Casey Drake ("Drake") was the SBI case agent. Petitioner was asked to review the case files and provide a criminal analysis report ("profile"). On May 7, 2009, Petitioner generated his final 11(a) profile report, referred to as a "blue paper" report, regarding the unsolved homicide. He intended the profile to be used by investigators to generate possible leads in the case. The profile had been completed with input from Petitioner's

mentor, Jon Perry. Petitioner also discussed the case with ATF Agent Ron Tunkel (also a member of ICIAF) and John Cromer (Virginia State Police Officer in training with the ICIAF) (T pp. 225-226; P Ex. 1 pp. 52-53)

38. Drake, along with other investigators, reviewed the analysis provided by the Petitioner and did not agree with his findings. In late August or early September 2010, the Henderson County Sheriff's Office made a request for South Carolina Law Enforcement Agent ("SLED") and ICIAF member Durwood "Bo" Barton ("Barton") to further review and profile the December 2008 murder. (P Ex. 1 pp. 22-23, 38-39)

39. In early October 2010, Perry was contacted by Agent Tunkel and told that Barton had appeared in a news conference to announce his involvement in the case and he was going to release a profile. (P Ex. 1 p. 9)

40. Based on Barton's review of the case and possible release of a profile, on October 26, 2010, Perry filed an ethics complaint against Barton with the ICIAF for "knowingly and directly soliciting the client of another member." Perry stated in his complaint that he was "not the aggrieved member" but was the "mentor" to "Assistant Special in Charge (ASAC) Duane Deaver of the North Carolina State Bureau of Investigation (SBI)", the aggrieved member. (P Ex. 1 pp. 9-11)

41. Attached to Perry's ethics complaint to the ICIAF was Petitioner's final 11(a) SBI criminal analysis report. (T p. 228; P Ex. 1 p. 25) A final 11(a) "blue paper" report is a report that has been entered into the SBI Case Records Management System ("CRMS"). (T pp. 617-619) Petitioner's profile of the Henderson County murder was completed in May 2009 and entered into the CRMS at the SBI on May 7, 2009. (P Ex. 1 p. 53) The report provided to Perry, and ultimately the ICIAF, was the same report Petitioner had provided to the Henderson County Sherriff in an effort to solve an unsolved homicide. (T pp. 277-278)

42. In early May 2009, after his final review, Petitioner forwarded his typed draft profile to the CRMS, and a final "blue paper" 11(a) Criminal Investigation Analysis Report (case # 2008-03474) was prepared on May 7, 2009. Petitioner compared the final "blue paper" profile prepared in 2009 with the version he provided to Tunkel and Perry in 2010 (knowing the profile would be disseminated to the ICIAF) and the reports were the same. The only difference was that a copy was added to Assistant Director Tulley and CRMS had removed some header information. Therefore, irrespective of whether the profiles Petitioner provided to Tunkel and Perry in 2010 were printed on "blue paper" they were, in fact, a final 11(a) SBI Criminal Investigation Report and Petitioner knew this when he released them. (T pp. 617-619; P Ex. 1 pp. 53, 58)

43. On October 25, 2010, while on investigatory leave, and without the approval or knowledge of his supervisors, Petitioner reviewed and corrected the ethics complaint submitted by Jon Perry to the ICIAF against Barton. Petitioner received the complaint at home on his

personal e-mail account and corrected certain portions of the complaint regarding the Henderson County Sheriff Office. Petitioner was aware that his name and SBI position would appear in the complaint. Petitioner was further aware that a copy of his criminal analysis profile would be attached to the complaint and disseminated to the ICIAF. (T p. 228; P Ex. 1 pp. 18, 55-59)

44. On October 5 and October 20, 2010, prior to reviewing and correcting the Perry complaint, Petitioner had provided copies of his criminal analysis profile to Tunkel and Perry, respectively. (P Ex. 1 pp. 18, 58) Tunkel had no contractual relationship with the Department of Justice and was not authorized to review Petitioner's profile reports, even "draft" reports. Petitioner's providing his profile report to Tunkel violated the SBI policies and procedures. (T pp. 122-129, 225-228)

45. Petitioner reviewed, corrected, endorsed and allowed his name and position to be used in a professional standards and ethics complaint against another law enforcement officer with the ICIAF. Petitioner provided his profile report to Perry knowing the report would be disseminated to the ICIAF. Perry was not authorized to receive any SBI reports for the purpose of filing a complaint against another law enforcement officer. Providing the profile report, even a draft report, to be disseminated to the ICIAF was a violation of SBI policies and procedures. (T p. 122-129, 144, 227-228; P Ex. 1 pp. 56-58)

46. Perry was not authorized to receive final confidential SBI reports. To make public or reveal the contents of an official file of the SBI to any unauthorized person is a violation of the SBI policies and procedures. (T p. 126-127, 227) Tunkel and the ICIAF were not authorized to receive and review any SBI reports including draft reports. Revealing the contents of an official file of the SBI to any unauthorized person is a violation of the SBI policies and procedures. (T pp. 122-129, 144, 225-228)

47. Petitioner endorsed, at least by implication, the professional standards and ethics complaint against another law enforcement officer with the ICIAF without the approval or knowledge of his supervisor and without the approval of the Director in violation of the SBI policies and procedures. (T p. 560, 594; P Ex. 1 pp. 56-58)

48. Petitioner returned to work on October 28, 2010; just days after the ethics complaint had been reviewed and served. Upon Petitioner's return to work, following his "investigatory placement," he met with his supervisor Assistant Director Marshall Tucker ("Tucker"). Petitioner never informed Tucker about the ICIAF complaint or that he had contact with Perry during the "investigatory placement" period. Failure to notify his supervisors of the ICIAF complaint or that he had contact with Perry violated the policies and practices of the SBI as well as the terms and conditions of Petitioner's investigatory placement status. (T pp. 560, 594; P Ex. 1 pp. 18-19)

49. On November 1, 2010, Tucker was notified by Assistant Director Brown of the ICIAF ethics complaint against Barton. On November 8, 2010, Petitioner was notified that an internal

investigation had been initiated related to Petitioner's violating policy by instigating, endorsing, encouraging or assisting in the filing of a complaint against another law enforcement officer without notifying his supervisor. (P Ex. 1 pp. 16, 27) The internal investigation found the allegations to be "Sustained (Facts support the allegation or complaint)". (P Ex. 1 p. 65)

**ii. Motion to Show Cause Re: Criminal Contempt**

50. On April 19, 1993, Gregory Flint Taylor was convicted of the murder of Jacquetta Thomas in Wake County Superior Court. *State v. Taylor*, 91 CRS 71728. (P Ex. 1 p. 89)

51. An SBI Laboratory report dated November 7, 1991, outlining the results of analysis conducted by the Petitioner, including the examination of several items (evidence items 16 and 18) which "gave chemical indications of blood" was submitted at the *Taylor* trial; Petitioner did not testify. (P Ex. 1 pp. 89, 348)

52. On September 7, 2007, the *Taylor* case was accepted by the North Carolina Innocence Inquiry Commission ("NCIIC") for formal inquiry. On August 11, 2009, the NCIIC issued a subpoena to Petitioner compelling him to appear and testify before the NCIIC regarding his lab report, testing and results in the *Taylor* matter. (P Ex. 1 pp. 89-90)

53. Prior to receiving his subpoena to testify (July 2009), Petitioner was called to a meeting with Assistant District Attorney Tom Ford and SBI agents and told the *Taylor* matter was being reviewed by the NCIIC and the SBI was reanalyzing the evidence. Petitioner did no further review or follow-up of his testing or lab reports. (P Ex. 1 pp. 349-350)

54. On September 1, 2009, Kendra Montgomery-Blinn ("Montgomery-Blinn") the Executive Director of the NCIIC telephoned Petitioner regarding his upcoming testimony before the NCIIC. During the taped conversation, Montgomery-Blinn asked Petitioner specifically about evidence items Nos. 16 and 18 and the blood stain testing. Petitioner stated the presumptive blood testing had been performed but the confirmatory testing had not been completed because there was no further sample. (P Ex. 1 pp. 90, 109-110) Montgomery-Blinn explained to the Petitioner that the purpose of the NCIIC hearing was to get all the facts and the NCIIC needed to know "all" the tests Petitioner had performed and he should "volunteer" all the information. (P Ex. 1 pp. 91-115)

55. Petitioner testified before the NCIIC on September 3, 2009. Petitioner testified that item No. 16 had a positive presumptive blood test but he was unable to perform the confirmatory test. He also stated that beyond the presumptive test he "got no result" for item No. 16. (P Ex. 1 pp. 91, 135-137) Later, Petitioner was questioned by former Court of Appeals Judge and NCIIC Member Charles Becton. Judge Becton, seeking clarity on the blood tests that Petitioner had performed, asked Petitioner directly if he "could not do" the confirmatory tests on items Nos. 16 and 18 and Petitioner responded "that's correct." (P Ex. 1 pp. 92, 142-143)

56. Petitioner failed to properly prepare for his sworn testimony before the NCIIC. Despite Petitioner meeting with Mr. Ford in April 2009 and speaking with Montgomery-Blinn two days before his testimony, Petitioner's preparation for this very important matter consisted of reviewing his file "in his car before going to testify." Petitioner failed to notify his supervisor that he had been subpoenaed to testify before the NCIIC. (P Ex. 1 pp. 349-350; R Ex. 9 pp. 160-163)

57. On February 11, 2010, Petitioner testified under oath during a three-judge panel hearing in *State v. Taylor*. In contrast to his previous conversations with Montgomery-Blinn and sworn testimony before the NCIIC, Petitioner testified he had conducted confirmatory tests on evidence items Nos. 16 and 18. (P Ex. 1 p. 92)

58. On August 4, 2010, an administrative, internal investigation was initiated into an allegation by attorney Mike Klinkosum that Petitioner had perjured himself before the NCIIC in September 2009. (P Ex. 1 pp. 213, 234-235)

59. The August 2010 alleged perjury internal investigation included interviews with the NCIIC members and was concluded in late September 2010. The SBI found the perjury allegation to be "Not Sustained (Insufficient facts were found to prove or disprove the allegation)". (P Ex. 1 pp. 214-227, 234, 366)

60. On October 7, 2010, the NCIIC served and filed a Motion for Order to Show Cause directing the Petitioner to appear and show cause why he should not be held in criminal contempt for providing false and misleading testimony during the September 2009 NCIIC hearing in *State v. Taylor*. (P Ex. 1 pp. 89-95) Petitioner failed to notify his supervisor that he had been served with the Motion to Show Cause re Criminal Contempt. (R Ex. 9 p. 161)

61. The Motion for Order to Show Cause for Criminal Contempt alleges the Petitioner "made contrary statements" to Montgomery-Blinn and during the NCIIC hearing. Also, Petitioner's responses to Judge Becton was "intentionally misleading" and in "willful disobedience" of the NCIIC directive and was so misleading as to amount to a "willful refusal" to "answer any legal question." Petitioner's "false" and "evasive" testimony before the NCIIC was in violation of N.C.G.S. §5A-11(n)(2, 3 and 4), *Criminal Contempt*. (P Ex. 1 pp. 93-95)

62. The Motion for Order to Show Cause for Criminal Contempt was served and filed after the NCIIC had been interviewed by the SBI during the SBI's internal investigation regarding the perjury allegation. The NCIIC is made up of members appointed by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals and includes judges, attorneys, sheriffs, victim advocates and public members. This esteemed judicial body ordered Petitioner to show cause why he should not be held in criminal contempt (N.C.G.S. §5A-11). (T pp. 156-160, 231-232, 329-330,339; P Ex 1, pp. 89-95)

63. The Motion for Order to Show Cause for Criminal Contempt is analogous to an SBI agent being indicted by a Grand Jury. The SBI is not aware of any other SBI agent ever being indicted by a grand jury for a criminal act. (T pp. 245-247,331-333) On October 28, 2010, Petitioner returned to work, following his "investigatory placement," he met with his supervisor Assistant Director Marshall Tucker. Petitioner never informed Tucker about the Motion for Order to Show Cause for Criminal Contempt. (T p. 560; R Ex. 9 p. 161)

**iii. *Turner* Video**

64. On May 13, 2009, at the request of another SBI agent, Petitioner was asked to participate in a videotaped re-construction test examining a blood stain pattern on a t-shirt in the matter of *State v. Turner*. (P Ex. 1 pp. 368, 378-379)

65. As part of the August 2010 SBI administrative, internal investigation of the Blood Stain Analysis program the *Turner* videotaped re-creation was reviewed. (P Ex. 1 pp. 369, 378)

66. Captured on the videotape, after the second SBI agent had conducted a successful "knife swipe" recreation, was the Petitioner stating: "Beautiful. That's a wrap, baby." The video re-creation, along with Petitioner's exclamation, was shown to the jury in *State v. Turner*. Mr. Turner was found not guilty of killing his wife. (T pp. 106-108; P Ex. 1 pp. 368, 377-379)

67. The SBI is entrusted to protect the rights of all citizens of North Carolina and to treat each citizen in a fair and non-biased manner, including criminal defendants. Petitioner concedes that his comment captured in the re-creation video were both embarrassing and unprofessional. (P Ex. 1 pp. 77, 379; T pp. 164, 334-335)

68. Petitioner's comments, captured on the videotape, were unprofessional, embarrassing and brought disrepute and disrespect to the SBI, and were a violation of SBI policies and practices. (T pp. 164, 232-235, 334-335)

**IV. Conclusion**

69. The decision process was remarkable for being deliberate, thorough, careful and open to dissenting voices. The internal investigation and initial decision making stretched over five months. Assistant Director Tucker expressed his reservations about firing Deaver to Director McLeod prior to the decision being made to terminate Deaver, and these concerns were addressed. There were three levels of grievance appeals involving different officials at each level. The final agency decision was made by yet a different official, who had not been involved in the grievance meetings.

70. Counsel for Petitioner have pressed the theory that Deaver was scapegoated by the SBI as a means of deflecting public criticism. Little evidence was presented to support this theory; Petitioner, for example, elected not to testify about this. It may well be that others at the SBI should also have been terminated or otherwise disciplined. However, the evidence for Petitioner

fell far short of showing disparate treatment. If Petitioner has substantial information that would show that the SBI routinely presented testimony to courts, or prepared reports, that were misleading – especially on matters relating to the ultimate guilt or innocence of citizens charged with crimes – he owes a duty to the public to come forward with this information, as do others in and out of the SBI. At the hearing of this matter, he did not do so.

71. Petitioner, through counsel, exhibited a distasteful disregard for the judicial system of this state. Contempt dripped from the lips of Petitioner's counsel when discussing Superior Court Judge Orlando Hudson and his findings with regard to Petitioner. The filing of a contempt motion by the North Carolina Innocence Inquiry Commission was repeatedly treated dismissively, referred to as "mere allegations." The filing of perjury allegations by a member of the N.C. State Bar seemed beneath Petitioner's contempt. None of this reflects well on Petitioner, who was seeking reinstatement to a position of trust in service to our system of justice.

72. The SBI acted with just cause in dismissing petitioner from his position as an ASAC with the SBI.

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings ("OAH") has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have given proper notice of the hearing and all parties are properly before this Administrative Law Judge.

2. There has not been an issue raised as to procedural defects nor to whether the Petitioner was properly and sufficiently apprised with particularity of the acts which lead to his dismissal.

3. 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 so considered without regard to the given labels.

4. Petitioner was a career state employee at the time of his dismissal and therefore entitled to the protections of the North Carolina State Personnel Act, including the provision that prohibits the termination of his employment except for just cause. N.C. Gen. Stat. §§ 126-1 *et seq.*, 126-35; 25 NCAC 01J. 0604(a).

5. N.C. Gen. Stat. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

6. Because Petitioner has alleged that Respondent lacked just cause for his termination, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a

recommendation to the State Personnel Commission, which will make the final decision in this matter.

7. Respondents followed the proper internal grievance and pre-disciplinary conference procedures. Petitioner was provided correct and adequate due process notice and all procedural requirements necessary to issue a disciplinary action were met. N.C. Gen. Stat. §126-35 (a); 25 NCAC 01J .0608 and .0613.

8. N.C. Gen. Stat. §126-35 (a) requires that before a State employee is disciplined, the employee shall be furnished with "a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action."

9. N.C. Gen. Stat. §126-35 (a) has been interpreted to require that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. . . . An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Employment Security Commission v. Wells,* 50 N.C. App. 389, 274 S.E.2d 256, (1981)

10. Petitioner was given proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law. There is nothing ambiguous in the dismissal letter concerning the specific acts committed by Petitioner which led to his dismissal. Petitioner was clearly notified of the specific acts which led to his dismissal allowing him to respond to the charges. The dismissal letter was sufficiently specific. (P Ex. 1, pp. 76-88) N.C. Gen. Stat. §126-35 (a); 25 NCAC 01J .0608 and .0613.

11. Pursuant to N.C.G.S. § 126-35(d) Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to dismiss Petitioner for unacceptable personal conduct.

12. Although the statute does not define "just cause," the words are to be accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

13. While just cause is not susceptible to a precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *NC DENR v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). The Supreme Court explained that the fundamental question is whether "the disciplinary action taken was 'just.'" Further, the Supreme Court held that, "Determining whether a public employer had just cause to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *NC DENR v. Carroll,* 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

14. 25 NCAC 1J .0604(b) provides that an employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct or unsatisfactory job performance.

15. Pursuant to 25 N.C.A.C. 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

16. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discharge. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

17. 25 NCAC 01J.0614 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 an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
d) the willful violation of known or written work rules;
e) conduct unbecoming a state employee that is detrimental to state service;
f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
g) absence from work after all authorized leave credits and benefits have been exhausted; or
h) falsification of a state application or in other employment documentation.

18. State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT is a known and written work rule. (R Ex 7) The SBI ETHICS AND CONDUCT Policy and Procedure Manual contains, among others, the following rules:

**GENERAL ETHICS (POLICY 5-1)**

A. Employees shall conduct themselves in such a manner as to reflect most favorably upon the Department of Justice, the State Bureau of Investigation, and the profession of Law Enforcement.

B. Employees shall conduct their private and professional lives in such a manner as not to impede the State of North Carolina, Department of Justice, or the SBI's efforts to achieve its policies and goals, nor bring discredit upon these agencies or upon the employees of any of these agencies.

C. All employees will receive ethics and conduct training, at a minimum, biennially.

**CONDUCT (POLICY 5-2)**

1. Conduct, as set forth in this Section, shall at all times govern the official and unofficial actions of each employee of the State Bureau of Investigation, whether their status is "sworn," "non-sworn," "on-duty" or "off-duty."

2. This rule applies to both the professional and private conduct of all employees. It

prohibits conduct which is contrary to the intent and purpose of Bureau policies or goals, or which would reflect adversely upon the Bureau or its employees. It includes not only all unlawful acts by employees, but also all acts, which although not unlawful in themselves, would degrade or bring disrespect upon the employee or the Bureau.

3. Conduct toward the public and fellow employees: Employees shall at all times be respectful, courteous, and impartial when dealing with the public and other employees.

4. Employees shall not use coarse, violent, profane, derogatory, or insolent language or gestures, and shall not maliciously express any prejudice concerning race, religion, politics, sex, or national origin.

5. Employees are encouraged to bear in mind the sensitivity of others and should exercise good judgment when making remarks that may be offensive to others even though these remarks are not meant to be malicious.

**UNBECOMING CONDUCT (POLICY 5-3)**

A. Conduct which tends to bring the Bureau into disrepute.

B. Conduct which reflects discredit upon any employee of the Bureau.

C. Conduct which tends to impair the operation and efficiency of the Bureau or its employees.

D. Conduct which impairs an employee's ability to complete work assignments objectively and diligently or to handle classified information.

**ENDORSEMENTS AND REFERRALS (POLICY 5-10)**

A. No employee will write any letter or otherwise communicate any recommendation or censure for any person, group, product, or item in the capacity of a Bureau representative and using the image and prestige of the Bureau, without the approval of the Director.

B. An employee shall not recommend or censure in any manner, except in the transaction of personal business, the employment or procurement of a particular product, professional service, or commercial service such as bondsman, mortician, or private detective.

**CONFIDENTIALITY OF INFORMATION (POLICY 5-12)**

Records of criminal investigations, intelligence records, and evidence collected and compiled by the Director and his or her assistants shall not be considered public records within the meaning of G.S. 132-1.4, and following, of the General Statutes of North Carolina and may be made available to the public upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the Director of the Bureau and his

or her assistant shall, upon request, be made available to the District Attorney of any district if the same concerns persons or investigations in his or her district (G.S. 114-15).

A. No employee will divulge any information concerning an investigation, evidence, or other non-administrative matter relative to official business of the Bureau, or any other agency to which the employee is privy by virtue of their employment, except to the following:

1. District Attorney if applicable under paragraph A above.
2. Individuals so designated by an order of competent jurisdiction.
3. Individuals entitled to an exception by another section of the Bureau Policy and Procedure Manual.
4. Other Bureau employees or officials of another agency actively engaged in the investigation together,
5. Others, including Bureau employees, on a need-to-know and right to know basis.

**TRUTHFULNESS (POLICY 5-12)**

An employee shall be truthful and complete in all written and verbal reports and statements pertaining to Bureau business and their Bureau related activities.

19. While on investigatory placement, without the knowledge or approval of his supervisor, Petitioner reviewed, corrected and approved the filing of a professional standards complaint and ethics violation with the ICIAF against a fellow law enforcement officer.

20. Petitioner willfully violated a known and written work rule, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *Endorsements and Referrals* (Policy 5-10) when he allowed and/or approved the censure of a fellow law enforcement officer in the capacity of a Bureau representative and using the image and prestige of the Bureau, without the approval of the Director.

21. The submission of the ICIAF complaint included a confidential SBI criminal analysis of an on-going criminal investigation. The ICIAF was not authorized to receive any SBI reports-irrespective if the reports were "drafts" or final "blue paper" reports. The submission of the SBI confidential criminal analysis report was done without Petitioner's supervisor's approval or knowledge.

22. Petitioner willfully violated a known and written work rule, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *Confidentiality of Information* (Policy 5-12) when he allowed and/or approved a confidential criminal analysis concerning an on-going investigation to be disseminated to the ICIAF.

23. Petitioner provided Perry with a final, 11(a) "blue paper" confidential criminal analysis report. Perry was not authorized to receive final reports. Providing the confidential criminal

analysis report to Perry was done without Petitioner's supervisor's approval or knowledge.

24. In October 2010, the North Carolina Innocence Commission served Petitioner with a Motion to Show Cause requiring the Petitioner to show cause why he should not be held in criminal contempt. The Innocence Inquiry Commission alleged that Petitioner had mislead the Commission and was not truthful when he testified before the Commission in September 2009 regarding the blood stain analysis tests and results reported out by Petitioner in the matter of *State v. Taylor*.

25. Petitioner's misleading testimony directly impaired the respect due the Commission and was a willful violation of known and written work rules: State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *General Ethics* (Policy 5-1), *Conduct* (Policy 5-2), *Unbecoming Conduct* (Policy 5-3) and *Truthfulness* (Policy 5-12).

26. The North Carolina Innocence Commission's assertions and Motion to Show Cause Re Petitioner's providing false and misleading testimony before the Innocence Commission is conduct unbecoming a state employee that is detrimental to state service.

27. In May 2009, Petitioner participated in a videotaped reconstruction test examining blood stain analysis in the matter of *State v. Turner*. At the conclusion of the recreation, Petitioner is heard to say, "Beautiful. That's a wrap, baby". This video and Petitioner's exclamation was shown to the jury during the *Turner* murder trial.

28. Petitioner's comments on the *Turner* recreation video were unprofessional and adversely impacted on his duties and credibility as an SBI Special Agent and were conduct unbecoming a state employee that is detrimental to his state service.

29. Petitioner's unprofessional and embarrassing comments captured on the *Turner* recreation video and played before a jury in the murder trial were a willful violation of known and written work rules, State Bureau of Investigation Policy and Procedure Manual, Policy 05, May 1, 2008, ETHICS AND CONDUCT, *General Ethics* (Policy 5-1), *Conduct* (Policy 5-2), *Unbecoming Conduct* (Policy 5-3).

30. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v. N.C. Dept. of Correction,* 177 N.C. App. 215 , 628 S.E.2d 395, 400 (2006) citing *Hilliard* v. *N.C. Dept. of Correction,* 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

31. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly. 25 NCAC 01J .0604(c)

32. Taken as a whole the allegations against Petitioner are substantial enough to constitute just cause for dismissal.

33. The Petitioner failed to offer any evidence, testimony or documents that the three occurrences identified in the Notice of Termination did not occur.

34. Based on the preponderance of the evidence, Respondent met its burden of proof that it had just cause to dismiss Petitioner for unacceptable personal conduct without prior warning or disciplinary action.

35. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for just cause.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the undersigned Temporary Administrative Law Judge makes the following:

## DECISION

The undersigned Temporary Administrative Law Judge finds that Respondent's dismissal of Petitioner for just cause should be **UPHELD**.

## NOTICE

This matter was commenced prior to January 1, 2012 and the Decision of the Administrative Law Judge in this Contested Case will be reviewed by the agency making the final decision according to standards found in 25 NCAC 01B.0437. The agency making the Final Decision in this contested case is required to give each party an opportunity to request oral argument, file written exceptions to this Decision and to present written arguments to those in the agency who will make the final decision.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission. 25 NCAC 01B.0437

The State Personnel Commission is required by 25 NCAC 01B.0437 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.

This the 20th day of August, 2014.

James L. Conner II
Temporary Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF LENOIR



IN THE OFFICE OF ADMINISTRATIVE HEARINGS
13 DHR 14222

NEOGENESIS, LLC

Petitioner,

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND ITS AGENT EASTPOINTE HUMAN SERVICES LOCAL MANAGEMENT ENTITY ,

Respondent.

**FINAL DECISION**

On April 2, 2014, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Lenoir County, North Carolina. On May 12, 2014, the undersigned issued an Order ruling that Respondent Eastpointe Human Services acted properly, used proper procedure, acted as required by law or rule; did not deprive Petitioner of property, exceed its authority or jurisdiction, or act arbitrarily or capriciously; and did not otherwise substantially prejudiced Petitioner's rights when it terminated Petitioner's Medicaid contract to provide Medicaid services in Eastpointe's catchment area for providing false and misleading information in its application to Eastpointe. The undersigned further denied Petitioner's pretrial Motion for Attorney's Fees based on the preponderance of the evidence produced at hearing.

## APPEARANCES

For Petitioner: Knicole C. Emanuel, Esq., Williams Mullen, 301 Fayetteville St., Ste. 1700, Raleigh, N.C. 27601

For Respondent Eastpointe Human Services: Jose A. Coker, Esq., The Charleston Group, P.O. Box 1762, Fayetteville, N.C. 28302-1762

For Respondent NC DHHS: Thomas J. Campbell, Esq., Assistant Attorney General, Public Assistance Section, N.C. Department of Justice, P.O. Box 629, Raleigh, N.C. 27602-0629

## ISSUES

1. Whether Petitioner made materially false or misleading statements in its attestation and enrollment application to Eastpointe Human Service ("Eastpointe")?

2. Whether Eastpointe erred, exceeded its authority or jurisdiction, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in terminating Petitioner's contract to provide Medicaid services in Eastpointe's catchment area?

3. Whether Petitioner is entitled to reasonable attorney's fees pursuant to N.C.G.S. § 150B-33(b)(11)?

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

| | | |
|---|---|---|
| Exhibit 1 | July 26, 2012 | ECBH letter to K. Britton |
| Exhibit 2 | August 2, 2012 | ECBH letter to K. Britton |
| Exhibit 3 | August 16, 2012 | NeoGenesis letter to ECBH |
| Exhibit 4 | September 11, 2012 | ECBH's Reconsideration Decision |
| Exhibit 6 | October 11, 2012 | ECBH letter to NeoGenesis |
| Exhibit 7 | November 2, 2012 | ECBH's Reconsideration Decision |
| Exhibit 8 | September 18, 2012 | Eastpointe Provider Enrollment Application |
| Exhibit 9 | May 30, 2013 | Eastpointe's termination letter to NeoGenesis |

For Respondent Eastpointe:

| | | |
|---|---|---|
| Exhibit 1 | December 3, 2012 | Eastpointe Procurement Contract for Provision of Services-Agency |
| Exhibit 2 | January 1, 2013 | Eastpointe Provider Operations Manual |

**WITNESSES**

For Petitioner: Kendrick Britton, Clinical Director and Owner of NeoGenesis, LLC

For Respondent Eastpointe: Karen Salacki, Chief of External Operations for Eastpointe Human Services

## FINDINGS OF FACT

1. Petitioner is a North Carolina Limited Liability Company that provides mental health, developmental disabilities and substance abuse services to Medicaid recipients within the catchment areas of East Carolina Behavioral Health ("ECBH") and Eastpointe.

2. Respondent North Carolina Department of Health and Human Services, Division of Medical Assistance ("DHHS") is the agency responsible for operating the State's Medicaid Plan under N.C.G.S. § 180A-54. Respondent Eastpointe is a managed care organization ("MCO") that manages, coordinates, facilitates and monitors the provision of state and federal Medicaid-funded mental health, intellectual, and developmental disabilities and substance abuse services for members in the Eastpointe catchment area. Residents of Bladen, Columbus, Duplin, Edgecombe, Greene, Lenoir, Nash, Robeson, Sampson, Scotland, Wayne, and Wilson are eligible members for the Eastpointe MCO. (Resp. Ex. 2, p. 8)

3. DHHS delegates responsibilities to manage the 1915(b) & (c) Medicaid Waiver to local management entities/managed care organizations such as ECBH and Eastpointe.

4. By letter dated July 26, 2012, ECBH notified Petitioner that it was out of compliance with sixteen requirements of its contract with ECBH, and therefore, was terminating its contract with Petitioner effective August 25, 2012. (P. Ex. 1).

5. In the July 26, 2012 letter, ECBH further notified Petitioner that it was: (i) "responsible for the transition of all consumers currently enrolled and being served" "prior to August 25, 2012," and (ii) not allowed to admit any new consumers for service during the transition period. (P. Ex. 1).

6. By letter dated August 2, 2012, ECBH reiterated its termination of Petitioner's contract effective August 25, 2012. (P. Ex. 2). On September 11, 2012, and November 2, 2012, ECBH upheld its decision to terminate Petitioner's contract through First Level and Second Level Peer Review Panels. (P. Ex. 4 & 7).

7. Although Petitioner disagreed with ECBH's termination of its contract, Petitioner transitioned its consumers in accordance with ECBH's termination directive. (T. p. 41, 61, 64).

8. Due to ECBH's termination of its contracts with Petitioner, Petitioner's consumers decreased, and Petitioner's business was negatively impacted. (T. p. 75). Eastpointe did not cause this. (T. p. 75).

9. On September 18, 2012, Petitioner submitted an application ("Eastpointe Provider Enrollment Application") to become a member of Eastpointe's Provider Network. (P. Ex. 8)

10. As part of the application process, Petitioner executed an Authorization to File Enrollment Application which read as follows:

To the best of my knowledge, my Agency is able to meet all requirements necessary to apply for Eastpointe Enrollment. I am submitting the attached Eastpointe Provider Enrollment Application, which, to my knowledge, is a true and complete representation of the requested materials.

(P. Ex. 8) (T. p. 68).

11. Question Twelve (12) of that Application stated:

> Have you ever had a contract cancelled by another LME/Area Authority/County Program in North Carolina or similar entity in another state?[;] If yes, attach explanation.

Petitioner responded "No" to that question without any explanation of its answer. (P. Ex. 8) (T. pp. 70-71)

12. Before completing the Eastpointe Provider Enrollment Application, Petitioner retained a consulting firm to review question no. 12, because of its significance. (T. p. 86, 88-89, 101-102). Kendrick Britton, the owner of Petitioner, asked the consulting group how should they answer question number 12 on Eastpointe's application since Petitioner had appealed ECBH's termination of its contract with Petitioner.

13. The consulting group advised Petitioner that termination is not final till the appeal is over, and that Petitioner wasn't making a false statement when it answered "no" to question number 12.

14. Petitioner never contacted Eastpointe to seek clarification or guidance regarding Question No. 12. (T. p. 86).

15. Petitioner also executed and submitted an Attestation Statement, dated September 27, 2012, as part of its application that read:

> All information submitted by [Petitioner] in this application, as well as any attachments, or supplemental information, is true, current, and complete to my best knowledge and belief as of the date of the signature below. I fully understand that any significant misstatement in this application may constitute cause for denial or termination of a resulting participation agreement.

(P. Ex. 8) (T. p. 69).

16. The Attestation Statement on the Eastpointe application further provided: "I further agree to notify Eastpointe in a timely manner (not to exceed 30 days) of any changes to the information requested on the initial application." (P. Ex. 8).

17. On November 28, 2012, Petitioner signed a Procurement Contract for Provision of [Medicaid] Services (the "Contract") with Eastpointe in Eastpointe's catchment area. (R. Ex. 1).

18. Based on the representations made by Petitioner in its application, Eastpointe entered into the Contract with Petitioner. The effective date of the Contract was January 1, 2013 through June 2014. (R. Ex. 1). (T. p. 114, 152).

19. Article II, Section 4 of the Contract provided:

> [Neogenesis] must report to EASTPOINTE any sanctions under the Medicare or Medicaid programs, including paybacks, lawsuits, insurance claims, or payouts, as well as adverse actions by regulatory agencies within the previous five (5) years. This information must be disclosed to EASTPOINTE at the time of Contract signature.

(R. Ex. 1).

20. Petitioner contractually agreed that Eastpointe could terminate its contract for any significant misstatement. (T. p. 112-113).

21. Petitioner had an affirmative duty to disclose information so that Eastpointe could ensure that Petitioner was an eligible and compliant provider able to participate in the Medicaid program. (T. p. 111-112, 126).

22. Eastpointe first became aware of ECBH's termination of Petitioner's contract in May 2013. (T. p. 122).

23. A subsequent review of Petitioner's application revealed that Petitioner provided materially false and misleading information to Eastpointe concerning Petitioner's prior contract termination by ECBH. (T. p. 123)

24. Petitioner did not notify Eastpointe that ECBH terminated Petitioner's contract effective August 25, 2012. Petitioner provided false and misleading representations to questions 6, 9, 12, and 17 of the Eastpointe Provider Enrollment Application. (T. p. 111, 123-124)

25. After careful consideration of Petitioner's false and misleading representations on the Eastpointe Provider Enrollment Application, Eastpointe terminated Petitioner's contract, effective June 30, 2013, by issuing Petitioner a Notice of Termination letter dated May 30, 2013. (T. p. 130).

26. Petitioner had "twenty (20) calendar days" to submit a written request for appeal and all supporting documentation to "Eastpointe Grievance and Appeals Department." (P. Ex. 9) (R. Ex 2).

27. Petitioner did not appeal that termination to Eastpointe's Grievance and Appeals Department. (T. p. 73).

28. On June 24, 2013, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings ("OAH") claiming that DHHS, through its agents ECBH and Eastpointe, improperly terminated Petitioner's contracts to provide Medicaid services within their respective catchment areas.

29. By *ex parte* Order dated July 30, 2013, the undersigned granted Petitioner's Motion for Temporary Restraining Order ("TRO") under Rule 65 of the North Carolina Rules of Civil Procedure.

30. As a condition of the TRO, Petitioner was required to pay a $10,000 bond on or before August 2, 2013.

31. By Order dated July 31, 2013, the undersigned entered a Final Decision, Order of Dismissal, dismissing this "contested case petition, *with prejudice*, against Respondent ECBH . . . regarding the claims involving ECBH's termination of Petitioner's Medicaid contracts."

32. On August 7, 2013, the undersigned heard Petitioner's Motion for Preliminary Injunction, took the Motion for Preliminary Injunction under advisement, and extended the July 30, 2013 TRO still subject to the requirement of a $10,000 bond.

33. By ex mero motu Order dated August 14, 2013, the Court further extended the July 30th TRO until September 13, 2013.

34. On August 19, 2013, Eastpointe filed an Objection and Motion to Vacate the Temporary Restraining Order.

35. On or about August 21, 2013, Petitioner paid the bond to secure the July 30, 2013 TRO.

36. On August 23, 2014, Petitioner filed a Verified Motion to Show Cause for Civil Contempt, Motion for Enforcement of Temporary Restraining Order, and a Motion for Attorney's Fees.

37. By Order dated August 29, 2013, the undersigned denied both Eastpointe's Motion to Vacate the Temporary Restraining Order, and Petitioner's Motion for Show Cause for Civil Contempt, Motion for Enforcement of Temporary Restraining Order, and Motion for Attorney's Fees. Further, the Court granted Petitioner's Preliminary Injunction effective August 29, 2013.

38. At all times relevant, Eastpointe provided Petitioner a Calcium Calendar that allowed Petitioner to schedule appointments with consumers screened through Eastpointe.

39. Petitioner was responsible for setting up slots on the Calcium Calendar as only the provider can set up slots on that calendar. (T. p. 80, 134, 137, 138, 140).

40. In January 2014, Petitioner had four slots open on the Calcium Calendar; three of the slots were filled. Petitioner did not have any slots set up for February, March, or April 2014. (T. p. 139).

41. Before July 30, 2013, Petitioner had four consumers. By April 2014, Petitioner had nine consumers. (T. p. 76).

42. The majority of Petitioner's consumers were primarily walk-ins and not referrals from Eastpointe. (T. p. 78).

43. Eastpointe never refused services or referrals to Petitioner. Eastpointe paid Petitioner every time it submitted invoices for payment for services rendered. (T. p.82, 102).

44. Eastpointe never refused to comply with the Court's injunction nor did it treat Petitioner differently from other providers in its catchment area. (T. p. 140).

45. Petitioner has neither presented any evidence of any action taken by DHHS against Petitioner, nor has it requested any relief from DHHS in this case.

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have been given proper notice of the hearing.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

3. N.C. Gen. Stat. §108C-12 requires this tribunal to issue a final agency decision within 180 days of the date of filing of the contested case petition. "The time to make a final decision shall be extended in the event of delays caused or requested by the Department."

4. Because Respondent requested a continuance, and the parties jointly requested continuances in this case, the time for making the final agency decision was extended both as a result of and at the request of the Agency. Under N.C. Gen. Stat. § 108C-12, this final decision is timely.

5. Eastpointe complied with the terms of the preliminary injunction entered in this case and maintained the status quo.

6. N.C.G. S. § 108C-9(a) provides:

> Applicants who submit an initial application for enrollment in North Carolina Medicaid . . . shall be required to submit an attestation and complete trainings prior to being enrolled.

7. Pursuant to N.C.G.S. § 108C-9(d), Eastpointe can terminate or deny a provider who has made "any materially false or misleading statement in an attestation or enrollment application."

8. Petitioner had an affirmative duty to disclose the terminations by ECBH to Eastpointe at the time it submitted its application, and it did not. The fact that ECBH's termination was on appeal had no effect on the effective date of ECBH's termination of its contract with Petitioner. That is, ECBH's contract with Petitioner terminated on the effective date of termination, regardless whether Petitioner appealed that termination or not. Not disclosing the termination hindered Eastpointe's ability to fully investigate Petitioner's application.

9. Petitioner provided materially false and misleading representations in its Eastpointe Provider Enrollment Application, which are grounds for Eastpointe terminating Petitioner's Contract.

10. Eastpointe did not substantially prejudice the rights of Petitioner or act arbitrarily or capriciously in terminating Petitioner's Contract. Thus, Petitioner is not entitled to reasonable attorney's fees against Respondents pursuant N.C.G.S. § 150B-33(b)(11).

11. Based on the preponderance of the evidence, Respondents have met their burden of proof that they did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse their discretion when Eastpointe terminated Petitioner's contract for providing false and misleading information in its application to Eastpointe.

12. Petitioner failed to show that Respondents (1) deprived Petitioner of property, (2) otherwise substantially prejudiced Petitioner's rights, (3) exceeded its authority or jurisdiction, (4) acted erroneously, (5) failed to use proper procedure, (6) acted arbitrarily or capriciously; or (7) failed to act as required by law or rule. N.C.G.S. § 150B-23(a).

**FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent Eastpointe's termination of its contract with Petitioner. The preliminary injunction is hereby dissolved, and Petitioner's pretrial Motion for Attorney's Fees is **DENIED.**

**NOTICE**

Under the provisions of N.C. Gen. Stat. §150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with 26 N.C. Admin. Code 03.012, and the Rule of Civil Procedure, N.C. Gen. Stat. §1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearing at the time the appeal is initiated in order to ensure the timely filing of the record.

This 9th day of June, 2014.

Melissa Owens Lassiter
Administrative Law Judge

| | |
|---|---|
| STATE OF NORTH CAROLINA<br><br>COUNTY OF MECKLENBURG | IN THE OFFICE OF ADMINISTRATIVE HEARINGS<br>13 DHR 19690 |
| UNITED HOME CARE, INC., d/b/a UNITED HOME HEALTH, INC. d/b/a UNITED HOME HEALTH<br>Petitioner,<br><br>vs.<br><br>N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,<br>Respondent,<br><br>and<br><br>MAXIM HEALTHCARE SERVICES, INC.,<br>Respondent-Intervenor | **FINAL DECISION** |

This matter came for hearing before the Honorable Donald W. Overby, Administrative Law Judge, on November 5-8, 2013, November 12-15, 2013 at the Office of Administrative Hearings ("OAH") in Raleigh, North Carolina and on January 27-28, 2014 and February 3-4, 2014 at the North Carolina State Bar in Raleigh, North Carolina.

Having heard all the evidence presented in the contested case hearing, considered the testimony, admitted exhibits, the arguments of the parties, and the relevant law, the Undersigned finds by the greater weight of the evidence the following Findings of Fact and makes the following Conclusions of Law based upon those facts, and issues this Final Decision. N.C. Gen. Stat. § 150B-34.

## APPEARANCES

For Petitioner United Home Care, Inc. d/b/a UniHealth Home Health, Inc. d/b/a UniHealth Home Health ("United"):

Noah H. Huffstetler, III
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, North Carolina 27612

Denise M. Gunter
Nelson Mullins Riley & Scarborough LLP
The Knollwood, Suite 530
380 Knollwood Street
Winston-Salem, North Carolina 27103

For Respondent North Carolina Department of Health and Human Services (the "Department"), Division of Health Service Regulation (the "Division"), Certificate of Need Section (the "CON Section" or the "Agency"):

Joel L. Johnson
Bethany A. Burgon
Assistant Attorneys General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

For Respondent-Intervenor Maxim Healthcare Services, Inc. ("Maxim"):

Renee J. Montgomery
Robert A. Leandro
Parker Poe Adams & Bernstein LLP
Post Office Box 389
Raleigh, North Carolina 27602-0389

## ISSUES PRESENTED

Whether the Agency: (1) substantially prejudiced United's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in denying the United certificate of need ("CON") application to develop a Medicare-certified home health agency ("HHA") in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10011-12; and (2) substantially prejudiced United's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in approving the Maxim CON application to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10003-12.

## APPLICABLE LAW

1. The procedural law applicable to this contested case hearing is the North Carolina Administrative Procedure Act ("APA"), N.C. General Statutes § 150B-1 *et seq.*, to the extent not inconsistent with the CON Law, N.C. Gen. Stat. § 131E-175 *et seq.*

2. The substantive law applicable to this contested case is the North Carolina CON Law, N.C. Gen. Stat. § 131E-175 *et seq*.

3. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10A N.C.A.C. 14C.2002 *et seq*. and the Office of Administrative Hearing Rules, 26 N.C.A.C. 3.0101 *et seq*.

**STIPULATED FACTS**

In the Prehearing Order, the parties agreed and stipulated to the following undisputed facts:

1. On July 16, 2012, United filed a CON application with the Agency proposing to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10011-12 (the "United Application").

2. On July 16, 2012, Maxim filed a CON application with the Agency proposing to develop a Medicare-certified HHA in Mecklenburg County, North Carolina, identified as Project I.D. No. F-10003-12 (the "Maxim Application").

3. By decision letters dated December 27, 2012 and findings also dated December 27, 2012, the Agency which approved the Maxim Application and denied the United Application.

4. On January 28, 2013, United filed a petition for contested case hearing with the Office of Administrative Hearings ("OAH"), 13 DHR 02567, appealing the Agency's denial of the United Application and the approval of the Maxim Application.

5. By Consent Order and Voluntary Dismissal Without Prejudice filed May 7, 2013 in contested case 13 DHR 02567, Chief Administrative Law Judge Julian Mann, III, with the consent of all Parties, dismissed contested case 13 DHR 02567 without prejudice pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure.

6. Pursuant to the Consent Order and Voluntary Dismissal Without Prejudice, United re-filed its petition for contested case hearing on May 31, 2013, designated File No. 13 DHR 13166, appealing the Agency's denial of the United Application, and the approval of the Maxim Application.

7. By Consent Order and Voluntary Dismissal Without Prejudice filed December 2, 2013 in contested case 13 DHR 13166, Administrative Law Judge Donald W. Overby, with the consent of all Parties, dismissed contested case 13 DHR 13166 without prejudice pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure.

8. Pursuant to the Consent Order and Voluntary Dismissal Without Prejudice, United re-filed its petition for contested case hearing on December 2, 2013, designated as File

No. 13 DHR 19690, appealing the Agency's denial of the United Application, and the approval of the Maxim Application.

## PROCEDURAL HISTORY

No party objected to designation of the Administrative Law Judge, notice of hearing, or the dates and location of hearing. On October 24, 2013, Maxim filed a Motion for Summary Judgment against United asserting the United Application could not be approved as a matter of law because the United Application failed to include UHS-Pruitt Corporation ("UHS-Pruitt") as an applicant.

Following a hearing on November 4, 2013, the Undersigned denied Maxim's motion on November 5, 2013 based upon the existence of a genuine issue of material fact. The decision on Maxim's motion for summary judgment was delivered in open court and is not otherwise contained in this Final Decision.

## BURDEN OF PROOF

With regard to whether the Agency erred by approving the Maxim Application and by not approving the United Application, United bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced it rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule when the Agency disapproved the United Application and approved the Maxim Application. N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 455 S.E.2d 455, 459 (1995), *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

On the specific issue of whether UHS-Pruitt should have been named as an applicant, Maxim bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced it rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in not requiring UHS-Pruitt to be an applicant on the United Application. N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455, 459 (1995), *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

## WITNESSES

**Witnesses for United:**

1. Janet Proctor. Ms. Proctor is the administrator of the United HHA in Wake County, North Carolina. Proctor, Vol. 1, p. 41. Ms. Proctor as been employed with United since November 2011. Proctor, Vol. 1, p. 47. Ms. Proctor is a licensed registered nurse in North Carolina. Proctor, Vol. 1, p. 52. Ms. Proctor was qualified as an expert in staffing for Medicare-certified home health agencies. Proctor, Vol. 1, p. 61.

2. Craig R. Smith (adverse). Mr. Smith serves as the Chief of the CON Section. Smith, Vol. 1, p. 165. Mr. Smith held the position of project analyst from June 1988 through August 1994. Smith, Vol. 1, pp. 165-166. Mr. Smith held the position of Assistant Chief from

1994 through November, 2009. Smith, Vol. 1, p. 166. Mr. Smith had a limited role in the decision with the Project Analyst, Mr. Michael McKillip and the Assistant Chief Martha J. Frisone, in approving the Maxim Application and denying the United Application. Smith, Vol. 1, p. 167.

3. Martha J. Frisone (adverse). Ms. Frisone serves as the Assistant Chief of the CON Section. Frisone, Vol. 2, p. 318. She has held that position since March 2010. *Id.* Ms. Frisone is currently the Interim Chief of the CON Section. Frisone, Vol. 12, p. 2009. Ms. Frisone has been employed at the CON Section for 19 years. Frisone, Vol. 3, p. 430. Ms. Frisone was assigned to the Mecklenburg home health review as co-signer with Project Analyst, Mr. Michael McKillip. Smith, Vol. 2, p. 246.

4. Michael J. McKillip (adverse). Mr. McKillip was the Project Analyst who conducted the review of the United Application and the Maxim Application. McKillip, Vol. 3, p. 493. Mr. McKillip reviewed the United Application and the Maxim Application in their entirety. McKillip, Vol. 3, p. 494. Mr. McKillip has been employed as a Project Analyst at the CON Section for 13 years. McKillip, Vol. 3, p. 491.

5. Teresa Hancock (adverse). Ms. Hancock is the Director of Clinical Services for Maxim in its Charlotte home care agency. Hancock, Vol. 3, p. 386. Ms. Hancock has been employed at Maxim for 5 years. *Id.* Ms. Hancock is a registered nurse in North Carolina. Hancock, Vol. 3, p. 387. Ms. Hancock participated in obtaining letters of support for the Maxim Application. Hancock, Vol. 3, p. 391.

6. Rita Southworth. Ms. Southworth is the Vice President of Home Care for UHS-Pruitt Corporation. Southworth, Vol. 5, p. 770. She has held this position since May 2012. Southworth, Vol. 5, p. 783. Ms. Southworth is a registered nurse. Southworth, Vol. 5, p. 771. Ms. Southworth was qualified as an expert in staffing for Medicare-certified home health agencies. Southworth, Vol. 5, p. 792.

7. Robert (Trey) Stark Adams, III. Mr. Adams is currently employed with The Lundy Group in Raleigh, North Carolina. Adams, Vol. 5, p. 927. Mr. Adams was previously employed with PDA, Inc., a consulting firm specializing in the healthcare industry. Adams, Vol. 5, p. 929. While employed with PDA, Inc., Mr. Adams prepared the United Application. Adams, Vol. 5, pp. 932; 942-43. Mr. Adams has prepared approximately 30 CON applications. Adams, Vol. 5, p. 931. Mr. Adams was qualified as an expert in CON preparation and health planning and analysis. Adams, Vol. 5, p. 946.

8. Aneel S. Gill. Mr. Gill is the Manager of Health and Financial Planning with UHS-Pruitt Corporation. Gill, Vol. 6, p. 1066. Mr. Gill served as liaison between PDA, Inc. and UHS-Pruitt in the preparation of the United Application. Gill, Vol. 6, p. 1079. Mr. Gill also assisted in the drafting of the United Application. *Id.* Mr. Gill has participated in the preparation of approximately 13 CON applications. Gill, Vol. 6, pp. 1070; 1075. Mr. Gill was qualified as an expert in CON preparation and health planning and analysis. Gill, Vol. 6, p. 1089.

9. Tara R. Larson. Ms. Larson is a Senior Healthcare Policy Specialist with Cansler Collaborative Resources, Inc. Larson, Vol. 8, p. 1366. From May 2008 to February 2013, Ms. Larson was the Senior Deputy Director (Chief Clinical Operating Officer) with the North Carolina Department of Health and Human Services, Division of Medical Assistance. United Ex. 136. Ms. Larson was qualified as expert in North Carolina Medicaid operations, the organization of the North Carolina Department of Health and Human Services and its divisions and offices, healthcare fraud, misuse and abuse and the impact that healthcare fraud, misuse and abuse has on the Medicaid program and Medicaid recipients. Larson, Vol. 8, p. 1374.

**Witnesses for Maxim:**

1. Karin Sandlin. Ms. Sandlin is a partner with Keystone Planning Group. Sandlin, Vol. 9, p. 1508. She has held this position for almost 9 years. *Id.* Ms. Sandlin has been involved in the preparation of approximately 160 CON applications. Sandlin, Vol. 9, p. 1510. Ms. Sandlin has been involved in the preparation of 7 CON applications for Medicare-certified home health agencies. Sandlin, Vol. 9, p. 1511. Ms. Sandlin was qualified as an expert in CON preparation and analysis and health planning. Sandlin, Vol. 9, p. 1513. Ms. Sandlin was responsible for preparing Sections I through V of the Maxim Application. Sandlin, Vol. 9, p. 1516.

2 David Meyer. Mr. Meyer is the senior partner with Keystone Planning Group, and has been with Keystone Planning Group since 2005. Meyer, Vol. 9, p. 1597. Mr. Meyer has been involved in the preparation of approximately 220 CON applications. Meyer, Vol. 9, p. 1599. Mr. Meyer was qualified as an expert in CON preparation and analysis and health planning. Meyer, Vol. 9, p. 1600. Mr. Meyer was responsible for preparing Sections VI through XII, and the pro forma projections of revenue and expenses ("pro formas") in the Maxim Application. Meyer, Vol. 9, p. 1603.

3. Michael James Raney. Mr. Raney is the Vice President of Operations for the southeastern region for Maxim. Raney, Vol. 11, p. 1881. Mr. Raney has been employed with Maxim for approximately 15 years. Raney, Vol. 11, p. 1880. Mr. Raney was the chief contact person and liaison between the Maxim Mecklenburg County branch office, Maxim headquarters and the consultants in the preparation of the Maxim Application. Raney, Vol. 11, p. 1893.

**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 each witness by taking into account the appropriate factors for judging the credibility, including but not limited to, the demeanor of the witness, 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 all other believable evidence in the case.

**FINDINGS OF FACT**

1. Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the "CON Section" or "Agency") is the agency of the State of North Carolina that administers the Certificate of Need Law (the "CON Law"), codified at Article 9 of Chapter 131E of the North Carolina General Statutes.

2. The CON Section is the agency within the Department that carries out the Department's responsibility to review and approve the development of new institutional health services under the CON Law. The CON Law establishes a regulatory framework under which proposals to develop new health care facilities or services or purchase certain regulated equipment must be reviewed and approved by the Agency prior to development. The CON Law has multiple purposes, including providing access to services and ensuring quality. *See* N.C. Gen. Stat. § 131E-175.

3. Petitioner United is a Georgia corporation authorized to do business in the State of North Carolina.

4. Respondent-Intervenor Maxim is a Maryland corporation authorized to do business in the State of North Carolina.

5. The 2012 State Medical Facilities Plan ("SMFP") declared a need for two Medicare-certified home-health agencies (HHAs) in Mecklenburg County. (Jt. Ex. 1, p. 2029). Ten applicants applied, including United and Maxim. *Id.* Because the need determination in the SMFP acts as a determinative limitation on the number of CONs that could be awarded in the 2012 Mecklenburg County home health review, the Agency could award a maximum of two CONs. (*Id.*; N.C. Gen. Stat. § 131E-183(a)(1)).

6. The Agency reviewed the ten applications competitively which meant that the approval of any two applications would result in the denial of the remaining eight applications. The Agency awarded the two CONs to Carolinas Medical Center @ Home, LLC and The Charlotte-Mecklenburg Hospital Authority (collectively, "Carolinas") and Maxim. (Jt. Ex. 1, p. 2171).

7. As provided under the CON review process, the applicants, including United and Maxim, filed written comments and exhibits concerning the proposals submitted by other applicants. (N.C.G.S. § 131E-185(a1); Jt. Ex. 1, pp. 100-978). The CON Section also held a public hearing in Mecklenburg County as required under the CON law. (*Id.* at pp. 981-82).

8. Both United and Maxim made presentations at the public hearing and submitted responses to the written comments. (Jt. Ex. 1, pp. 981-89; 1075-87; 1267-78; 1279-1303).

9. On or around December 27, 2012, the CON Section notified the applicants of its decision to approve the applications of Maxim and Carolinas. The applications submitted by United and the other seven applicants were not approved. (Jt. Ex. 1, pp. 2028-2171).

10. The CON Section found the applications of both Maxim and United conforming with all the statutory and regulatory criteria. (Jt. Ex. 1, pp. 2028-2159) (hereinafter "Maxim Application" and "United Application"). Maxim was approved instead of United because Maxim was determined to be comparatively superior to United based upon the Agency's comparative analysis. (*Id.* at pp. 2168, 2170).

11. Respondent Agency and Respondent-Intervenor Maxim presented testimony and other evidence that the Agency did not violate any of the standards of N.C. Gen. Stat. § 150B-23(a) by approving Maxim's Application and denying United's Application.

12. Maxim presented evidence that United's application was fatally flawed because United failed to name UHS-Pruitt as an applicant. Maxim contends that because UHS-Pruitt proposed to be involved in developing and offering the services described in the United Application, UHS-Pruitt Corporation was required to be named as an applicant under the CON law.

13. The CON Section recognized Maxim's contention that UHS-Pruitt should be named as an applicant; however the CON Section does not agree that the application was fatally flawed because UHS-Pruitt was not named as an applicant.

14. United has appealed the denial of its application and the award of one of the CONs to Maxim. The award of the CON to Carolinas is not at issue in this contested case. Maxim did not appeal the Agency's decision.

**Agency Review**

15. Mr. McKillip reviewed the entirety of both the United Application and the Maxim Application, the comments in opposition and responses to comments in opposition submitted by the applicants and attended the public hearing in conducting his review and analysis in this matter. (McKillip, Vol. 3, p. 494) Mr. McKillip was responsible for drafting the Agency Findings and worked in collaboration with Ms. Frisone in finalizing the Agency Findings. (McKillip, Vol. 3, pp. 510-511)

16. Ms. Frisone, the CON Section Assistant Chief, approved and signed the Agency's decision in this review. She also reviewed the comments in opposition and response to comments from all applicants in this review. (Frisone, Vol. 2, p. 319; Vol. 3, p. 473) Ms. Frisone also consulted with Mr. McKillip during the course of the review and preparation of the Agency Findings. (Frisone, Vol. 2, p. 341)

17. Maxim did not appeal the Agency decision. Maxim did not offer evidence at trial that the United Application was non-conforming with any review criteria or administrative rules.

**United's Contentions Regarding Maxim's Past Billing Issues**

Because United contends that Maxim's past fraudulent billing relates to several statutory criteria, this issue will be addressed first.

18. United witness, Aneel Gill, a Health Planner with UHS-Pruitt Corporation at the time of the review, contends on behalf of United that the fraudulent billing by Maxim that ended in 2009 was grounds for finding the Maxim Application non-conforming with Criterion 1, 4, 5, 13(b), 18(a) and 20.

19. At the time of the review, the CON Section was aware of the past billing fraud and determined that it did not result in Maxim's Application being non-conforming with any of the review criteria. (Frisone, T. Vol. 2, pp.325-26; McKillip T. Vol. 4, pp.635-36).

20. Beginning in the spring of 2009, Maxim engaged in extensive reforms and remedial actions as a result of the disclosure of fraudulent billing practices that lead to a criminal investigation. Maxim fully cooperated with the investigation. (Maxim Ex. 324).

21. These reforms and remedial actions included terminating senior executives and other employees the company identified as responsible for the misconduct; establishing and filling the positions of Chief Executive Officer, Chief Compliance Officer, Chief Operations Officer/Chief Clinical Officer, Chief Quality Officer/Chief Medical Officer, Chief Culture Officer, Chief Financial and Strategy Officer, and Vice President of Human Resources; and hiring a new General Counsel. (Maxim Ex. 324). Maxim significantly increased the resources allocated to its compliance programs and identified and disclosed to law enforcement the misconduct of former Maxim employees. (*Id.*).

22. Because of Maxim's remedial actions, willingness to cooperate, and its identification and disclosure to law enforcement of the misconduct of former Maxim employers that assisted the Government in obtaining convictions, the Department of Justice was willing to enter into a Deferred Prosecution Agreement ("DPA") with Maxim in September 2011. (United Ex. 117, p 5).

23. The DPA required Maxim's acceptance and acknowledgement of full responsibility for the conduct that led to the government's investigation and Maxim agreed to more than fully compensate federal and state agencies, including North Carolina, for the fraud. (Maxim Ex. 324).

24. The Government's willingness to enter into a DPA instead of seeking to put Maxim out of business demonstrates that the Government wanted Maxim to remain in business and continue to provide services.

25. In the DPA, the Department of Justice acknowledged that neither the DPA nor the criminal complaint alleges that Maxim's conduct adversely affected patient health or patient care. (United Ex. 103, ¶ 2).

26. Maxim also entered a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services. (United Ex. 120).

27. The CON Section is charged with determining whether a CON applicant is conforming with relevant statutory and regulatory criteria. (Smith, Vol. 2, p. 293). It is not the role of the CON Section to punish applicants for past actions. (*Id.*). Thus the CON Section's review of the fraud that ended in 2009 was limited to determining if and how the fraud related to the statutory and regulatory review criteria. (*Id.*).

28. In making its decision, the Agency was aware of the past billing fraud, carefully considered how the past billing fraud might apply to its review of the statutory criteria, and determined that the billing fraud, which ended in 2009, was not relevant to any of the statutory and regulatory criteria it is charged with applying under the CON Statute. (McKillip, T. Vol. 4, pp. 635-36; Frisone, T. Vol. 2, pp. 324 – 26; T. Vol. 3, pp. 471 – 73, 477-78; Smith, T. Vol. 1, pp. 168, 224, 266-67, 277).

*Maxim's Past Fraud and Criterion 20*

29. United contends that Maxim's history of having been involved in the billing fraud should have been a basis for the CON Section finding Maxim's Application nonconforming with N.C. Gen. Stat. § 131E-183(a)(20) ("Criterion 20") relating to past quality of care.

30. In its competitive comments United did not contend that Maxim's past billing fraud would have any effect on the Agency's Criterion 20 analysis. (Jt. Ex. 1, pp. 887-97; Frisone, T. Vol. 3, pp. 477-78).

31. Criterion 20 states:

> *An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.*

32. The Agency considers quality history under Criterion 20 by determining if the Licensure and Certification Section, which is charged with quality of care oversight, has found that the applicant provided poor quality of care within the eighteen (18) months prior to the submission of its application. (McKillip, T. Vol. 4, pp. 716-17).

33. The Agency found that because Maxim had not experienced any adverse actions against its license for its Mecklenburg County home care agency for eighteen months preceding the date of the decision, Maxim was conforming with Criterion 20. (*Id.*, Jt. Ex. 1, p. 2145). Maxim had no penalties or licensure limitations imposed during the past eighteen (18) months on any of its North Carolina licensed home care offices. (*Id.*; Jt. Ex. 2, p. 34).

34. The eighteen month "look-back" is a standard that has been being used by the Agency for quite some time and no one seems to know exactly when it came into use. It is not a promulgated rule, but rather an arbitrary time frame that has been used for quite some time. Criterion 20 does not set any particular standard of time within which to "look-back" for prior poor quality of care, and thus it is within the discretion of the Agency to determine an

appropriate look-back period under the facts and circumstances of the particular case. This is not to say that an arbitrary eighteen months look-back period is appropriate in every case.

35. Section II of Maxim's Application further addressed quality of care by responding to the questions set forth in this section of the application form. (Jt. Ex. 2, pp. 10-39; Sandlin, T. Vol. 9, pp. 1520, 1523-28).

36. Section II.7(a) asked Maxim to describe the methods used or to be used by the applicant to ensure and maintain quality care. (Jt. Ex. 2, p. 28; Sandlin, T. Vol. 9, pp. 1527-28). Maxim responded that all of its offices, including its agency in Mecklenburg County, are accredited by the Accreditation Commission for Health Care and Maxim intends to continue that accreditation. (Jt. Ex. 2, pp. 28, 233). Maxim also described in detail all of the quality measures that would be used to ensure the proposed services maintain quality care. (Jt. Ex. 2, pp. 28-34; Sandlin, T. Vol. 9, pp. 1520, 1523–1528).

37. The Chief of the CON Section, Craig Smith, and the Assistant Chief of the CON Section, Martha Frisone, both testified that the Agency had determined that the past billing fraud was not relevant to Criterion 20 because the Agency believed the fraud relates to billing issues and not quality of care. (Smith, T. Vol. 1, p. 182; Frisone, T. Vol. 2, pp. 328, 330). The Agency's position is supported by the DPA. (United Ex. 103, ¶ 2).

38. Even if the past billing fraud were relevant to Criterion 20, in applying Criterion 20 the CON Section's practice has been to limit its review of negative quality of care events to those that occur within eighteen months of its decision. (Smith, T. Vol. 2, pp. 288-90; Frisone, T. Vol. 2, p. 328). In some circumstances, the Agency has shortened the look back period but has never extended it beyond eighteen months. (Smith, T. Vol. 2, p. 258; Frisone, T. Vol. 3, p. 463).

39. Even if the past billing fraud were relevant to Criterion 20 and even if the eighteen month look-back is an arbitrary standard and unpromulgated rule, to consider the past billing fraud in this case, the Agency would have needed to look back more than 3 years. (Smith, T. Vol. 2, p. 289). The efforts undertaken by Maxim were available to the Agency during the review period, and in light of the efforts of Maxim and the intervening amount of time, it would not have been reasonable under the facts of this case to have considered such fraud.

40. United attempted to use the Congressional testimony of Richard West to show that patient care was involved because Mr. West did not receive certain services that were billed for by Maxim. (Smith, T. Vol. 2, p. 201). However, the conduct discussed by Mr. West in his Congressional testimony occurred in New Jersey more than three years prior to the CON Section's decision. (United Ex. 126, p. 816). United's argument that Mr. West's testimony demonstrated poor quality of care under Criterion 20 is also contradicted to a degree by the Government's representation in the DPA (United Ex. 103, ¶ 2).

41. United presented no evidence that any billing fraud continued after 2009 or that there were any other negative quality of care events at Maxim's Mecklenburg County agency or at any other Maxim agency that would support a finding of nonconformity with Criterion 20.

42. United's expert witness, Tara Larson, testified that if the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), believed that Maxim's fraud had not ended 2009, it would not have signed the settlement agreement that was a part of the DPA. (Larson, T. Vol. 8, p. 1455).

43. If DMA had information of even a credible allegation of fraud by Maxim since 2009, DMA would have been required by law to immediately suspended Maxim's Medicaid payments. (Larson, T. Vol. 8, pp. 1452-54).

44. There has been no credible allegation of fraud or resulting suspension of payment action taken against Maxim. (Larson, T. Vol. 8, pp. 1452-54; Raney, T. Vol. 11, p. 1928).

45. Ms. Larson testified that after 2009, because Maxim was being monitored under the DPA, if Maxim had continued the fraud there was a high probability that such fraud would have been uncovered and Maxim would have been closed. (*Id.* at p. 1488). Maxim's witness Mike Raney confirmed that the DPA has expired without further actions being taken by the Government against Maxim. (Raney, T. Vol. 11, p. 1928).

46. In a recent audit conducted by DMA, the auditors concluded after a reconsideration review that Maxim's administrative and clinical documentation was completely error free. (Larson, T. Vol. 8, pp. 1464-69).

47. United argued at the hearing that the Agency's decision in 2012 in the *Cape Fear Valley* CON application supported its position that Maxim should have been found nonconforming with Criterion 20. Because Cape Fear Valley was under a System Improvement Agreement and Maxim remained under a Corporate Integrity Agreement at the time the decision was made by the Agency, United argued that Maxim also should have been found non-conforming with Criterion 20.

48. In the *Cape Fear Valley* decision, the Licensure Agency determined that Cape Fear Valley Hospital had provided poor patient care resulting in the death of one (1) patient. As a result of this finding, Cape Fear Valley Hospital was subject to a System Improvement Agreement. (Maxim Ex. 332, pp. 53-54; Smith, T. Vol. 2, pp. 254, 307).

49. The CON Section found that Cape Fear Valley Hospital's CON Application was nonconforming with Criterion 20 because it was found to have provided poor quality of care within eighteen months of the application decision. (Smith, T. Vol. 2, p. 253). However, in hospital CON reviews, the Agency has been willing to find a hospital conforming with Criterion 20, even if the poor quality of care occurred within the 18-month look back period, if the hospital receives a full validation survey in the intervening time period. (*Id.* at p. 255). In Cape Fear Valley's case, the hospital had not received the full validation survey with no conditions. The CON Section was therefore not willing to ignore the quality of care event that occurred within the 18-month look back period as a result. (*Id.*). Again, eighteen months is not a hard and fast rule, but under the circumstances of this case it is a reasonable time.

50. The findings in *Cape Fear Valley* are not applicable to the Maxim Application because the poor quality of care findings that led to the system improvement agreement in *Cape Fear Valley* occurred within a reasonable look back period and there was no full validation survey. (Smith, T. Vol. 2, pp. 254, 307; Maxim Ex. 332, pp. 53-54)). In Maxim's case, the past fraud occurred more than three years prior to the decision and therefore unlike *Cape Fear Valley*, fell well outside any reasonable look back period. (Smith T. Vol. 2, p. 289; Frisone, T. Vol. 2, p. 328).

51. The *Cape Fear Valley* decision is also not relevant because the events at issue in *Cape Fear Valley* directly related to poor quality of care and included a patient death. (Smith, T. Vol. 2, pp. 253, 308; Maxim Ex. 332, pp. 53-54). In Maxim's case, the issue that United contends disqualifies Maxim's Application involved billing fraud that ended in 2009 which the Agency determined was not related to its Criterion 20 analysis. The Department of Justice specifically acknowledged in its agreement with Maxim that the past fraud did not involve poor patient care (United Ex. 103, ¶ 2).

52. Based on the above, the Agency was correct to find Maxim conformed with Criterion 20. (Meyer, T. Vol. 9, pp. 1640-43; Frisone, T. Vol. 2, pp. 325-26).

*Maxim's Past Fraud and Criteria 4 and 5*

53. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") states:

> *Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.*

54. N.C.G.S. §131E-183(a)(5) ("Criterion 5") states:

> *Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.*

55. United contended that because of the fraud that ended in 2009, Maxim could not be certified to provide Medicare and Medicaid home health services or that the risk of potential exclusion from Medicare and Medicaid makes Maxim's Application nonconforming with Criteria 4 and 5. N.C. Gen. Stat. § 131E-183(a)(4) and (5). (Gill, T. Vol. 7, pp. 1161-63).

56. In its competitive comments, United only contended that the past fraud related to Criterion 5. (Jt. Ex. 1, p 892).

57. United presented no evidence that Maxim could not be certified by Medicare or Medicaid or that it has had any difficulty obtaining certification to provide services to Medicare and Medicaid beneficiaries since 2009.

58. Maxim's existing 17 offices in North Carolina have remained certified for participation in the North Carolina Medicaid program and Maxim has been re-credentialed by DMA since the past fraud case was settled. (Raney, T. Vol. 11, p. 1928).

59. Maxim has also developed new Medicare-certified home health agencies and added Medicare-certified home health services to existing agencies since 2009. Maxim has not had any problems obtaining certification for participation in Medicare and Medicaid during this time period. (*Id.* at p. 1927).

60. Regarding the "risk" of future disqualification, the Agency recognizes that there is a risk that any CON applicant may face future sanctions, including disqualification from Medicare and Medicaid. (Smith, T. Vol. 2, p. 278) The Agency does not make its decisions based upon speculation of what might or could happen to an applicant in the future. (Frisone, T. Vol. 3, p. 439).

61. Maxim's past billing fraud was not a reason for finding Maxim's Application non-conforming with Criteria 4 and 5 or any other criteria. (Meyer, T. Vol. 9, p. 1543).

*Maxim's Past Fraud and Other Criteria*

62. Mr. Gill with UHS-Pruitt Corporation also testified that there were other criteria with which Maxim's Application should have been found non-conforming based upon the past billing fraud, including Criteria 1, 13(b) and 18a. Mr. Gill stated the same reasons that he gave in connection with the criteria addressed above for his opinion regarding the criteria.

63. Maxim's Application was properly found conforming with Criteria 1, 13(b) and 18a. (Meyer, T. Vol. 9, pp. 1606-07, 1638-40; Maxim Ex. 303; Jt. Ex. 1, pp. 2130-31, 2126, 2139). Maxim's past billing fraud was not a reason for finding Maxim's Application non-conforming with these Criteria. (*Id.*; Meyer, T. Vol. 9, p. 1643).

*No Requirement for Fraud Disclosure in Maxim Application*

64. United also argued that Maxim's application should not have been approved because Maxim did not disclose its past billing fraud in its application.

65. The past billing fraud was a matter of public knowledge and the Agency was aware of the billing fraud through competitive comments, considered the issue, and determined it was not relevant to any of the statutory or regulatory criteria. (Raney, T. Vol. 11, p. 1918; Frisone ,T. Vol. 2, pp. 325-26, 363, 367-69; Smith, T. Vol. 2, pp. 283, 290).

66. There are no questions in the CON application form that address prior history of billing fraud. (Jt. Ex. 2, pp. 10-38; Sandlin, T. Vol. 9, p. 1528).

67. Maxim's Certified Financial Statement, which was included as an exhibit in Maxim's Application, provided information regarding the past billing fraud. (Jt. Ex. 2, App. Ex. 16, p. 344; Meyer T. Vol. 9, pp. 1645-46). Moreover in its Application, Maxim addressed in detail all of the compliance and quality assurance programs, policies, and procedures that have been put in place beginning in 2009. (Jt. Ex. 2, pp. 20-24, 28-34; Jt. Ex. 2, App. Ex. 11; Sandlin, T. Vol. 9, p. 1587; Raney, T. Vol. 11, pp. 1920-27). Maxim provided all the measures that it currently uses to ensure quality of care as requested in Section II.7(a) of the application form. (*Id.*).

68. United presented evidence that in subsequent applications, Maxim has provided information regarding its past billing fraud to the Agency. The decision to address the past billing fraud in Maxim's subsequent applications was a strategic decision made by Maxim to discourage competitor comments on the subject, not because it was error to exclude such information. (Sandlin, T. Vol. 9, p. 1588; Raney, T. Vol. 11, p. 1918; Meyer, T. Vol. 9, p. 1645).

69. Although perhaps prudent in order to not have to continually explain in forums such as OAH, it was not required for Maxim to discuss its past billing fraud or the agreements that resulted from it in Maxim's CON Application. (McKillip, T. Vol. 3, pp. 505-07; Frisone, T. Vol. 2, p. 360; Smith, T. Vol. 2, pp. 250–51, 273; Meyer, T. Vol. 9, p. 1645).

70. United failed to demonstrate by a preponderance of the evidence that the Agency erred or violated any of the other standards of N.C. Gen. Stat. §150B-23(a) in its consideration of Maxim's past billing fraud.

**Criterion 3**

71. N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") provides:

> *The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.*

72. The CON Section determined that Maxim's Application conformed with the requirements of Criterion 3. (Jt. Ex. 1, p. 2044).

73. Aneel Gill testified that the Maxim Application should have been found nonconforming with Criterion 3 because he believes that Maxim's ramp-up projections were too aggressive and the anecdotal information provided in Maxim's application regarding estimated referrals should have been more specifically documented. (Gill, T. Vol. 6, p. 1135). Mr. Gill also found Maxim's projected market share to be unreasonable. (*Id.* at p. 1146).

74. Maxim proposed serving 426 patients in Year 1 and 503 patients in Year 2 of the project. This would result in a market share of Mecklenburg County patients of 2.3% in Year 1 and 2.6% in Year 2. (Jt. Ex. 2, pp. 51, 67 and 68; Sandlin, T. Vol. 9, p. 1537).

75. There are 10 Medicare-certified home health agencies currently located in Mecklenburg County and the average Mecklenburg County home health market share for those agencies is 9.6%. (Jt. Ex. 2, p. 52). Maxim proposed that in Year 2, its market share would be well below the average market share of other existing home health agencies in Mecklenburg County. (*Id.*; Sandlin, T. Vol. 9, p. 1537).

76. Maxim's projected Year 2 market share was also more conservative than United's projected market share. United proposed serving 548 patients in Year 2 of its project as compared to 503 patients projected by Maxim, making its Year 2 market share projection higher than Maxim's (Jt. Ex. 3, p. 159; Sandlin, T. Vol. 9, pp. 1593 – 94).

77. United proposed that its initial admissions or "ramp up" would be slower than Maxim's in Year 1 of the project. (Jt. Ex. 3, p. 156). However, Maxim's ramp up projections are not unreasonable, particularly considering that Maxim has operated in Mecklenburg County for almost 20 years and has an established referral base. (Sandlin, T. Vol. 9, pp. 1522,1529, 1535-36). United's expert, Aneel Gill, admitted that in considering whether an applicant's proposed ramp up is reasonable, every circumstance is different. (Gill, T. Vol. 7, p. 1250-51).

78. Maxim's patient projections, including ramp up, are very similar to the projections included in United's 2010 application for Wake County. (McKillip, T. Vol. 4, p. 680; Gill, T. Vol. 7, p. 1254; Sandlin, T. Vol. 9, p. 1536; Maxim Ex. 301, Attachment 1). Mr. Gill's testimony that Maxim's projected market share of 2.3% in Mecklenburg County was not reasonable is contradicted by United's projections in its winning 2010 Wake County application. In comparing Maxim's projections in its Mecklenburg County Application to United's projections in its Wake County Application, both projected the same market share of 2.3% in Year 1 with a similar number of agencies already serving each county. (Jt. Ex. 2, p. 51; Sandlin, T. Vol. 9, p. 1535-38; Maxim Ex. 301, Attachment 1; McKillip, T. Vol. 4, p. 680).

79. United also contended that Maxim should have been found nonconforming with Criterion 3 because of anecdotal referral information included in its application.

80. Maxim's Application estimates that out of its 125+ patients (served by its Charlotte office), it would be able to provide at least 31 of these patients with additional therapy via Medicare certification. Additionally, Maxim stated that it currently refers approximately 100 patients to other Medicare-certified home health agencies each year because its lack of Medicare certification prevents Maxim from providing needed services. (Jt. Ex. 2, p. 50; Sandlin, T. Vol. 9, p. 1540).

81. Maxim offered that the estimates were compiled by an employee in Maxim's home care office, Nikky Littlejohn, who reviewed patient medical records and intake with the recruiters. (Hancock, T. Vol. 3, pp. 398-99; Raney, T. Vol. 11, p. 1963). An e-mail between Nikky Littlejohn and Mike Raney confirms Ms. Littlejohn's involvement. (Jt. Ex. 2, p. p. 321).

82. Maxim's need and patient projections are not based upon the anecdotal information. The application clearly states that the anecdotal information was not used to project the specific patient projections for the proposed project. (Jt. Ex. 2, p. 50). Maxim's anecdotal estimates were not required as a part of Maxim's patient projections and were provided only as additional support for Maxim's project. (Jt. Ex. 2, p. 50; Sandlin, T. Vol. 9, pp. 1540, 1591–93).

83. United's contention that Maxim's Application was deficient for failing to provide documentation with its application supporting these estimates has no merit. As the project analyst McKillip testified, he did not expect that Maxim would provide such documents with its Application. (McKillip, T. Vol. 4, p. 683). Likewise, there also were statements in United's Application that were not supported by documentation. (*Id.* at p. 684).

84. The CON Statute and the CON Home Health Application Form do not require that applicants provide documentation to support every statement or representation made by the applicant. (McKillip, T. Vol. 4, p. 683). Some assertions in the applications are accepted on faith and that the applicant is being truthful. It would be an overwhelming task to put to test every single statement within an application; and thus, a test of reasonableness must be applied to the applications in determining upon which statements may be relied. The public comment and written responses are excellent sources of information pointing the reviewer to areas of concern that might warrant further scrutiny.

85. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Sat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 3.

**Criterion 5**

86. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") provides:

> *Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.*

87. The CON Section determined that Maxim's Application conformed with the requirements of Criterion 5. (Jt. Ex. 1, p. 2080).

88. United contends that Maxim overstated its Medicaid and Medicare revenues in its application and therefore should have been found nonconforming with Criterion 5.

89. United set forth this contention in its competitive comments. Prior to making its decision to approve Maxim's Application, the Agency reviewed all the competitive comments. (McKillip, T. Vol. 3, p. 494; Frisone, T. Vol. 12, p. 2027).

90. Ms. Frisone reviewed and considered United's comments on the issue of whether Maxim overstated its Medicare and Medicaid revenue but concluded that the comments did not justify finding Maxim's Application nonconforming with Criterion 5. (Frisone, T. Vol. 12, p. 2027).

91. In determining the financial feasibility of a proposal, the CON Section determines whether net revenue is projected to exceed the total operating costs by Project Year 2. (Jt. Ex. 1, p. 2079; Meyer, T. Vol. 9, pp. 1616-17). Thus the applicable analysis is whether Maxim reasonably projected that its proposed agency would be profitable in Year 2 of the project. (*Id.*).

92. Maxim's expert witness David Meyer testified that due to an error in selecting the proper cell in the spreadsheet, he had mistakenly used "visits" instead of "episodes" to calculate revenues for the projected patients that would be Low Utilization Payment Adjustment (LUPA) and Partial Episode Payment (PEP). (Meyer, T. Vol. 9, pp. 1616-17).

93. If Mr. Meyer had used episodes instead of visits in projecting Medicare revenues for LUPA and PEP, Medicare revenues would have been approximately $90,000.00 less than projected by Maxim in Year 2. (Meyer, T. Vol. 9, pp. 1618, 1666). With this adjustment, Maxim still would have shown a profit in Year 2, so this error made no material difference in Maxim's conformity with Criterion 5. (Meyer, T. Vol. 9, pp. 1616-18; T. Vol. 11, pp. 1864-65).

94. Mr. Gill contends that Maxim's Medicare revenue was over budgeted by $163,348.00 (Combining Years 1 and 2) and that Medicaid revenue was over budgeted by $24,007.00. (Gill, T. Vol. 7, p. 1178). Maxim's CON Application projects a net profit in Year 2 that exceeds the amount that Mr. Gill contends was overstated for Medicare and Medicaid revenue in Years 1 and 2 combined. (Jt. Ex. 2, p. 130). Neither Mr. Gill nor any other United witness contended that as a result of the calculation error, Maxim's proposed project would not be profitable in Year 2.

95. Mr. Gill's opinion regarding Maxim's Medicaid revenue was not correct and was based on an erroneous understanding of Maxim's Pro Forma. In Maxim's Application, some of the Medicaid revenue shown on Maxim's pro forma was reduced by its charity care deductions, which resulted in the Medicaid revenue projected in Maxim's Application. (Meyer, T. Vol. 9, pp. 1615-17, 1663-64).

96. Three comparative factors in the comparative analysis relied upon revenues as part of the calculation. Maxim's overstatements of its net revenues placed Maxim in a less favorable position regarding these comparative criteria. (Meyer, T. Vol. 9, pp. 1617-18; Meyer, T. Vol. 11, pp. 1865-67). Consequently, this error was not material to the Agency's determination that Maxim's application was comparative superior to United's application. (*Id.*).

97. It is not uncommon for CON applicants to make errors in their applications. (Meyer, T. Vol. 11, p. 1873). Mr. Meyer pointed out several examples of applicant errors that were determined by the Agency to be immaterial, including errors by applicants in this review. (Meyer, T. Vol. 11, pp. 1867-71; Jt. Ex. 1, pp. 2105, 2132, 1964, 2010). In each of these cases

of applicant error, the Agency found the applicant conforming with the criterion because the error was not material to the Agency's analysis. (*Id.*).

98. United's expert, Aneel Gill, acknowledged that the Agency should consider the materiality of an error when he testified that United's Application included erroneous and overstated referral projections. Mr. Gill testified that this error was not material because United had projected sufficient utilization even if these erroneous projections were removed from the analysis. (Gill, T. Vol. 7, pp. 1245-46; Meyer, T. Vol. 11, pp. 1872-1873).

99. The CON Section did not err by finding Maxim conforming with Criterion 5. The error that was made by Maxim made no material difference because Maxim still showed a net profit in Year 2 and Maxim still would have been found comparatively superior on at least 9 of the 15 comparative factors that were used in the review. (Meyer, T. Vol. 11, p. 1867).

100. United also contends that Maxim should be found non-conforming with Criterion 5 because it alleges that Maxim did not provide its most recent audited financial statements.

101. United presented no evidence that Maxim did not present its most recent audited financial statement. The audited financials submitted with Maxim's application were the most recent financials. (Meyer, T. Vol. 9, p. 1608).

102. It is noted that United failed to even provide a complete audited financial statement in its application. (McKillip, T. Vol. 4, p. 690; Meyer, T. Vol. 9, p. 1610). Instead, United provided only the cash flow portion of its financial statement. United's cash flow statement was completed only six months closer in time to the application filing date than the full audited financial statement submitted by Maxim. (Meyer, T. Vol. 9, pp. 1609-10).

103. United also contends that Maxim was not conforming with Criterion 5 because certain projected expenses were understated by Maxim. Mr. Gill testified that Maxim failed to allocate any expenses for medical records. (Gill, T. Vol. 6, p. 1124). Mr. Gill's testimony is not credible. Maxim's Application clearly explains that medical record expenses are included in its corporate overhead. (Meyer, T. Vol. 10, p.1768; Jt. Ex. 2, p. 130).

104. United contends that Maxim should also have allocated additional funds for marketing in its financial projections. (Gill, T. Vol. 6, p. 1140). Maxim budgeted $9,000.00 for marketing in Year 2, which is a reasonable projection, particularly considering that Maxim already has a home care agency in Mecklenburg County and an established referral basis. (Raney, T. Vol. 11, p. 1912; Meyer, T. Vol. 10, p. 1784). Maxim also projected that corporate overhead would include marketing (Jt. Ex. 2, p. 134).

105. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Sat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 5.

**Criterion 7**

106. N.C. Gen. Stat. § 131E-183(a)(7) ("Criterion 7") provides:

> *The applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided.*

107. In reviewing Maxim's proposed staffing under Criterion 7, the CON Section determined that Maxim proposed sufficient clinical and administrative staff for its project, and conformed with the requirements of Criterion 7. (Jt. Ex. 1, p. 2105).

108. Criterion 7 does not prescribe any specific job titles or specific management positions that must be proposed in order for an applicant to be found conforming with the requirement of the statute. N.C. Gen. Stat. § 131E-183(a)(7).

109. United contended that Maxim's Application did not conform with Criterion 7 because of its proposed administrative staffing. United's experts contended that: (1) Maxim failed to propose one FTE administrator for the proposed agency; (2) Maxim did not have a separate job title for a nurse supervisor; (3) Maxim's administrative staffing in total was not sufficient; and (4) Maxim did not propose a separate marketing position.

110. United conceded that Maxim proposed sufficient clinical staff to care for its patients and thus its challenge only related to administrative staffing. (Southworth, T. Vol. 5, p. 901).

*Maxim's Agency Administrator*

111. United's experts testified that Maxim's Application should have proposed one (1) FTE employee to serve as the administrator of only the Medicare-certified home health services distinct from the administrator over the other services offered by Maxim at its Mecklenburg agency. (Southworth, T. Vol. 5, p. 835).

112. Because Maxim already operates a home care agency in Mecklenburg County and proposes only to add Medicare-certified home health services to this existing agency, Maxim allocated its administrator's time between its Medicare-certified services and its non-Medicare-certified services in its administrator projection. (Jt. Ex. 2, pp. 102-03).

113. United presented two individuals, Rita Southworth and Janet Proctor, who were accepted as experts in staffing Medicare-certified home health agencies. Ms. Southworth is employed by UHS-Pruitt Corporation ("UHS-Pruitt") as its Director of Home Care and Janet Proctor is the Administrator of United's Wake County Medicare-certified home health agency. (Southworth, T. Vol. 5, p. 770; Proctor, T. Vol. 1, p. 41). Neither Ms. Southworth nor Ms. Proctor have any experience in developing staffing, or operating Medicare-certified home health services as an addition to an existing home care agency. (*Id.* at 788-90; *Id.* at 59, 114).

114. Ms. Southworth admittedly has little familiarity with North Carolina's home care licensure regulations and both Ms. Southworth and Ms. Proctor admitted that Medicare conditions of participation do not require one (1) FTE administrator. (Southworth, T. Vol.5, pp. 880, 906; Proctor, T. Vol. 1, p. 115).

115. Under North Carolina law, Medicare-certified home health agencies are licensed as home care agencies. N.C. Gen. Stat. § 131E-136. A provider that provides Medicare-certified home health service and non-Medicare-certified home care services from the same site operates under a single license. (Ex. 1, pp. 1428-35, Interim Licensure Renewal Application).

116. 10A NCAC 13 J.1001(b) entitled Agency Management and Supervision, requires that a home care licensee "designate an individual to serve as agency director. (10A NCAC 13J. 1001(b); Jt. Ex. 2, p. 218; Meyer, T. Vol. 11, pp. 186-62). If Maxim had a separate administrator for its Medicare-certified home health service and non-Medicare-certified home care service, it would not comply with licensure regulations that require the agency to designate an individual to serve as the agency director. *Id.*

117. Ms. Southworth, United's expert on staffing, admits that under the State regulations, an agency can only have one Administrator. (Southworth, T. Vol. 5, p. 905). Ms. Southworth, however, did not know that home care and home health agencies are licensed as a single agency. (*Id.* at 905-06).

118. In its staffing chart for project Years 1 and 2, Maxim indicated that the Administrator position would be .33 FTE and that there would be a Manager of Branch Operations of .5 FTE. (Jt. Ex. 2, pp. 102-03). Thus Maxim allocated .88 administrative time for administrator services.

119. The Manager of Branch Operations supports the Administrator in his or her role. (Raney, T. Vol. 11, pp. 1903-04; Meyer, T. Vol. 9, p. 1630; T. Vol. 11, pp. 1860-61). The Year 2 salary of $51,781 shows that the Manager of Branch Operations performs more than clerical functions and will have substantial administrative responsibilities. (*Id.*).

120. Both the Administrator and the Manager of Branch Operations would be full-time employees and would be on-site during agency operating hours. The FTE projections proposed by Maxim represent an estimate of the average time each of these administrative staff members would dedicate to the Medicare-certified home health agency. In some weeks, Maxim expects that the Administrator and Manager of Branch of Operations would dedicate more time to the Medicare-certified home health agency and in some weeks they may dedicate less time. (Meyer, T. Vol. 10, pp. 1781-82).

121. Mike Raney who oversees Maxim's operations in the southeastern United States currently oversees eight (8) offices in Tennessee that provide Medicare-certified home health services and non-Medicaid certified home care services. In each of those offices, Maxim operates with a single administrator that oversees both Medicare-certified home health and non-Medicare-certified home care services. (Raney, T. Vol. 11, pp. 1900-1901). Maxim's business model is built on having a single administrator who oversees the entire agency. (*Id.*).

122. Maxim also stated in its application that administrative support would be provided at the proposed agency by regional and corporate staff. Regional and corporate administrative support staff would provide essential administrative functions including education, training, billing accounting, central referral, human resources support, IT support, quality assurance support and medical records support (Jt. Ex. 2, p. 9; Raney, T. Vol. 11, pp. 1906-1907). Ms. Teresa Hancock, an employee at Maxim's Mecklenburg home care office, testified that she feels very well supported by the corporate and regional administrative resources that Maxim provides to the Agency. (Hancock, T. Vol. 4, p. 422).

123. The instructions for completing the staffing charts in the CON Application form provide that FTEs be divided between the time the person devotes to the new service or office and the time devoted to existing services or offices. The application form states, "If the administrator is projected to devote 30% of his or her time to management of the proposed new office, 0.3 of a FTE position should be entered in the table below [1.0 FTE x 30% = 0.3 FTE]." (Jt. Ex. 2; McKillip, T. Vol. 3, pp. 562-563).

124. Medicare's Conditions of Participation provide that the administrator may also be the supervising physician or registered nurse and therefore the administrator is permitted to spend less than one (1) FTE on providing administrative services (32 CFR §484.14(c); Maxim Ex. 305). There is no requirement in the Conditions of Participation that an agency employ one (1) FTE administrator for its Medicare-certified services. (*Id.*; Southworth, T. Vol. 5, p. 880; Proctor, T. Vol. 1, p. 115).

125. The staffing experts for United never addressed the fact that North Carolina licensure regulations would not allow a separate administrator to oversee only the Medicare-certified services that are operated as part of a home care agency. 10A NCAC 13J .1001(b).

126. Ms. Southworth and Ms. Proctor also incorrectly assumed that all the patients currently served by Maxim are not acutely ill and testified that the administrative and clinical oversight currently provided is totally different than would be required for the proposed home health agency. (Southworth, T. Vol. 5, pp. 824 – 825; Proctor, T. Vol. 1, p. 51). However, Maxim's Application explains that it currently serves skilled patients, most of whom are classified as catastrophic care, receiving 8 to 24 hours per day of hospital-level nursing care in their homes. (Jt. Ex., 1, p. 9; Raney, T. Vol. 11, pp. 1884, 1888-89).

127. Both Ms. Southworth and Ms. Proctor testified that their opinions regarding the need for one (1) FTE administrator were based on their review of licensure renewal applications submitted by other Mecklenburg County home health agencies. (Southworth, T. Vol. 5, pp. 841-42; Proctor, T. Vol. 1, pp. 88-89, 98-106). All of these licensure renewal applications, with the exception of the licensure application of Interim Healthcare, indicate that these agencies do not provide non-Medicare-certified home care services, as Maxim proposed in its application. (Jt. Ex. 1, pp. 1403-1530; Meyer, T. Vol. 10, p. 1780).

128. Interim's licensure renewal application was the only application that documented that it provides both Medicare-certified home health services and non-certified home care

services. (Jt. Ex. 1, pp. 1828-35). Thus the only renewal application relied upon by United's experts that reflects the service model proposed by Maxim is the Interim Licensure Renewal Application.

129. Interim's application indicated that it allocates its administrative staff including its Agency administrator between the home care and home health services. (Jt. Ex. 1, pp. 1828-35). David Meyer, an expert witness for Maxim, contacted Interim's owner and confirmed that Interim allocates its one FTE administrator between its Medicare-certified and non-Medicare-certified services, exactly as Maxim proposes in its application. (Meyer, T. Vol. 10, p. 1780-81).

*Maxim's Clinical Supervision*

130. United's experts testified that Maxim should have been found nonconforming with Criterion 7 because it did not specifically list a nurse supervisor position in the application staffing chart in its application and Maxim would not be providing required clinical supervision.

131. There is no requirement that applicants specifically list a nurse supervisor position in the staffing chart and the Agency does not necessarily expect to see a position labeled "Nurse Supervisor." (Frisone, T. Vol. 12, p. 2012). Other applicants in this review in addition to Maxim did not use the title Nurse Supervisor in their staffing charts. (*Id.* at 2019; Jt. Ex. 1, pp. 2107, 2110, and 2113).

132. The Home Care Licensure Regulations require that a home care agency provide clinical supervision. *See* 10A NCAC 13 J.1001(c) and J.1102(a).

133. Maxim's Application states that it will be in compliance with all licensure requirements, which includes the requirement to provide clinical supervision. (Jt. Ex. 2, pp. 27, 211, 219, 222).

134. The Medicare Conditions of Participation provide: "The skilled nursing and other therapeutic services furnished are under the supervision and direction of a physician or a registered nurse (who preferably has at least one year of nursing experience as a public health nurse)." 42 CFR §484.14(d) (Maxim Ex. 305). As Rita Southworth testifying for United admitted, the Conditions of Participation do not require that a specific title be given to the clinician providing supervision. (Southworth, T. Vol. 5, pp. 896-97).

135. Maxim intends to have one of its Registered Nurses provide clinical supervision. (Raney, T. Vol. 11, pp. 1911-12; Meyer, T. Vol. 9, pp. 1619-20, Vol. 10, p. 1722). In its Application, Maxim included a job description for the clinical supervision to be provided by a Registered Nurse. The job description sets forth the qualifications and responsibilities that the RN providing clinical supervisor would have at the proposed agency. (Jt. Ex. 2, App. Ex. 9, p. 274; Raney, T. Vol. 11, pp. 1909-10; Frisone, T. Vol. 12, p. 2030).

136. It is consistent with the Medicare Conditions of Participation to have an RN responsible for clinical supervision. (Meyer, T. Vol. 9, pp. 1627-28).

137. Maxim also budgeted additional FTE time for its RNs. (Jt. Ex. 2, pp. 102-03; Jt. Ex. 1, p. 2105). In the Agency's Findings, the Project Analyst calculated that Maxim required 3.37 FTE registered nurses for its projected visits in Year 2, but proposed having 3.75 registered nurses. (Jt. Ex. 1, p. 2105).

138. Ms. Frisone, testified that with the additional FTE RN capacity, it was reasonable to expect that one of the RNs on Maxim's staffing chart would provide supervision. (Frisone, T. Vol. 12, p. 2012; Meyer, T. Vol. 9, pp. 1626-29). Ms. Frisone testified that based on her experience, it was reasonable for a RN Supervisor to also provide direct patient care. (Frisone, T. Vol. 12, p. 2013).

139. The Agency evaluated Maxim's current and projected staffing and concluded that Maxim would comply with the Medicare Conditions of Participation, including the requirement for clinical supervision. (Frisone, T. Vol. 12, pp. 2014–2015).

140. Maxim also projected one FTE Oasis Coordinator as a member of its administrative staff. The Oasis Coordinator is part of the administrative oversight in measuring and recording quality, and thus the position alleviates some of the administrative requirements that otherwise would be assumed by the nurse who provides clinical supervision. (Meyer, T. Vol. 9, p. 1620, 1627).

141. Maxim also has corporate and regional support for each of its offices, including support of Maxim's Director of Clinical Operations and a team of clinicians responsible for quality assurance and clinical compliance. (Raney, T. Vol. 11, pp. 1906-07; Jt. Ex. 2, pp. 22, 33, 134; Meyer, T. Vol. 9, pp. 1620-21).

142. United's witnesses, Ms. Southworth and Ms. Proctor, opined that Maxim would not be providing the required clinical supervision. (Southworth, T. Vol. 5, p. 882; Proctor, T. Vol. 1, p. 90). However, neither witness addressed the additional FTE RN capacity shown in Maxim's staffing projections and both failed to acknowledge that Maxim's Application specifically contained a job description documenting that an RN will provide clinical supervision.

143. Both Ms. Southworth and Ms. Proctor admitted that it was not necessary to use the term "nurse supervisor" or "clinical supervisor" in the staffing tables. (Southworth, T. Vol. 5, pp. 896–898; Proctor, T. Vol. 1, p. 135). Other applications did not use these titles. (Jt. Ex. 1, pp. 2107, 2110, 2111; Frisone, T. Vol. 12, p. 2019-20). Ms. Southworth admitted that registered nurses who provide visits can also provide the required supervision. (Southworth, T. Vol. 5, p. 898).

144. In its Application, United did not list any FTEs for medical records (Jt. Ex. 1, p. 2116). However, because United must manage its medical records, it is reasonable to assume that United will have a person responsible for medical records just as it is reasonable to conclude that Maxim will provide clinical supervision. (Meyer, T. Vol. 9, pp. 1621-22; Frisone, T. Vol. 12, p. 2029).

145. Most of the applications did not list a position for Oasis Coordinator as Maxim did. (Jt. Ex. 1, pp. 2103-2119). However, it is equally reasonable to assume that these responsibilities will be assumed by one of the listed job titles because Oasis reporting is required for Medicare-certified home health services. (Meyer, T. Vol. 9, p. 1621).

146. United also contended that Maxim could not be using one of its RN care providers to provide supervision because there is no differentiation in salary in the staffing table showing that the nurse supervisor would be paid a higher salary for providing supervision. (Gill, T. Vol. 7, p. 1185). However, as Maxim expert Mr. Meyer testified, the staffing chart in the application form asks for an average salary which means some RNs would make more and some less than the average. (Meyer, T. Vol. 10, p. 1737). Because the CON Section's chart requested average salaries, it was not necessary for Maxim to list individual salaries that would be paid to each RN. (*Id.*).

147. United also contends that Maxim's additional FTE capacity could not be used for both supervision and on call coverage. However, United presented no witnesses to support its position.

148. Furthermore, United also projected using its existing RNs for on call coverage but proposed considerably less additional FTE capacity than Maxim. Maxim proposed .38 additional FTE capacity in Year 2 and United proposed only .19. (Jt. Ex. 1, pp. 2105 and 2117; Jt. Ex. 3, p. 210). Therefore, United's application supports that there is additional RN time available in Maxim's Application for clinical supervision.

149. United also contends that two applications submitted by Maxim after the Application for Mecklenburg County show that Maxim did not intend to provide clinical supervision with the staffing proposed in the Mecklenburg County Application. (United Exs. 122-23). The staffing proposed in a subsequent application cannot be compared as each application depends upon the unique circumstances of that application. For example, in Brunswick County, Maxim does not currently operate a home care agency as it does in Mecklenburg County, so its staffing would not be the same as in Mecklenburg. (*Id.*). (Meyer, T. Vol. 10, p. 1743).

150. United also argues that an organizational chart included in Maxim's Application shows that Maxim intended to have a separate position for Clinical Supervisor. (Jt. Ex. 2, p. 176). This chart was a template used for branch operations that are fully operational, including both Medicare-certified and non-Medicare-certified services and was not intended as an exact staffing chart for the proposed additional services. (Raney, T. Vol. 11, pp. 1907-09).

*Need to Propose A Specific Marketing Staff Member*

151. United also challenged Maxim's administrative staffing for not designating a marketing person. (Gill, T. Vol. 7, pp. 1182-83).

152. Maxim does not hire a marketing person but instead community outreach is done by numerous individuals within Maxim's Mecklenburg office as well as by the support services

offered by Maxim's corporate office. (*Id.*; Jt. Ex. 2, pp. 10, 134). Maxim's clinicians and other staff are involved with marketing through their interactions with referral sources, patients and families. (Meyer, T. Vol. 9, p. 1634).

153. Maxim's Application documents that it has existing referral relationships because it has provided home care service in Mecklenburg County since 1995. (Jt. Ex. 2, pp. 9, 10, 82–84, Jt. Ex. 2, App. Ex. 18–21). Maxim will use its existing relationships to educate the public and current referral sources about the addition of Medicare-certified home health services once these services can be offered. (Raney, T. Vol. 11, pp. 1912-13).

154. There is no requirement in Criterion 7, the licensure regulations or the Conditions of Participation that an agency designate a person who will be dedicated to marketing or community relations. (Jt. Ex. 2, App. Ex. 6, p. 305).

*Maxim's Total Administrative Staffing*

155. Maxim's administrative staffing was determined by individuals within the Maxim organization who have significant experience staffing Medicare-certified home health services. (Raney, T. Vol. 11, pp. 1896-97, 1937-39; Meyer, T. Vol. 10, p. 1779). The consultants who prepared Maxim's Application provided Maxim with current and projected staffing charts that Maxim completed and returned to the consultants for inclusion in Maxim's Application. (Meyer, T. Vol. 9, p. 1604-05; Raney, T. Vol. 11, pp. 1896-97, 1937-39).

156. The CON Section found that Maxim's administrative staffing was sufficient. (Jt. Ex. 1, p. 2105). Ms. Frisone also testified that she would expect efficiencies in administrative staffing for Maxim because it is proposing to add Medicare-certified services to an existing agency (Frisone, T. Vol. 1, p. 466) As Ms. Frisone testified, the Agency saw no evidence that Maxim had downplayed its administrative staffing to reduce its costs. (*Id.*).

157. Maxim's plan to allocate staff between its Medicare-certified home health services and its other services is cost effective and relates to the CON objectives of value and cost effectiveness. (Meyer, T. Vol. 9, p. 1631).

158. Maxim proposed more administrative staff than some other applicants in the review who have experience providing Medicare-certified home health services in North Carolina. (Meyer, T. Vol. 9, pp. 1632-33; Jt. Ex. 1, pp. 2107, 2110).

159. Ms. Southworth and Ms. Proctor testified that Maxim's administrative staffing was not sufficient. However, neither Ms. Southworth nor Ms. Proctor have had any experience adding Medicare-certified home health services to an existing home care agency. (Southworth, T. Vol. 5, pp. 789-90; Proctor, T. Vol. 1, pp. 59, 114).

160. Both Ms. Southworth and Ms. Proctor admitted that other applicants in the review with experience offering Medicare-certified home health services proposed fewer administrative staff than Maxim. (Southworth, T. Vol. 5, pp. 90-102; Proctor, T. Vol. 1, pp. 131-32; Jt. Ex. 1, pp. 2107 (The HKZ Group) and 2110 (Assisted Care)). The administrative staffing

of these other applications was also found to be sufficient by the Agency. (Jt. Ex. 1, pp. 2109, 2111).

161. Ms. Southworth further admitted that she did no comparison of Maxim's projected total administrative staffing to the total administrative staffing of other Medicare-certified home health agencies currently operating in Mecklenburg County. (Southworth, T. Vol. 5, pp. 907-08). Carolinas, the other winning applicant in this review, currently operates a Medicare-certified home health agency in Mecklenburg County. Carolinas current administrative staff to patient ratio is lower than the administrative staff to patient's ratio that Maxim projects in its application. (Compare .36% for Healthy at Home to .45% for Maxim) (Southworth, T. Vol. 4, pp. 908-911).

162. Maxim also proposed administrative staff positions that were not proposed by United. Maxim proposed to have a dietitian and a medical records clerk while United's proposed agency would not have staff members dedicated to either of these responsibilities. (Jt. Ex. 2, p. 102; Jt. Ex. 3, p. 213).

163. Maxim's applications set forth that regional and corporate staff would provide significant support for many of the administrative functions that may be provided in-house by other agencies. (Raney, T. Vol. 11, pp. 1906-07; Jt. Ex. 2, p. 21). Ms. Proctor admitted that she did not review and did not consider the administrative support available to Maxim through its corporate and regional staff. (Proctor, T. Vol. 1, p. 139)

164. As Ms. Southworth admitted, it is very difficult to compare administrative staff because some companies outsource certain activities and some companies call staff different names. (Southworth, T. Vol. 4, p. 904).

165. Maxim's Application proposed sufficient administrative staffing, including staff to provide clinical supervision, to conform to Criterion 7.

166. United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 7.

**Other Criteria**

167. Prior to the hearing, United also contended that Maxim failed to conform with Criteria 8, 13(c) and 14.

168. Maxim was properly found to be conforming with Criterion 8. (Meyer, T. Vol. 9, p. 1635-36; Jt. Ex. 1, p. 2120; Maxim Ex. 303). Maxim demonstrated that it would have available the necessary ancillary and support services and that Maxim's proposed service would be coordinated with the existing health care system. (*Id.*).

169. Maxim was properly found conforming with Criterion 13(c). (Meyer, T. Vol. 9, pp. 1636-37; Jt. Ex. 1, p. 2129; Maxim Exh. 303). Maxim demonstrated that the elderly and

medically underserved groups will have adequate access to the proposed home health services. (*Id.*). Contrary to United's contention, Maxim indicated throughout its Application that it would accommodate those who speak a foreign language. (Meyer, T. Vol. 9, p. 1637; Jt. Ex. 2, p. 12).

170. Maxim was properly found conforming with Criterion 14. (Meyer, T. Vol. 9, p. 1637; Jt. Ex. 1, p. 2135; Maxim Exh. 303). Maxim provided a letter to a health professional training program which satisfies the requirements of Criterion 14. (*Id.*).

**Regulatory Criteria**

171. In this review, the Agency also applied certain regulatory criteria and standards applicable to home health services. 10A NCAC.2000 *et seq*. (Jt. Ex. 1, pp. 2146-59). Maxim's Application was found conforming with all of the regulatory criteria. (*Id.*).

172. United's witness, Aneel Gill, testified that Maxim's Application should have been found non-conforming with 10A NCAC.2002(a)(3)-(6), .2003, and .2005(a) (Gill, T. Vol. 7, pp. 1192-95). Mr. Gill testified that the same reasons that he believed that Maxim's Application did not conform with Criteria 3 and 7 were reasons that it failed to conform with these regulatory criteria. (*Id.*).

173. Based on the findings above addressing Criteria 3 and 7, United has failed to prove, based on a preponderance of the evidence, that the Agency erred or otherwise violated the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with all of the regulatory criteria, 10A NCAC 14C.2000 *et seq.*

174. Maxim's Application was properly found conforming with all the regulatory criteria. (Meyer, T. Vol. 9, pp. 1543-44; Maxim Exh. 303).

**Whether UHS-Pruitt Was Required to be an Applicant**

175. Under North Carolina's Certificate of Need law, a person that proposes to develop or offer a new institutional health service must apply for and receive a CON. (N.C. Gen. Stat. § 131E-178(a)).

176. Prior to the hearing on the merits of this contested case, Maxim filed a motion for summary judgment asserting that UHS-Pruitt Corporation ("UHS-Pruitt"), a sister company under the broad corporate umbrella with United, should be required to be an applicant for the United Application.

177. UHS-Pruitt and United are each subsidiaries of United Health Services, Inc. ("UHS"). UHS-Pruitt and United are two separate and distinct corporations, having been duly incorporated under existing law. (Jt. Ex. 3, pp. 283-292; United Ex. 176, ¶ 3; Affidavit of Aneel S. Gill).

178. When the contested case was called for hearing on the merits, Maxim's motion for summary judgment was denied by this Tribunal, having found as fact and concluded as a matter of law that a genuine issue of material fact existed. At trial, Maxim continued to pursue the issue

that UHS-Pruitt should have been an applicant. Evidence on that issue was allowed in order to have a full and complete discourse on the issue of who is the appropriate party in CON's. Maxim bears the burden of proof on this issue.

179. Maxim contends that statements in the United Application, the deposition testimony and the hearing testimony show that UHS-Pruitt's involvement in the proposed project constitutes both the "development" and "offering" of a new institutional health service. Consequently, the United Application is not approvable because UHS-Pruitt was required to be an applicant.

180. United and the Agency contend that UHS-Pruitt was not required to be an applicant because its role in the project is only to provide "administrative services", pursuant to a management agreement between the parties.

181. Maxim's comments on the United Application do not state that UHS-Pruitt needed to be an applicant. (Jt. Ex. 1, p. 206; Meyer, Vol. 9, p. 1675).

182. The Agency's decision did not find that UHS-Pruitt should have been an applicant. (Jt. Ex. 1, pp. 2028-2171). The Agency does not support Maxim's argument that UHS-Pruitt should have been an applicant. (Frisone, Vol. 2, pp. 319-323; Vol. 3, pp. 467-469; United Ex. 177).

183. Maxim did not appeal the Agency's decision which is critical in rendering this decision. However, this issue has the potential to be a recurring issue which commands full discourse in order to not only answer the issue herein, but to offer potential resolution of the issue prospectively.

184. To receive a CON, a person must file an application with the CON Section using the application form created by the Agency. N.C. Gen. Stat. § 131E.-182. The CON Statute provides the Agency with the authority to create the application form and to request information that it believes is required to determine conformity with the applicable review criteria. N.C. Gen. Stat. §182(b).

185. Section I, Question 1 of the CON application form asks the applicant to identify the legal name of the applicant. The question further states that: "the applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other persons who will offer, develop or incur an obligation for a capital expenditure for the proposed new institutional health service."

186. This question derives from N.C. Gen. Stat. §§ 131E-178(a) and (c) which state "[n]o person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department" and "[n]o person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added)

187. The statute defines "develop" as "undertake[ing] those activities which will result in the offering of institutional health service or incurring of a financial obligation in relation to the offering of such service." N.C. Gen. Stat. § 131E-176(7).

188. When used in connection with health services, the CON Statute defines "offer" to mean "that the person holds himself out as capable of providing, or as having the means for the provision of specified health services." N.C. Gen. Stat. § 131E-176(18).

189. In creating the Home Health CON Application Form, the Agency has determined that under the CON Statute, there can be more than one applicant. Specifically, Section 1.1 of the application form requests that the applicant provide:

> Legal Name of the Applicant(s): The applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other person who will offer, develop, or incur an obligation for a capital expenditure for the proposed new institutional health service. (Exhibit A, Jt. Ex. 3, p. 7).

190. The directions in Section 1.1 acknowledge that more than one legal entity can be required to be named as an applicant in a CON review. Section 1.1 of the application also makes clear that an "applicant" is not only the entity that will own the facility or will be issued a license to provide the health service at issue, but also includes any entity that will offer or develop the new institutional health service.

191. In determining whether the necessary applicant(s) has been named, Martha Frisone testified that the CON Section looks only at the entity that will obtain licensure and certification and does not analyze which entities are offering and developing the proposed health service. (Frisone, T. Vol. 3, pp. 467, 469).

192. While Ms. Frisone states that's how the CON Section interprets the law, it is not in keeping with the plain language of the statute which requires more than just who is getting the license and certification. (Frisone, T. Vol. 3, p. 469). Neither the CON Application form nor the CON law define the entities that must be named as applicants as only those entities that will obtain licensure and certification for services. (Jt. Ex. 3, p. 7; N.C. Gen. Stat. § 131E-176(7) and (18) and § 131E-178(a)).

193. It is recognized by this Court that the model used by United has been used many times over many years without question. The model of setting up a corporation that will become the working entity although not staffing it in any regard until the CON is awarded seems to make sense, in some regard. Conversely, it does not seem to make sense to fully staff a corporate entity which is contingent on the award of a CON before the CON is awarded. However, one must look to see who or what entity is actually going to do the work of offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

194. Maxim's expert witness Mr. Meyer's company Keystone Planning, as well as others, has previously employed a similar structure based on a management agreement for an

MRI application in Onslow County. The applicant was Onslow MRI, LLC and the manager was Eastern Radiologists, Inc. Only Onslow MRI, LLC was the applicant. *See* Meyer, Vol. 9, pp. 1678-1679.

195. Mr. Meyer acknowledged that he did not disagree in any way with the Agency's review of the United and Maxim Applications, and that he agreed with the Agency's findings. (United Ex. 157, pp. 206-207). Maxim's expert witness Ms. Sandlin offered no opinion that the Agency erred in any respect in its findings, and offered no opinion that United was not the proper applicant. (Sandlin, Vol. 9, p. 1546) Maxim confirmed in its written discovery responses that it did not disagree with the Agency's decision. (United Ex. 145, p. 3).

196. As noted above many items within the various applications are to be taken on faith in the truthfulness of the applicants. The rhetorical question then becomes should the Agency accept on faith that the entity to be license and certified is the proper applicant. The further question would be whether or not there are sufficient indicia within the application to call into question the proper applicant—again, a test of reasonableness.

197. The answer to that question within the confines of the application in this contested case is that "yes" there is sufficient evidence within the application to examine further what entity offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

198. United points to many examples within its application that tend to show that United is "offering and developing" the project and not UHS-Pruitt. For example, that "United is proposing to establish a new Medicare-Certified Home Health agency in Mecklenburg County". Further, that United "proposes to offer all Medicare/Medicaid home health agency covered services" and then lists numerous services that it proposes to offer and to develop. (Jt. Ex. 3, Section II, p. 30 *et. seq.*).

199. Likewise, there are numerous statements and exhibits contained in the United CON application which represent that UHS-Pruitt will be directly involved in the development and offering of the home health agency as defined in N.C. Gen. Stat. §131E-176(7) and (18).

200. United's Application expressly states that "UHS-Pruitt has all the necessary corporate resources in place to effectively manage and *develop* the proposed agency…" (Jt. Ex. 3, p. 27). (Emphasis added). Rita Southworth, UHS-Pruitt's Vice President for Home Care Services, confirmed that based on her understanding of UHS-Pruitt's operations, this statement was accurate. (Southworth, T. Vol. 8, p. 870).

201. Trey Adams, the consultant who was principally responsible for drafting the United Application, tried to explain why the words "develop" and "UHS-Pruitt" are in the same sentence by saying that Pruitt was not developing the agencies but providing services to assist in the development of those agencies. (Adams, Vol. 6, p. 999).

202. Mr. Gill said that it was merely "lingo" when trying to explain the relationship between Pruitt and its ownership and/or management of other facilities when it implied or stated

in the attachments to the application that Pruitt was in a superior position and controlling the entities. (Gill Vol. 7, page 1337).

203. When questioned further by the Court about the instances in the application where it pointed to quality of care by Pruitt as well as other numerous instances where the application very pointedly and plainly identified Pruitt as being the driving force, Mr. Gill conceded that "we could have been more precise." (Gill Vol. 7, page 1336; Ex. 44 and Ex. 69 to Jt. Ex. 3.). Exhibit 44 to the United Application is a document entitled "UHS-Pruitt Corporation 2011 Quality Report."

204. Mr. Gill then offered that one should merely look to the statement on page 10 of the application which identifies United as being the entity who will actually develop and provide the services. That in no way explains or answers the question. His answer merely asserts that this trier of fact should accept United as the proper applicant without testing to see who the proper applicant is. (Gill Vol. 7, page 1336-1343).

205. United acknowledges that at certain points Exhibit 44 uses the names of UHS-Pruitt and other UHS subsidiaries interchangeably, but contends that there are other places within the document that states that UHS-Pruitt does not provide care. At best this is contradictory and confusing as to exactly what UHS-Pruitt actually does.

206. Mr. Gill's acknowledgement that some of the language in the application and that sometimes the names "United" and "UHS-Pruitt" are used interchangeably in these documents could have been more precise is of no consequence to the agency reviewer who would have been looking at these documents. (Gill, Vol. 7, p. 1335, p. 1357). That there was no intent to mislead is not the point.

207. The representations, justifications, and rationalizations by Mr. Gill and other United witnesses does not change the fact that the application is replete with manifold acknowledgments of UHS-Pruitt's very deep involvement in the affairs of United in obtaining the CON as well as establishing the functioning entity of United. The statements are in plain understandable English and are not "lingo." The representations go beyond the bounds of a management arrangement.

208. United refers often to the management agreement between United and UHS-Pruitt which it contends addresses many of the problems herein. Such reliance is problematic. First and foremost there is no actual agreement in existence. The only agreement in evidence is at best a "sample."

209. In its Certificate of Need application to establish a home health agency in Wake County, United Home Care, Inc. was the only named applicant, just as it was in the Mecklenburg application. (Maxim Ex. 312, p. 7). As in the Mecklenburg application, United represented in the Wake application that it would enter into a management agreement with UHS-Pruitt. (Maxim Ex. 312, 314) The management agreement submitted with the Wake application is the same draft agreement submitted with the Mecklenburg application.

210. Janet Proctor has been the administrator of the Wake County agency since its opening in November of 2011. (United Ex. 160, p. 37; United Ex. 161, p. 36-39). Ms. Proctor testified that the agreement accurately reflects how her agency operates; however, she was not aware of any management agreement for the Wake County home health agency. (Proctor, Vol. 1 p. 151, United Ex. 161, p. 39).

211. Given that Ms. Proctor is the highest ranking management/executive employee at the United Wake County Office, her lack of knowledge regarding the management agreement is some evidence the agency is not going to execute the agreement. There is other evidence that the Wake agency does not adhere to the conditions within the management agreement, despite Ms. Proctor's contentions to the contrary.

212. There is no evidence to the contrary that the agreement was ever executed for Wake County. Once the CON is awarded, there is no sanction for not following through with a representation contained within the application.

213. United's Home Health 2013 Licensure Renewal Application also states that the United Wake County Agency has no management agreement. (Maxim Ex. 313, p. 5; United Ex. 161, p. 37).

214. Mr. Gill repeatedly referred to the management agreement as having been fully executed in the Mecklenburg application , which it has not. He ultimately concedes that it was never executed and could not since there was no one on staff for United with which to contract.

215. United wanted to use Neil Pruitt's name or the name of UHS-Pruitt because Pruitt is a well-known name in the healthcare industry; i.e., it was felt that using the Pruitt name would be of greater benefit in the application process and getting United off the ground than if Pruitt's association were not known.

216. The purported management agreement allows United to use the UHS-Pruitt name because of the name recognition. (Jt. Ex. 3, pp. 294-313; Jt. Ex. 2, Section 5.10, p. 312).

217. There are other examples in evidence of the involvement of UHS-Pruitt. Janet Proctor stated at the public hearing in support of the United Application that "It has been exciting to be a part of UHS-Pruitt Corporation in the development and operation of a new Certified Home Health Agency in North Carolina" (Jt. Ex. 1, p. 1275). (Emphasis Added).

218. United's Application also contains a listing of the corporate leadership that will be involved with the project. The corporate leadership team listed in the United Application is comprised only of UHS-Pruitt employees and does not include a single individual employed by United. (Jt. Ex. 3, p. 22)

219. The corporate leadership team listed in the application includes Ms. Rita Southworth. United Application represents that Ms. Southworth's role in the proposed project will be to "supervise the operational, clinical, sales, and billing components." The Application also represents that Ms. Southworth will be responsible for "maintaining customer relationships

and industry networks." (Jt. Ex. 3, p. 22). Based on these representations, Ms. Southworth would be ultimately responsible for the development and operations of the Mecklenburg County home health agency if it were approved. (Jt. Ex. 3, p. 22; United Ex. 160; p. 22; United Ex. 160, p. 24).

220. Ms. Southworth testified that UHS-Pruitt would be responsible for: (1) setting budgets for the home health agencies; (2) approving capital expenditures; (3) creating and approving any policies for the home health agencies including policies relating to the types of patients that will be admitted; (4) setting employee salaries and determining the benefits that will be offered and (5) paying all of the home health agencies bills. (Southworth, T. Vol. 5, pp. 869-70; United Ex. 160, pp. 33, 40-42). Ms. Southworth also confirmed that she will oversee the work of the administrator and that the administrator directly reports to her. (Southworth, T. Vol. 5, pp. 867, 872). There is no individual at United to whom the agency administrator will report.

221. As part of her role, Ms. Southworth approves all new policies, including policies regarding patient admissions. (Southworth, T. Vol. 5, p. 864). Ms. Southworth also has the authority to hire and fire the agency administrator. (*Id.* at 873; Proctor, T. Vol. 1, pp. 140-41, 146, 149; United Ex. 161, pp. 24-34).

222. Maxim's expert witnesses, David Meyer and Karin Sandlin, testified that they have been involved in previous CON reviews in which a management company was not named as an applicant. However, both Mr. Meyer and Ms. Sandlin testified they had never seen a management agreement which gave the management company the authority to fire the highest ranking executive of the company it manages. (Meyer, T. Vol. 9, p. 1647; Sandlin, T. Vol. 9, p. 1594). Mr. Gill, United's expert and an employee of UHS-Pruitt, was not sure if other management agreements provided management companies with this type of authority. (Gill, T. Vol. 7, p. 1244).

223. The exhibits attached to the United Application also show the extensive involvement that UHS-Pruitt will have in the development and offering of the proposed services. United included an exhibit in its application that purports to be UHS-Pruitt's "Client Policies and Procedures." (Jt. Ex. 3, App., Ex. 5, pp. 373-478). United included no exhibit regarding its Client Policies and Procedures. By including the Pruitt policies and procedures in its application, the reasonable inference is that United will use the policies and procedures of UHS-Pruitt.

224. United also included as one of its exhibits UHS-Pruitt's Performance Improvement Policy and Procedure Manual. There was no such policy included in the application that was authored by United. (Jt. Ex. 3, App. Ex. 7, pp. 373-478). The reasonable inference is that United will use that policy and procedure manual of UHS-Pruitt.

225. A job description for the Regional Home Care Administrator included in United's Application is titled "UHS-Pruitt Corporation" and describes United Home Care as merely a "division" of UHS Pruitt. (Jt. Ex. 3, App. Ex. 57, pp. 1342-1425). Similarly, United Application Exhibits, 23, 29, 44, 54 and 72 document UHS-Pruitt's involvement in the development of the home health agency.

226. The United Application also contains several representations showing that UHS-Pruitt holds itself out as capable of or having the means for the provision of health services. United's Application states: "[s]ustained evidence of UHS-Pruitt's ability to provide quality client care is documented by the American Health Care Association's National Quality Award Program for Nursing Facilities." (Jt. Ex. 3, p. 79)(Emphasis added).

227. The Application also represents that "[o]ver the years, UHS-Pruitt has made its workforce and its clients a priority. Its various programs and initiatives will help enhance the workforce in Mecklenburg County and ensure quality care to the home care clients in Mecklenburg County." (Jt. Ex. 3, p. 92).

228. The "2011 Quality Report" published by UHS Pruitt , an exhibit in United's Application, contains numerous representations that UHS-Pruitt will offer or is capable of offering health services." (Jt. Ex. 3, App. Ex. 44, pp. 939-75). The report begins by stating that UHS-Pruitt is a "leader in the delivery of post-acute care service" and represents that "throughout our [UHS-Pruitt's] history, our focus has been and always will be delivering quality health care. (*Id.* at p. 943) (Emphasis added). The 2011 Quality Report goes on to state that "[w]e [UHS-Pruitt] provide services that promote not only physical health, but mental and spiritual well-being as well; treating the whole person and not the symptom. (*Id.* p. 945) (Emphasis added). The quality report acknowledges that "it is a great responsibility to provide appropriate care and/or services to each one of our clients." (*Id.* at p. 947) (Emphasis added). This exhibit makes no mention of United.

229. Mr. Gill, himself an employee of UHS-Pruitt, testified that this exhibit was misleading and should have stated that United Home Care provides services, not UHS-Pruitt. (Gill, T. Vol. 7 pp. 1340-41). However, the numerous statements contained in Exhibit 44 can only be viewed on their face as representations that UHS-Pruitt holds itself out as offering health services which is included in the definition of "offer" under the CON statute. N.C. Gen. Stat. § 131E-176(18).

230. United Application Exhibit 32 also documents that UHS-Pruitt holds itself out as a provider of services. This exhibit, which is drafted by Richard Gephart, Senior Vice-President of Health Services at UHS-Pruitt, states "I understand that UHS-Pruitt Corporation has a reputation for providing quality healthcare services in North Carolina. (Jt. Ex. 3, App. Ex. 32, p. 873)(Emphasis added). Given Mr. Gephart's high ranking position at UHS-Pruitt, his statement is an admission by UHS-Pruitt that UHS-Pruitt considers itself to be an entity that provides healthcare services.

231. The draft management agreement in the United Application between United and UHS-Pruitt is titled "Health Care Provider Services Contract". (Jt. Ex. 3, App. Ex. 2, pp. 293-313). UHS-Pruitt argued during the hearing that this agreement documents that UHS-Pruitt will only serve in the capacity of a "management company" and as such will only provide "administrative support" services to United. (Proctor, T. Vol. 1, p. 111; Gill, T. Vol. 6, p. 1089).

232. United's testimony that UHS-Pruitt only provides "administrative support" services is contradicted by other credible evidence of the supervisory control and authority that

Ms. Southworth exercises over Ms. Proctor as the administrator of the United Wake County Home Health Agency.

233. The draft management agreement on its face provides UHS-Pruitt with extensive control over the agency. Under the agreement UHS-Pruitt has the authority to develop policies and procedures for the operation of the facility. (Jt. Ex. 3, App., Ex. 2, p 294 Section 1.1(a)). UHS-Pruitt pays all accounts payable of the home health agency. (*Id.* at 295, Section 1.1(a)). UHS-Pruitt also develops standards and procedures for admitting patients, for charging patients for services, and for collecting charges from patients. (*Id.*).

234. In addition, the draft management agreement specifically provides that United shall have no right to control the manner in which UHS-Pruitt's work is performed. (Jt. Ex. 3, App., Ex. 2, p. 307, Section 5.2). If this were an arms-length transaction between a CON applicant and a management company, the CON applicant, as the entity responsible for regulatory compliance, would have some control over the manner in which the management company's work is performed.

235. The testimony of UHS-Pruitt and United witnesses shows that the representations in the management agreement cannot be taken at face value because the control UHS-Pruitt exercises over the home health agencies within its system goes well beyond what is anticipated in the draft management agreement. As stated above, the draft agreement was never executed for the Wake County facility.

236. Based on the testimony United and UHS-Pruitt appear to ignore many of the provisions of the management agreement that require United to approve "recommendations" of UHS-Pruitt. Section 1.1(a) of the Agreement states that UHS-Pruitt will only recommend policies and that any recommended policies must be approved by United (Jt. Ex. 3, App. Ex. 2, p. 294). The testimony of Ms. Southworth and Ms. Proctor shows that UHS-Pruitt dictates policies to United and that any policy changes must be approved by UHS-Pruitt. (Proctor, T. Vol. 1, pp. 140-41; Southworth, T. Vol. 5, p. 868).

237. Section 1.1(b) also states that UHS-Pruitt must receive approval from United before it makes any personnel changes regarding the administrator. (Jt. Ex. 3, App. Ex. 2, p. 294). Ms. Southworth testified that the agency administrator is the highest executive level staff member employed by United. Thus the administrator would be responsible for approving any personnel changes involving her position. Ms. Southworth testified that she is responsible for the hiring and termination of agency administrators. (Southworth, T. Vol. 5, pp. 862-73). This expressly contradicts the management agreement.

238. The agreement contains numerous other provisions in which ultimate control should be vested with United. For example the agreement requires that United approve: (1) employee benefits; (2) capital expenditures; and (3) standards for admitting patients. The testimony shows that UHS-Pruitt approves and ultimately determines each of these aspects of agency operations. (Jt. Ex. 3, App. Ex. 2, pp. 294-95).

239. United's practice of ignoring the terms of the agreement is significant because the Agency reviewed and relied on the agreement in making its determination that UHS-Pruitt was not required to be a named applicant. (United Ex. 117; Frisone Aff., ¶ 7; Frisone, T. Vol. 2, p. 322).

240. The evidence also shows that it is doubtful that the management agreement submitted with the Mecklenburg County application would be executed or its terms implemented.

241. It is important that applicants not knowingly misrepr esent to the Agency the nature of their relationships with other parties in a CON application because the Agency relies on these representations.

242. It is also important that the correct applicants be named because the obligations of the CON statute such as Criterion 20, apply to the applicants. United's expert witness Aneel Gill, who supervises CON submissions for UHS-Pruitt, when asked by the Court if excluding UHS-Pruitt would result in there never being a situation where the applicant will have any sort of past history for having provided any bad services under Criterion 20 answered that such was the case – "they do not have a history." (Gill, T. Vol. 7, pp. 1355-56). This admission indicates that excluding UHS-Pruitt as a named applicant may have the effect of limiting the Agency's review of past quality.

**The CON Section's Comparative Analysis**

243. After reviewing each of the applications under the statutory and regulatory criteria, the Agency conducted a comparative analysis of the Applications to determine which proposal was a comparatively more effective alternative. The Agency used a total of fifteen comparative factors. (Jt. Ex. 1, pp. 2166-70). The Agency determined that the Applications of Maxim and Carolinas Health at Home were comparatively the most effective alternatives. (*Id.*).

244. One of the factors used by the Agency's comparative analysis was licensed practical nurse salary which did not apply to either Maxim or United; therefore, Maxim and United could only be compared on fourteen factors. (Jt. Ex. 1, p. 2168)

245. United contended the Agency should have found United's Application comparatively superior to Maxim's Application. United's expert testified that the Agency should have used additional and different factors than it choose to use in this review. (United Ex. 109).

246. In its review, the CON Section used factors that had been used in other home health agency reviews. Maxim's Application was comparatively superior to United's application in nine of the fourteen remaining factors used by the Agency. (Jt. Ex. 1, pp. 2160-70; Meyer, T. Vol. 9, pp. 1648-55). Thus United ranked higher on five factors.

247. Specifically, Maxim's application was superior to United in: (1) access to Medicaid recipients; (2) average number of visits per unduplicated patients; (3) average net revenue per unduplicated patients; (4) average total operating costs; (5) average direct care operating costs; (6) average administrative operating costs; (7) average direct care costs per visit as a percentage of average total operating cost per visit; (8) registered nurse salaries and (9) nursing aide salaries. (Jt. Ex. 1, pp. 2160-70).

248. The factors used in this review are almost identical to the three previous home health agency reviews, including a review in which United was awarded the CON. (Maxim Ex. 304; Meyer, T. Vol. 9, pp. 1649-50).

249. In deciding on the comparative factors to use in a CON review, the Agency chooses factors that are measurable, rather than subjective factors that are not measureable. (Meyer, T. Vol. 9, pp. 1651, 1658).

250. Each of the comparative factors used in this review relate to the CON objectives of access, value, and quality. (Jt. Ex. 1, pp. 2160-68; Meyer, T. Vol. 9, p. 1659-61).

251. Principally, United's argument concerning the factors wherein Maxim was found to be superior was a restatement of arguments in other criteria. For example, United argues that Maxim should not have been found superior because its projections were unreliable, the past billing fraud issue and the staffing issue.

252. United's expert witnesses, Trey Adams and Aneel Gill, testified that the CON Section should have used different comparative factors in its review of the applications, such as staffing levels and demonstration of need. (United Ex. 109). These are factors which United had already contended in other criteria that Maxim had been non-conforming. Some of the comparative factors that United's witnesses testified should have been used are more subjective and not measurable. (Meyer, T. Vol. 9, pp. 1655-58).

253. United's witnesses Mr. Adams and Mr. Gill testified that the Agency should not have compared RN and aide salaries but instead should have compared salaries combined with taxes and benefits for each of these positions. United could not point to any example of a comparative analysis in which the Agency combined salaries with taxes and benefits to conduct its comparative analysis. In previous Medicare-certified home health agency reviews, the Agency compared RN and aide salaries, just as it did in this review. (Jt. Ex. 1, pp.1623, 1707-08, 1772, 1832-33, 2022-23; Meyer T. Vol. 9, pp. 1652-53; Maxim Ex. 303).

254. United's experts testified that past quality of care should have been used as a comparative factor in this review. United had otherwise contended that Maxim was non-conforming because the fraud issue was a quality of care issue. Quality of care has only been used as a comparative factor in a 2005 review of Medicare-certified home health services when one of the applicants was found nonconforming with Criterion 20, which is not applicable here. (Meyer, T. Vol. 9, p. 1652; Frisone, Vol. 3, p. 457).

**CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact, the Undersigned Administrative Law Judge makes the following Conclusions of Law:

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. The parties are properly before the Office of Administrative Hearings. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

3. United timely filed its petition for contested case hearing pursuant to N.C. Gen. Stat. § 131E-188(a).

4. Maxim did not file a petition for contested case hearing challenging any aspect of the Agency's decision in this matter.

5. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in this matter as required by N.C. Gen. Stat. § 150B-23.

6. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

7. The subject matter of this contested case is the Agency's decisions to disapprove the United Application and to approve the Maxim Application. N.C. Gen. Stat. § 131E-188(a) provides for administrative review of an Agency decision to issue, deny or withdraw a certificate of need. *Presbyterian Hospital v. N.C. Dep't of Health & Human Services*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). ("The subject matter of a contested case hearing by the ALJ [administrative law judge] is an agency decision.").

8. "The correctness, adequacy or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10A N.C.A.C. 14C .0402. This means that the CON Law and the SMFP cannot be challenged in this review.

9. Under N.C. Gen. Stat. § 131E-183(a), the Agency "shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."

10. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an applicant fails to conform with

any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. "[A]n application must comply with *all* review criteria." (emphasis in original). *Presbyterian-Orthopaedic Hospital v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534-535, 470 S.E.2d 831, 834 (1996) "[A]n application must be found consistent with the statutory criteria before a Certificate of Need may be issued." *See Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109, 523 S.E.2d 677, 681 (1999).

11. The CON Section determines whether an application is consistent with or not in conflict with the review criteria set forth in N.C. Gen. Stat. § 131E-183 and any applicable standards, plans and criteria promulgated thereunder in effect at the time the review commences. *See* 10A N.C.A.C. 14C.0207.

12. An applicant may not amend an application. 10A N.C.A.C. 14C.0204.

13. Upon the Agency's decision to issue, deny or withdraw a certificate of need, pursuant to N.C. Gen. Stat. § 131E-188, any affected person is entitled to a contested case hearing. The statute also allows affected persons to intervene in a contested case hearing. *See* N.C. Gen. Stat. § 131E-188(a).

14. United asserted that the Agency erred in approving the Maxim Application and disapproving the United Application. United also asserted that the Agency erred in finding the Maxim Application comparatively superior to the United Application. Maxim did not appeal and did not assert in its discovery responses or in the testimony of any of its witnesses that the Agency erred in any aspect of its decision.

15. When challenging the CON Section's decision to approve a Certificate of Need application, a Petitioner must establish, by a preponderance of the evidence that: (1) the Agency's decision deprived Petitioner of property, ordered the Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the Petitioner's right and (2) the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law. *Britthaven v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995); *see also* N.C.G.S. § 150B-23(a).

16. As the Petitioner, United had the burden of proving the facts required by N.C. Gen. Stat. §150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §150B-29(a). Under N.C. Gen. Stat. §150B-34(a), "[A]n administrative law judge shall decide the case based upon a preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

17. Petitioners bear the burden of proof on each and every element of their case. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

18. The Agency does not have a burden of proof in this contested case.

19. An ALJ is not limited to information that the CON Section actually reviewed or relied upon in making its decision regarding an application. *Dialysis Care of North Carolina, LLC v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 648, 529 S.E.2d 257, 262, *affirmed per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000). *See also In re Wake Kidney Clinic, PA.*, 85 N.C. App. 639, 643-644, 355 S.E.2d 788, 791 (1987). In determining these issues, the undersigned considered evidence that was presented or available to the Agency during the review period.

20. The appellate authorities do not preclude the consideration of evidence not available at the time of the review for impeachment purposes.

21. The administrative law judge may only set aside the initial agency decision if the petitioner proves, by the greater weight of the evidence, one of the stated grounds for overturning an agency decision. The administrative law judge may not overturn the initial agency decision because the judge might have made a different judgment if he or she had been the person making the initial agency decision. N.C. Gen. Stat. § 150B-23(a).

22. Administrative Agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning in the exercise of judgment." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotations omitted). The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001).

## AGENCY FINDINGS

***Criterion (1) and Policy GEN-3***

23. United's contentions as to how Maxim should have been found non-conforming in Criterion 1 and Policy Gen-3 principally rely upon staffing issues, omission of a specific position of nurse supervisor, and Maxim's past history of billing fraud.

24. Those issues are addressed elsewhere in the Conclusions of Law within this Final Decision.

25. Based upon the findings of fact and the further conclusions of law, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure; act arbitrarily or capriciously or fail to act as required by law or rule in determining that the Maxim application was conforming to Criterion 1 and Policy Gen-3.

26. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (1) and Policy GEN-3.

***Criterion 3***

28. Criterion 3 requires that an applicant identify the population to be served by the proposed project and demonstrate the need this population has for the services proposed. N.C. Gen. Stat. § 131E-183(a)(3).

29. United failed to meet its burden of proving that the Agency erred in finding that Maxim's ramp up and market share projections were reasonable. Maxim's ramp up and market share are also in line with past ramp up and market share projections made by United in a previous application and its Year 2 market share is lower than the market share projected by United in this review.

30. The Agency did not err or otherwise violate any of the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's market share and utilization projections conformed with Criterion 3.

31. United's contention that Maxim should have provided documentation to support the anecdotal information it included in its application regarding the number of current Maxim patients it could serve if it had Medicare certification is without merit. There is no statutory or regulatory requirement that Maxim provide any anecdotal information in its application. There is also no statutory or regulatory requirement that required Maxim to provide supporting documentation to confirm anecdotal information provided in an application.

32. Maxim's utilization projections clearly and reasonably set forth the basis for its projections. United has not met its burden of showing that the anecdotal information provided in Maxim's application made it nonconforming with Criterion 3.

33. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (3).

34. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (3).

***Criterion 4***

35. Criterion (4), N.C. Gen. Stat. § 131E-183(a)(4), requires the applicant to demonstrate that it has selected the least costly or most effective alternative.

36. The Maxim Application is premised on the HHA's ability to become Medicare-certified and to receive Medicare funds. *See* Jt. Ex. 2, pp. 3; 10; 130.

37. An HHA must have either a Nurse Supervisor or Physician Supervisor to meet the Medicare CoPs. United contends that the evidence shows that Maxim's project does not include a Nurse Supervisor. Those issues are addressed elsewhere in the Conclusions of Law within this Final Decision.

38. Based upon the findings of fact and the further conclusions of law, the Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (4).

39. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (4).

***Criterion 5***

40. Criterion (5), N.C. Gen. Stat. § 131E-183(a)(5), requires the applicant to demonstrate the immediate and long-term financial feasibility of its project based upon reasonable projections of costs and charges.

41. The Agency has determined that under Criterion 5 an applicant must demonstrate that it will make a profit in the second project year in order for the project to be financially feasible.

42. It is undisputed that Maxim's projected Medicare revenue was overstated due to a mathematical error in its application. However, the fact that an applicant makes a mathematical error in its application standing alone is not a sufficient basis for determining that the applicant failed to conform with the statutory criteria.

43. The issue becomes whether or not the error is "material." In the context of Criterion 5, one must consider if the mathematical error results in the applicant not showing a profit in the second project year. The error must be such that the error results in the application failing to meet the standards of the statutory or regulatory criteria to be material in nature as applied in Criteria 5. Materiality is a relative term and subject to other standards for other criteria.

44. Maxim's error in its projected Medicare revenue was not material because Maxim's revenue projections show that it would be profitable in the second year of its project, notwithstanding this error. Similarly, United's error in overstating its utilization projections did not cause it to be nonconforming with any of the statutory criteria.

45. Ms. Frisone conceded that the Agency was aware of the overstatement of Medicare revenues in the Maxim Application because of competitive comments submitted. Frisone, Vol. 12, p. 2027; Jt. Ex. 1, pp. 938-939.

46. United's contention that Maxim will not be capable of receiving licensure because of the lack of a specified position of nurse supervisor and thus will be unable to receive Medicare reimbursement is not persuasive as discussed in the findings of fact and other conclusions of law.

47. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) by finding that Maxim's project would be profitable in the second project year and was conforming with Criterion 5.

48. United also cannot demonstrate that it was substantially prejudiced by Maxim's error because regardless of this calculation error, Maxim's proposal demonstrates that it would be profitable in the second project year.

49. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule in determining that the Maxim Application was conforming with Criterion (5).

50. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion (5).

***Criterion 7***

51. Criterion 7 requires that an applicant show evidence of the availability of health manpower and management personnel. Criterion 7 does not require that an applicant propose specific staff positions in its application or that specific staff members dedicate a specific amount of time to managing the proposed service.

52. Criterion 7 does not require that an applicant propose a 1.0 FTE administrator. 10A NCAC 13J .1001(b) states that each licensed home care office must designate an individual to serve as the Agency director. Based on the requirements of this regulation, Maxim would not be permitted to have more than one administrator for its home care agency as United contended.

53. Criterion 7 does not require that an applicant propose a 1.0 FTE nurse supervisor. The Medicare Conditions of Participation and the licensure regulations require that a home health agency provide clinical supervision. Under the Medicare Condition of Participation, clinical supervision is not required to be a 1.0 FTE position and can be provided by a physician or registered nurse. 42 C.F.R. § 484.14(d)

54. Maxim's application adequately addresses the availability of clinical supervision and sets forth that clinical supervision will be provided by a Registered Nurse who must meet specific qualifications. Maxim's Application conforms with the Medicare Conditions of Participation and Licensure regulations requiring clinical supervision.

55. Criterion 7 does not require that an applicant identify a marketing staff member. The Medicare Conditions of Participation and the home care licensure rules do not require that agencies have a dedicated marketing staff person. Under Criterion 7, Maxim was not required to name a dedicated marketing person.

56. Criterion 7 does not require that an applicant propose a specific number of FTEs to provide administrative support to the agency. Under Criterion 7, administrative support can be provided both by agency staff and by corporate and regional level staff members. Maxim's proposed administrative support is conforming with the requirements with Criterion 7.

57. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 7.

58. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or failed to act as required by law or rule in determining that the Maxim Application was conforming with Criterion 7.

59. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion 7.

***Criterion 20***

60. Criterion 20 specifically addresses quality of care in the past. Quality of care is also incorporated into Criterion 18 and Policy GEN-3. (N.C. Gen. Stat. §§ 131E-183(a)(1), (18a) and (20)). Quality of care is important in CON review. (McKillip, Vol. 3, p. 495).

61. United contends that Maxim should be found to be non-conforming on the issue of quality of care based on the past fraud. In assessing whether or not the past fraud should be considered by the Agency, the reviewers used an eighteen month "look-back" rule.

62. The practice of looking back eighteen months from the date of the Agency's decision to see if the applicant has had quality issues is not found in any statute or rule; it is simply a standard that has been being used by the Agency for a number of years. It has been so long standing that no one seems to know exactly when it came into use. The fact that the practice is long-standing does not make it compliant with general principles of statutory construction or with the North Carolina Administrative Procedure Act.

63. The eighteen month time period has no basis in law or rule. Ms. Frisone and Mr. McKillip both acknowledged that there is no statute or rule regarding the eighteen month look-back for assessing the quality of care provided by an applicant. Criterion 20 is "open-ended." (Frisone, Vol. 2, p. 329; McKillip, Vol. 4, p. 633) Mr. Smith acknowledged in his deposition that the Agency has discretion to look back longer or shorter than eighteen months. (Smith, Vol. 1, p. 192; United Ex. 156, pp. 25; 83).

64. What constitutes a "rule" is defined by the North Carolina Administrative Procedure Act in N.C. Gen. Stat. § 150B-2(8a) as:

"Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule.

65. The term does not include "[N]onbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." Likewise, "rule" does not include "[S]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; . . ."

66. Criterion (20) is a statute, N.C. Gen. Stat. § 131E-183(a)(20). The plain language of the statute contains no time period. " . . . [A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-420, 451 S.E.2d 284, 289 (1994). Since Criterion 20 does not set any particular standard of time within which to "look-back" for prior poor quality of care, it is within the discretion of the Agency to determine an appropriate look-back period for Criterion (20) under the facts and circumstances of the particular case.

67. The Agency is empowered "to adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [the CON Law]," to "[d]efine, *by rule*, procedures for submission of periodic reports by persons or health service facilities subject to Agency review," and to "[i]mplement, *by rule*, criteria for project review." N.C. Gen. Stat. § 131E-177 (emphasis added).

68. Nevertheless, the Agency "has no power to promulgate rules and regulations which alter or add to the law which it was set up to administer or which have the effect of substantive law." *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 319, 626 S.E.2d 861, 868 (2006).

69. The eighteen month look-back has been applied by the Agency as a "rule." It is not a properly promulgated rule, but rather an arbitrary time frame that has been in use by the Agency for quite some time. The "rule" is not "non-binding" as provided as an exception in the definition, but rather is applied uniformly as binding. Likewise it does not qualify as an exception because the staff of this agency is not "performing audits, investigations, or inspections."

70. Even if the past billing fraud were relevant to Criterion 20 and even if the eighteen month look-back is arbitrary and an un-promulgated rule, to consider the past billing fraud in this case, the Agency would have needed to look back more than 3 years. (Smith, T. Vol. 2, p. 289). The Agency had discretion to determine the length of time within which to look back.

71. The efforts undertaken by Maxim to address the fraud were available to the Agency during the review period. In light of the efforts of Maxim and the intervening amount of time, it would not have been reasonable under the facts of this case to have considered such fraud.

72. United contends that the DPA, CIA and federal, as well as the North Carolina state settlement agreement, were all in effect during the review period and therefore should have been considered. (United Ex. 102-103; 120-121). However, the existence of those documents during the review period is not the controlling test. The question is when, if at all, the lack of proper care would have taken place, not when the agreements were entered.

73. The Agency found that because Maxim had not experienced any adverse actions against its license for its Mecklenburg County home care agency for eighteen months preceding the date of the decision, Maxim was conforming with Criterion 20. (*Id.*, Jt. Ex. 1, p. 2145). Maxim had no penalties or licensure limitations imposed during the past eighteen months on any of its North Carolina licensed home care offices. (*Id.*; Jt. Ex. 2, p. 34).

74. The Agency did not violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's Application conformed with Criterion 20.

75. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or failed to act as required by law or rule in determining that the Maxim Application was conforming with Criterion 20. The Agency relied upon the eighteen month look-back which is not a properly promulgated rule and thus is non-binding. The Agency had discretion to determine the length of the look-back and even a look back of two years in this case would not have produced a different result. A longer look back than two years would not have been reasonable under the facts and circumstances of this contested case.

76. United failed to meet its burden demonstrating that the Agency erred in finding the Maxim Application conforming with Criterion 20.

***Comparative Criteria***

77. In a competitive review, the Agency may conduct a comparison of the applications to determine which applicant should be awarded the CON. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625, S.E.2d 837, 845 (2006). There is no statute or rule which requires the Agency to utilize certain comparative factors. *Id.* The Agency has discretion to select comparative factors which it believes is appropriate for each particular review. *WakeMed v. N.C. Dep't of Health and Human Resources*, 750 S.E.2d 186, 196 (2012).

78. Because the Agency has the discretion to select the comparative factors that will be used in each review, Petitioners have the burden of demonstrating that the Agency acted arbitrarily and capriciously in the selection of the factors it uses to compare the applicants.

79. The comparative factors used by the Agency in this review were appropriate, measurable, and objective. These factors in no way were whimsical and the Agency did not fail to indicate any course of reasoning in choosing these factors. The CON Section had no obligation under the CON Statute to use the comparative factors suggested by United in its determination of which applicant proposed the comparatively superior project.

80. Petitioners failed to meet their burden of proving that the Agency was arbitrary or capricious in the selection of the comparative factors used to determine that Maxim's Application was comparatively superior.

81. The Agency did not err or otherwise violate the standards of N.C. Gen. Stat. § 150B-23(a) in finding that Maxim's application was comparatively superior to United's Application.

***UHS- Pruitt's Failure to Be Named as an Applicant***

82. Under North Carolina's Certificate of Need law, a person that proposes to develop or offer a new institutional health service must apply for and receive a CON. (N.C. Gen. Stat. § 131E-178(a)).

83. The General Assembly, through the enactment of N.C. Gen. Stat. § 131E-178(a), determined that "no person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added). The CON Statute defines a person to include a corporation. *See* N.C. Gen. Stat. 131E-176(19).

84. A CON is valid only for the "defined scope, physical location and person named in the application." N.C. Gen. Stat. § 131E-181(a). Based on the plain language of the statute, if a corporation proposes to undertake activities that will result in the development or offering of a new institutional health service, it must first apply for and receive a CON.

85. The CON Statute provides the Agency with the authority to create the application form and to request information that it believes is required to determine conformity with the applicable statutory review criteria. N.C. Gen. Stat. § 131E-182(b). Consistent with its statutory authority, the CON Section has determined that proposed projects can have more than one applicant.

86. Likewise, in creating the Home Health CON Application Form, the Agency properly determined that under the CON Statute there can be more than one applicant. Section I, Question 1 of the CON application form asks the legal name of the applicant. The question further states in the plural that: "the applicants are the legal entities (i.e., persons or organizations) that will own the facility and any other persons who will offer, develop or incur an obligation for a capital expenditure for the proposed new institutional health service."

87. This question derives from N.C. Gen. Stat. §§ 131E-178(a) and (c) which state "[n]o person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department" and "[n]o person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need from the Department." (Emphasis added)

88. Thus the statute and the application form make clear that more than one legal entity can be required to be named as an applicant in a CON review, and that an "applicant" includes any entity that will offer or develop the new institutional health service or one who will incur an obligation for a capital expenditure. The "applicant" is also the entity that will own the facility or will be issued a license to provide the health service at issue.

89. The CON statute defines "develop" as "undertake[ing] those activities which will result in the offering of institutional health service or incurring of a financial obligation in relation to the offering of such service." N.C. Gen. Stat. § 131E-176(7).

90. When used in connection with health services, the CON Statute defines "offer" to mean "that the person holds himself out as capable of providing, or as having the means for the provision of specified health services." N.C. Gen. Stat. § 131E-176(18).

91. In determining whether the necessary applicant(s) has been named, the CON Section has looked only at the entity that will obtain licensure and certification and does not analyze which entities are offering and developing the proposed health service. (Frisone, T. Vol. 3, pp. 467, 469).

92. The CON Section's interpretation of the law is not in keeping with the plain language of the statute which requires more than just who is getting the license and certification. (Frisone, T. Vol. 3, p. 469). In limiting its determination of the appropriate applicant(s) to only that entity or entities that will be the named licensee and certified to receive Medicare and Medicaid, the CON is failing to follow the requirement in the CON law that the entity or entities that will be offering or developing the new institutional health service must apply for the Certificate of Need. (Jt. Ex. 3, p. 7; N.C. Gen. Stat. § 131E-176(7) and (18) and § 131E-178(a)).

93. It is recognized by this Court that the model used by United has been used many times over many years without question. The model of setting up a corporation that will become the working entity although not staffing it in any regard until the CON is awarded would seem to make sense, in some regard. Conversely, it would not seem to make sense to fully staff a corporate entity which is contingent on the award of a CON before the CON is awarded. However, one must look to see who or what entity is actually going to do the work of offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

94. The Agency simply cannot take on faith that the entity to be license and certified is the proper applicant. The Agency should not accept United as the proper applicant without testing to see who the proper applicant is. Inquiry must be made as to whether or not there are sufficient indicia within the application to call into question the proper applicant.

95. In the United application in this contested case there is sufficient evidence within the application wherein the Agency should have examined further what entity is offering or developing a new institutional health service or incurring an obligation for a capital expenditure.

96. UHS-Pruitt and United are each subsidiaries within the corporate structure of United Health Services, Inc. ("UHS"). UHS-Pruitt and United are two separate and distinct corporations, having been duly incorporated under existing law. (Jt. Ex. 3, pp. 283-292; United Ex. 176, ¶ 3; Affidavit of Aneel S. Gill). Neil Pruitt is the only individual associated with United in any regard. The mere fact that there is a corporate entity in existence does not in and of itself answer the underlying question.

97. In its Certificate of Need application to establish a home health agency in Wake County, United Home Care, Inc. was the only named applicant, just as it was in the Mecklenburg application. (Maxim Ex. 312, p. 7). As in the Mecklenburg application, United represented in the Wake application that it would enter into a management agreement with UHS-Pruitt.

(Maxim Ex. 312, 314) The management agreement submitted with the Wake application is the same draft agreement submitted with the Mecklenburg application.

98. Maxim presented evidence that many of the provisions in the purported United Management Agreement with UHS-Pruitt will not be followed. Instead, UHS-Pruitt Corporation dominates and controls the Medicare-certified home health agency in Wake County and intends to have the same dominion and control over the agency proposed for Mecklenburg County.

99. Even if the draft management agreement is executed and followed strictly, on its face the agreement provides UHS-Pruitt with extensive control over the agency. Under the agreement UHS-Pruitt has the authority to develop policies and procedures for the operation of the facility. (Jt. Ex. 3, App., Ex. 2, p 294 Section 1.1(a)). UHS-Pruitt pays all accounts payable of the home health agency. (*Id.* at 295, Section 1.1(a)). UHS-Pruitt also develops standards and procedures for admitting patients, for charging patients for services, and for collecting charges from patients. (*Id.*).

100. In addition, the draft management agreement specifically provides that United shall have no right to control the manner in which UHS-Pruitt's work is performed. (Jt. Ex. 3, App., Ex. 2, p. 307, Section 5.2). If this were an arms-length transaction between a CON applicant and a management company, the CON applicant, as the entity responsible for regulatory compliance, would have some control over the manner in which the management company's work is performed.

101. The testimony of UHS-Pruitt and United witnesses shows that the representations in the management agreement cannot be taken at face value because the control UHS-Pruitt exercises over the home health agencies within its system goes well beyond what is anticipated in the draft management agreement.

102. The agreement contains numerous other provisions in which ultimate control should be vested with United, but is not. For example the agreement requires that United approve: (1) employee benefits; (2) capital expenditures; and (3) standards for admitting patients. The testimony shows that UHS-Pruitt approves and ultimately determines each of these aspects of agency operations. (Jt. Ex. 3, App. Ex. 2, pp. 294-95).

103. The draft agreement submitted with the Wake County Application has never been executed for the Wake County facility.

104. United's practice of ignoring the terms of the agreement is significant because the Agency reviewed and relied on the agreement in making its determination that UHS-Pruitt was not required to be a named applicant. (United Ex. 117; Frisone Aff., ¶ 7; Frisone, T. Vol. 2, p. 322).

105. Based on a preponderance of the evidence, the management agreement included in the United Application did not accurately represent the authority and control that UHS-Pruitt would exercise over the proposed agency, even if it were to be fully executed. Therefore, although the agreement could be considered when determining whether UHS-Pruitt was required

to be an applicant in this proposed project, the "sample" agreement should be given very little weight, if any.

106. By including a management agreement in the Mecklenburg application that does not accurately represent the relationship between the parties, United and UHS-Pruitt Corporation have misrepresented their relationship.

107. United contends that UHS-Pruitt was not required to be an applicant because UHS-Pruitt was only a management company. There is no legal authority in either in the statute or applicable case law to support a position that a management company operating under a services agreement need not be named as an applicant. *See Hope – A Women's Cancer Center v. N.C. Department of Health and Human Services.*, 203 N.C.App.276, 691 S.E.3d 421 (2010). Instead, the test under the statute is whether the activities provided by the management company constitute the development or offering of a proposed health service.

108. The evidence has clearly shown that UHS-Pruitt will have more of a relationship with United than just as a management company operating within the confines of a management agreement.

109. United's argument that all contractors, including CON attorneys and consultants, would be required to be an applicant under Maxim's interpretation of the CON Statute is not persuasive and has no basis in the law. The CON Statute has a very specific definition of "develop" and "offer" which clearly excludes contractors that do not have control of a project or hold themselves out as having the ability to provide the proposed health service.

110. North Carolina's CON statute provides that "No person shall incur an obligation for a capital expenditure which is a new institutional health service without first obtaining a certificate of need. . . ." N.C. Gen. Stat. § 131E-178(c). An "obligation for a capital expenditure" includes "[A]n enforceable contract, excepting contracts which are expressly contingent upon issuance of a certificate of need, is entered into by a person for the construction, acquisition, lease or financing of a capital asset; . . ." N.C. Gen. Stat. § 131E-178(c)(1)

111. N.C. Gen. Stat. § 131E-178(c) expressly recognizes "contracts which are expressly contingent upon issuance of a certificate of need." United is currently unstaffed since its staffing was contingent on the grant of the CON. There is no contract in effect between United and UHS-Pruitt, nor anyone else. The sample contract has not been followed and was never executed as part of the Wake application. The sample contract has little to no significant bearing on this application.

112. When there is a corporation created only for the potential outcome of a CON grant with no existing employees dominated by the corporate control of the funding entity and no enforceable contract between the parties exists, it follows that the parent corporation, not the shell, is the correct applicant. By its own evidence, UHS-Pruitt is in almost complete corporate control of United.

113. The legal doctrine of piercing the corporate veil does not apply to this case. The question before this court is not whether UHS-Pruitt should be liable for United's actions or whether United should not have been a named applicant. Instead, the question is whether UHS-Pruitt should have also been included as an applicant in this review. Therefore it is not necessary to pierce the corporate veil in order to determine under the CON Statute that UHS-Pruitt's involvement in the proposed project meets the definition of to offer and develop the proposed service.

114. Based on a preponderance of the evidence as contained in the Findings of Facts, UHS-Pruitt's involvement in the United's proposed project meets the statutory definition of "develop" under N.C. Gen. Stat. § 131E-176(7).

115. Based on a preponderance of the evidence as contained in the Findings of Fact, the United Application contains multiple representations where UHS-Pruitt holds itself out as capable of providing or having the means for the provision of specified health services.

116. Based on a preponderance of the evidence presented in this contested case, United's Application would not have been approvable because UHS-Pruitt was not named as an applicant as required under the CON law; however, Maxim did not appeal the Agency's decision.

117. By not having appealed, Maxim agreed with the Agency decision and agreed that the Agency had not erred. The substance of Maxim's argument has been addressed for a complete record. Inasmuch as the model and corporate structure used by United has been in use for quite some time by many CON applicant's, the Undersigned felt it appropriate to address the underlying issues in that this issue will likely be recurring.

118. The holding in this instant contested case is not to be interpreted to mean that the model used by United is per se a bad model, but merely that the Agency should look behind the representation to ascertain who the real applicant is.

119. Whether or not UHS-Pruitt should also have been an applicant in addition to United is not determinative, and is not the point of this instant holding. The primary point to be made is that the Agency should make a determination in CON applications as to who is the appropriate party to apply not based solely on who is going to receive a license or certification. The determination should be based on the statutory requirements, which was not done in this review; however, that is of no consequence since Maxim did not appeal the Agency decision in any regard thereby agreeing that the Agency did not err.

120. The Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by law or rule by not requiring UHS-Pruitt to be an applicant.

121. Maxim did not meet its burden to demonstrate that the Agency erred by not requiring UHS-Pruitt to be an applicant.

122. Because Maxim did not meet its burden to demonstrate that the Agency erred by not requiring UHS-Pruitt to be an applicant, the ALJ need not and does not reach the issue of

whether the Agency substantially prejudiced Maxim's rights by not requiring UHS-Pruitt to be an applicant.

123. Based on the foregoing, the Undersigned concludes that UHS-Pruitt did not need to be an applicant. The Agency did not err by not requiring UHS-Pruitt to be an applicant.

**BASED UPON** the foregoing Findings of Fact and Conclusions of the Law, the Undersigned makes the following:

## FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision pursuant to N.C. Gen. Stat. § 150B-34 and N.C. Gen. Stat. § 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on the Findings of Fact and Conclusions of Law set forth above, the undersigned determines that Petitioner, United Home Care, Inc. d/b/a United Home Health, Inc. d/b/a United Home Health, failed to carry its burden of proof by the greater weight of the evidence. The CON Section's Decision to approve Maxim's Application and to deny United's Application is affirmed.

On the issue of whether UHS-Pruitt Corporation should have been a named applicant in the review at issue, Maxim has failed to carry its burden of proof by a preponderance of the evidence. Maxim failed to appeal the Agency decision thereby agreeing with the Agency decision, including who the proper parties were or should have been. UHS-Pruitt Corporation is not required to have been named as an applicant in the review at issue.

Based upon the holdings in this case, the Agency Decision is **AFFIRMED**.

## NOTICE

Under the provisions of North Carolina General Statute § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of final decision, and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department [North Carolina Department of Health and Human Services] and all other affected persons who were parties to the contested hearing."

Pursuant to N.C. Gen. Stat. § 131E-188(b1): "Before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court

of Appeals. The bond requirements of this subsection shall not apply to any appeal filed by the Department."

In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

**IT IS SO ORDERED.**

This is the 5th day of June, 2014

Donald W. Overby
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
6/9/2014 9:37 AM

STATE OF NORTH CAROLINA

COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13SOS18521

| | |
|---|---|
| Cheryl A Tatum<br>Petitioner<br><br>v.<br><br>DEPARTMENT OF SECRETARY OF STATE<br>Respondent | **FINAL DECISION** |

This matter was heard by Administrative Law Judge J. Randolph Ward, at the Guilford County Courthouse in High Point on March 28, 2014. Following the hearing, the parties were given a period of thirty days from the date of the hearing, up to and including April 28, 2014, within which to submit Statements of Contentions in support of their respective positions.

## APPEARANCES

Petitioner: Steven D. Smith, Attorney for Petitioner

Respondent: Lareena J. Phillips, Assistant Attorney General, Attorney for Respondent

## WITNESSES

For Petitioner: Petitioner Cheryl Tatum and William R. Hicks

For Respondent: Ozie Stallworth, Director, Notary Enforcement Section

## EXHIBITS

During the hearing, Respondent's Exhibits ("R. Exs.") 1 through 10 were entered into evidence without objection, as follows:

1. Complaint Form to Respondent including:
   a. 2012 License Renewal Application
   b. Response from attorney dated April 2, 2012
   c. Email dated January 30, 2012
   d. Notarized letter from Robert David Carr dated March 12, 2012
2. May 3, 2013 letter from Respondent to Petitioner
3. May 8, 2013 letter from Petitioner to Respondent

4. July 16, 2013 letter from Respondent to Petitioner with Order of Revocation
5. N.C. Gen. Stat. §10B-5
6. N.C. Gen. Stat. §10B-60
7. 18 NCAC 07B.0903
8. 18 NCAC 07B.0901
9. Pamela Nickles v. Dept. of Secretary of State, 09 SOS 03120
10. Elizabeth Jackson v. Dept. of Secretary of State, 09 SOS 05528

## ISSUE

Whether Respondent properly revoked Petitioner's Commission as a North Carolina Notary Public?

**UPON DUE CONSIDERATION** of the written Contentions of the parties, and the sworn testimony of each witness presented at the hearing, assessing its weight and credibility in light of the demeanor of the witness; the opportunity of the witness to see, hear, know, and recall relevant facts and occurrences; the interests and predisposition of the witness; whether the testimony of the witness is reasonable and consistent with the other credible evidence; taken together with the exhibits admitted, weighing all the evidence of the alleged facts or lack thereof, and the record as a whole, and the reasonable inferences to be drawn therefrom, the undersigned Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Petitioner Cheryl A. Tatum was commissioned as a Notary Public on January 2, 2009, and remained in that capacity until her commission was revoked by Respondent N.C. Department of the Secretary of State, Notary Enforcement Section (hereinafter, "Respondent"), on July 16, 2013.

2. On January 30, 2012, Petitioner was the office manager and provided clerical services at an office building housing several small firms, including ProTech Restoration Services, Inc. ("ProTech"), a construction firm. ProTech was co-owned by contractors William R. Hicks and David K. Carr, and the latter's son, Robert David ("Robby") Carr, was a construction manager for the firm. Robby Carr was generally out of the office on jobs. He tended to communicate with people in the company through his father, and Mr. Hicks testified that even when a question was addressed directly to him, Robby Carr usually responded through his father.

3. As a building contracting firm, ProTech was required to maintain licensure with the North Carolina Licensing Board for General Contractors (hereinafter, "Contractors Licensing Board"), and its license application and renewals had to bear the signature of a licensed general contractor who owned or was employed by the firm, designated as the "qualifier." 21 N.C. Admin. Code 12.0205(b) & .0408(a). On January 30, 2012, ProTech's license was due for renewal. Robby Carr was the qualifier on the prior application and had signed before Petitioner, who had notarized the signature. Although

Mr. Hicks also could have signed the renewal application as qualifier, David K. Carr insisted that he wanted his son to do so for ProTech. Mr. Hicks testified there were professional benefits to signing in that capacity. He also described tensions and ongoing disagreements at that time between himself and David K. Carr, which eventually led to their business relationship dissolving later that year and subsequent lawsuits.

4. Petitioner was instructed that ProTech's renewal application needed to be mailed to the Contractors Licensing Board on Friday, January 30, 2012, and she made multiple attempts to arrange for Robby Carr to sign the application, including an inter-office e-mail to his father at 3:49 PM that day. At 4:29 PM, David K. Carr replied: "*You probably need to send them.* Robby is out of town and cannot get here to sign." (Emphasis added) (See R. Ex. 1)

5. David K. Carr subsequently called Mr. Hicks and Petitioner into his office and displayed "them" -- a 4-page renewal application bearing Robby Carr's signature -- and urged Petitioner to notarize it. Mr. Hicks added his signature as an "owner."

6. Petitioner notarized the signature of Robert David ("Robby") Carr on ProTech's license renewal application on Friday, January 30, 2012, without Mr. Carr appearing in person before her, in violation of N.C. Gen. Stat. §10B-60(c)(1) (2012).

7. Petitioner testified that she did not know how Robby Carr's signature got on the renewal application; but that it matched his signature on the previous license application and that she recognized his signature from that and other documents signed before her for notarization. Mr. Hicks' testimony described David K. Carr as manipulative, and he specifically testified that it would have been in character for the elder Mr. Carr to have held back the application bearing his son's signature until late in the day to increase pressure on Petitioner to notarize the document without his son being personally present.

8. Based on all of the evidence, the undersigned finds that the fact that David K. Carr possessed the renewal application bearing Robby Carr's signature could reasonably cause Petitioner to believe that the signature was authentic.

9. Petitioner reasonably believed that Robert David ("Robby") Carr wanted her to notarize his signature on the subject renewal application, due to his signature in her presence on the prior application, the familiar appearance of the signature on the application, and the request of his father who she reasonably believed spoke for Robby Carr.

10. By appearance, the signatures purported to be that of Robert David ("Robby") Carr on the subject renewal application and on the notarized complaint letter of March 12, 2012 to the Contractors Licensing Board, relied on by Respondent in initiating this inquiry, could be signatures of the same person. (See R. Ex. 1)

11. There is no evidence that Petitioner acted out of any motive other than her business relationship with ProTech and its officers and employees.

12. Petitioner did not notarize Robert David ("Robby") Carr's signature with the intent to defraud any person or firm. Consequently, Petitioner did not commit forgery.

13. Mr. Hicks testified that signing an application as a qualifier was beneficial--e.g., a contractor cannot sign as qualifier if (s)he has not been a qualifier during the four years preceding the application--but that no contractor can sign as a qualifier for more than two companies, and Mr. Hicks testified that David K. Carr owned other companies. 21 N.C. Admin. Code 12.0205(b).

14. If ProTech's renewal had not been "effected" in January 2012, the company's "certificate of license" would have expired. NC Gen. Stat. 87-10(e). David K. Carr wanted his son to sign the application as the "qualifier" for his son's benefit, and/or he did not want Mr. Hicks to be the "qualifier" for the company.

15. Based on the preponderance of the direct and circumstantial evidence, and the reasonable inferences that can be drawn therefrom, David K. Carr procured the signature of Robert David ("Robby") Carr on the subject application, by whomever it was made, for this form's intended purpose, with his son's knowledge, consent, and authority. Consequently, Petitioner did not commit forgery.

16. Respondent produced a letter, dated March 12, 2012, over the notarized signature of "Robert David Carr," addressed to the Contractors Licensing Board, "concerning [his] license qualifier status," noting that his signature appeared as qualifier on ProTech's application and alleging that he had "not worked for the company or authorized my name to be used as a qualifier since October 28, 2011," and refers to the application as a "forgery." (Emphasis in letter) (See R. Ex. 1) No evidence of the context for this letter was presented by Respondent, but it is consistent with a scenario in which Robert David ("Robby") Carr had tried to act as qualifier for two of his father's other companies while the ProTech license renewed with his signature remained in effect.

17. In light of all of the evidence, the "forgery" allegations against Petitioner in this letter are not worthy of belief. Most obviously, the claim that, "I...have not worked for the company...since October 28, 2011," cannot be reconciled with the email exchange between Petitioner and David K. Carr on January 30, 2012 (See R. Ex. 1), or the consistent, credible, and uncontradicted testimony of the witnesses present when the application was prepared. Secondly, no plausible motive for a forgery on January 30, 2012--requiring David K. Carr as a malevolent co-conspirator--has been suggested. Finally, Mr. Stallworth testified that he made multiple attempts to interview both the Carrs and could not obtain their cooperation. The complaint filed with the Secretary of State was prepared and sent by an employee of the Contractors Licensing Board--presumably after unsuccessfully urging the putative victim to do it--some ten (10) months after Robby Carr's complaint letter. The complaint contains no facts that were not in that letter or ProTech's application, nor any elaboration to suggest that the Contractors Licensing Board had interviewed Robby Carr or acquired any information other than the letter on which to base the complaint.

18. On May 3, 2013, Respondent sent a letter to the Petitioner inquiring about the allegation "that [Petitioner] notarized the forged signature of Robert David Carr." (R. Ex. 2) Petitioner responded May 8, 2013, with the admission that, although she was familiar with Robby Carr's signature from witnessing and notarizing it numerous times, "He did not personally appear before me on January 30, 2012," when she notarized David K. Carr's "renewal with the signature on file." Otherwise, Petitioner did not discuss the origin of the signature, as none of the questions in the letter specifically inquired about that.

19. The foregoing facts constituted ample grounds for Respondent to take disciplinary action against Petitioner. N.C. Gen. Stat. §10B-60(a) and (c)(1).

20. Petitioner was negligent in failing to require the personal presence of Robert David ("Robby") Carr before notarizing his signature. 18 NCAC 07B .0901(13).

21. Other than the notarial statement that Robert David ("Robby") Carr signed the document in Petitioner's presence, there is no evidence that any fact stated in the application was false or misleading in any way. Consequently, there was no actual or potential monetary or other harm to the general public, or any group, individual, or client due to Petitioner's negligence. 18 NCAC 07B .0901(3).

22. There is no evidence of Petitioner committing any other infractions, or engaging in any dishonest acts, or making dishonest statements before or during the investigation of this matter. 18 NCAC 07B .0901.

23. Petitioner instigated this proceeding pursuant to G.S. 10B-2 and 18 NCAC 07B .0907, and the parties were timely and properly served with notice of this hearing.

24. To the extent that portions of the following Conclusions of Law include findings of fact, such are deemed incorporated into these Findings of Fact.

## CONCLUSIONS OF LAW

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are deemed incorporated into these Conclusions of Law.

2. The parties and the controversy are properly before the Office of Administrative Hearings upon the Notary Public's timely Petition appealing Respondent's final agency decision of July 16, 2013, pursuant to N.C. Gen. Stat. §150B-23(a), Chapter 10B, and 18 NCAC 07B .0907.

3. N.C. Gen. Stat. §10B-60(a) & (c)(3) provides that, "The Secretary [of State] may issue a warning to a notary or restrict, suspend, or revoke a notarial commission" for specified acts, including "if the notary … takes an acknowledgment or administers an oath or

affirmation without the principal appearing in person before the notary," which is denominated "a Class 1 misdemeanor."

4. Respondent properly determined that Petitioner's error was an act of "negligence" within the meaning of 18 NCAC 07B .0901(13).

5. "[A]n intent to defraud is an essential element of forgery[.]" 15A N.C. Index 4th Forgery § 1. "[T]hree elements are necessary to constitute the offense of forgery: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22; State v. Brown, 9 N.C.App. 498, 176 S.E.2d 881." State v. Bauguess, 13 N.C. App. 457, 461, 186 S.E.2d 185, 187 (1972); State v. Guarascio, 205 N.C. App. 548, 696 S.E.2d 704 (2010). Consequently, Petitioner did not commit forgery.

6. If the purported signer of a document "is a real person and actually exists, [to prove forgery] the State is required to show not only that the signature in question is not genuine, but *was made by defendant without authority*." *State v. Phillips,* 256 N.C. 445, 448, 124 S.E.2d 146, 148 (1962). This is because the *law generally presumes that one signing another's name has authority to do so*." 37 C.J.S. *Forgery* Sec. 80 (1943). (Emphasis added) Consequently, Petitioner did not commit forgery.

7. The lack of prior offenses, or of any record of acts of moral turpitude or dishonesty, and the absence of actual or potential damage to the public or individuals involved, weigh heavily in mitigation in determining appropriate discipline for Petitioner's serious breach of an essential notarial duty.

## FINAL DECISION

Respondent's finding that Petitioner, *by negligence*, breached her notarial duty to require a principal to appear personally before her before notarized his signature, in violation of N.C. Gen. Stat. §10B-60(c)(3), is AFFIRMED.

Based upon the foregoing, the undersigned orders that the Secretary of State suspend Petitioner's Notarial Commission for a period of one (1) year, commencing July 16, 2013.

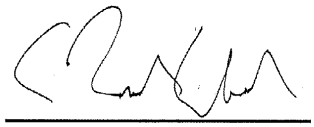
## NOTICE

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the

contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 9th day of June, 2014.



J.Randolph Ward
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
9/4/2014 9:11 AM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ04313

| | |
|---|---|
| David R Beatson<br>Petitioner<br><br>v.<br><br>N C Private Protective Services Board<br>Respondent | **PROPOSAL FOR DECISION** |

On July 29, 2014, Administrative Law Judge J. Randolph Ward called this case for hearing in Raleigh, North Carolina.

## APPEARANCES

Petitioner appeared *pro se.*

Respondent was represented by attorney Jeffrey P. Gray, Bailey & Dixon, LLP, P.O. Box 1351, Raleigh, North Carolina 27602.

## ISSUE

Whether Petitioner should be denied renewal of his unarmed guard registration permit based on Petitioner's lack of good moral character and demonstration of intemperate habits as evidenced by a conviction of misdemeanor Assault & Battery - 3rd Degree.

## APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case: N.C.G.S. §§ 74C-3(a)(6); 74C-8; 74C-9; 74C-11; 74C-12; 12 NCAC 7D § .0700.

## FINDINGS OF FACT

1. Respondent Board is established pursuant to N.C. Gen. Stat. §74C-1, *et seq.,* and is charged with the duty of licensing and registering individuals engaged in the armed and unarmed security guard and patrol business.

2. Petitioner applied to Respondent Board for a renewal of his unarmed guard registration permit.
3. Respondent denied the unarmed guard registration permit due to Petitioner's criminal

record which showed the following:

A conviction in York County, State of South Carolina, on August 6, 2013 for Assault & Battery - 3rd Degree.

4. Petitioner requested a hearing on Respondent's denial of the renewal of his unarmed guard registration permit.

5. By Notice of Hearing dated June 16, 2014, and mailed via certified mail, Respondent advised Petitioner that a hearing on the denial of his unarmed guard registration permit would be held at the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina 27609 on July 29, 2014. Petitioner appeared at the hearing.

6. Petitioner testified that the incident happened in March 2013 at his residence in Lake Wylie, SC. He was getting dressed for work and looked out his window. He saw two kids walking a dog. The kids let the dog relieve himself, and then smeared the dog feces on his mailbox and that of his neighbors. Other neighbors had had feces smeared on their doors and cars, but the responsible culprits had not been identified. Petitioner called the police and reported the incident, and then told the dispatcher he was going outside to confront the kids. He was unsure how old the kids were at the time. He related they ranged from 9 to 14 years old. By the time he got outside, the kids had crossed the street and were walking down the other side of the street.

7. Petitioner followed the kids to their residence and began to write down their address. He was standing in the street watching the house when an SUV with a male driver pulled up. The man got out of the SUV and asked Petitioner if there was a problem. Petitioner answered that yes, there was a problem. Petitioner told him that two kids that live in the house had smeared dog feces on Petitioner's mailbox. The man called his sons outside and asked them if they smeared dog feces on Petitioner's mailbox. The older boy said, "No," and the younger said, "Yes." The man became angry and told Petitioner to leave. A short discussion ensued, and then the man became aggressive. Petitioner walked away, and the man followed him. The man then started cleaning the dog feces off the mailboxes. Petitioner started videotaping the man cleaning the mailboxes. The man yelled at him to stop the videotaping. The man started running at him, and Petitioner retreated back towards his house. The man continued to pursue him, and Petitioner reached in his car and grabbed the ASP Baton he carried at work. He told the man not to come on his property because he would defend himself. The man left. Petitioner made no physical contact with the man who pursued him.

8. When the police arrived, a short investigation into the incident was conducted by the responding police officer. After interviewing Petitioner and the man, Petitioner was charged with Assault and Battery - 3rd Degree. The reason, according to Petitioner, is because he grabbed his ASP Baton. The police said he offered to injure someone by brandishing the baton, therefore he was charged with Assault and Battery - 3rd Degree.

9. A public defender was assigned to Petitioner's case. Petitioner provided video evidence

to her, but she did not produce the video of the man threatening him. A witness testified that the baton was extended. Another witness testified that the baton was not extended. The court found him guilty and sentenced Petitioner to pay a $470.00 fine. He appealed the conviction, but lost the appeal.

10. Petitioner presented a copy of Section 16-3-600 of the General Statutes of South Carolina, "Assault and Battery." Subsection (E)(1) of this statute makes it a violation to "offer…to injure another person with the present ability to do so."

11. Petitioner testified that the ASP Baton was issued by his employer to carry while working as an unarmed guard.

12. Petitioner served in the U.S. Army Reserves from 1995 to 1999. He was a Communication Center Operator. He received a General Discharge under Honorable Conditions due to a foot injury. He serves his community as a volunteer firefighter. He is 41 years old and has no other criminal record.

13. Petitioner testified that he marked "No" to question 1 on the application because the incident had not occurred when he was completing the application in May 2013.

14. Petitioner worked for Metro Security & Investigative Services, Inc. for four months and was assigned to a commercial warehouse to patrol the area to prevent crime.

## CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. Under G.S. §74C-12(a)(25), Respondent Board may refuse to grant a registration if it is determined that the applicant has demonstrated intemperate habits or lacks good moral character.

3. Under G.S. §74C-8(d)(2), conviction of any crime involving an act of violence is *prima facie* evidence that the applicant does not have good moral character or demonstrates intemperate habits.

4. Respondent Board presented evidence that Petitioner had demonstrated intemperate habits and lacked good moral character through his conviction in York County, South Carolina for misdemeanor Assault & Battery - 3rd Degree.

5. Petitioner presented evidence sufficient to explain the factual basis for the charge and has rebutted the presumption.

Based on the foregoing, the undersigned makes the following:

**PROPOSAL FOR DECISION**

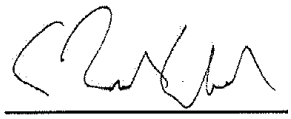
Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that Petitioner be issued an unarmed guard registration permit.

**NOTICE AND ORDER**

The N C Private Protective Services Board is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is 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.

This the 4th day of September, 2014.



J.Randolph Ward
Administrative Law Judge