



# NORTH CAROLINA

## State Board of Elections & Ethics Enforcement

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August 10, 2018

VIA HAND DELIVERY & EMAIL

Amber May  
Rules Review Commission  
1711 New Hope Church Road  
Raleigh, NC 27609

Re: Request for waiver pursuant to 26 NCAC 05 .0112

Ms. May:

The State Board of Elections and Ethics Enforcements requests a waiver pursuant to 26 NCAC 05 .0112 for the following rules:

08 NCAC 02 .0110 and .0111

The waiver request is made because the 2018 general election is only a few months away and the rules make important changes to the State Board's election rules. The election will take place on September 7, and pursuant to state and federal law, absentee ballots will be mailed out beginning September 7. In-person early voting begin on October 18. These rules, which substantially revise the election protest form and clarify that county boards of elections shall not delay canvass when a protest could not affect the outcome of an election, need to be adopted well in advance of the election to allow time for distribution to the county boards and to inform the public about these changes.

The State Board has acted expeditiously on these rules. The rules were published on June 1, 2017 but, due to litigation between the governor and the legislature, the State Board's membership became vacant that same day and remained so for over nine months. Final action on the rules was taken on July 18, 2018, and they were submitted to the Commission the following day. Changes to the above listed rules have been made based on counsel's request for technical changes and the issued staff opinions. For the above reasons, the agency requests that you consider the rules with changes at the August meeting.

Respectfully submitted,

Katelyn Love  
Deputy General Counsel and Rulemaking Coordinator  
State Board of Elections and Ethics Enforcement

08 NCAC 02 .0110 is readopted with changes as published in 31:23 NCR 2313 as follows:

**08 NCAC 02 .0110 ACTIONS OF COUNTY BOARD AS TO ELECTION PROTESTS**

(a) The county board shall deliver any filed election protest, including any attachments, to the State Board as follows:

(1) if hand-delivered or mailed, within 24 hours after the election protest is filed;

(2) if faxed, the same day the election protest is filed; or

(3) if emailed, the same day the election protest is filed.

~~within 24 hours after it is filed. Faxing the protest, with attachments, on that same day it was filed to the State Board shall constitute the required delivery. Sending the protest and attachments, by e mail, on the same day it was filed shall also constitute the required delivery.~~

(b) The county board ~~may~~shall not consider election protests not timely filed ~~in time~~, but shall refer all such untimely protests, along with copies of the protest and attachments, to the State Board of Elections office for consideration ~~in accordance with of a possible hearing by the State Board of Elections~~ under G.S. ~~163-182.12~~163A-1180. For the purposes of this rule, "timely" means within the time specified in G.S. 163A-1178.

(c) Upon receipt of a timely filed election protest, the county board of elections shall hold a preliminary consideration hearing in accordance with G.S. 163A-1178. ~~If after preliminary consideration of a protest,~~ the county board determines that a hearing is necessary ~~should be held as authorized by G.S. 163-182.10~~, the board shall set the hearing no later than ten business days from the date of the preliminary consideration, and shall start no earlier than 8:00 a.m. and no later than 8:00 p.m. at any location set by the county board of elections. The county board may continue hearings for good ~~cause, cause as determined by the county board.~~ Only for good cause and upon informing the State Board of Elections office, may a hearing be set on or continued to a weekend day or holiday. Examples of good cause include, but are not limited to, procuring documentary evidence or securing witness testimony necessary to conclude the hearing.

(d) Notice of hearing as required by G.S. ~~163-182.10 (b)(2)~~163A-1178(b) shall be given at least three business days prior to the day of the hearing, and the notice required shall be ~~actual~~ notice by any means chosen by the county board. Any oral notice of the hearing shall be followed ~~as soon as possible~~ with a written notice sent prior to the hearing date. The oral notice shall constitute valid notice meeting the three-day notice requirement.

(e) Required procedures include:

(1) Upon a reasonable and relevant request by a protester or interested person, the chair or any two members of the county board may issue subpoenas for persons or documents. Such subpoenas shall be served in the same manner as allowed in the North Carolina Rules of Civil Procedure.

(2) The county board shall notify the person protesting, any affected candidate, and any affected officeholder of its decision in a protest hearing no later than 5:00 p.m. the next day after the conclusion of the hearing itself. The board shall file at the board office a written decision within the mandates of G.S. ~~163-182.10 (d)~~163A-1178(d) by 5:00 p.m. five business days after the oral decision is given to the person filing the protest. Such written decision shall be served by any means of ~~actual~~ delivery upon the protestor and any affected candidate or officeholder within 24 hours after

1 being filed at the board office. Nothing herein shall discourage more prompt decisions and written  
2 orders.

- 3 (3) All election protest hearings before county boards shall be recorded by a court reporter. The hearing  
4 need not be transcribed unless the board's decision is appealed. Upon notice of appeal to the State  
5 Board of an election protest, the county board shall cause the record of the hearing to be transcribed  
6 and delivered to the State Board, at the county board's expense, within seven business days of the  
7 notice of appeal. ~~A county board may cause hearings, that on their face do not present merit to be  
8 recorded by mechanical means and not by court reporter only with prior permission of the Executive  
9 Director of the State Board of Elections. Any non-transcribed record of the county hearings may  
10 be destroyed 60 days after the date of hearing if not appealed, or 60 days after the entry of any final  
11 order or decision in an appealed hearing.~~ Transcripts of hearings shall be kept for two years after  
12 their creation.

- 13 (4) If the State Board sets an appeal for hearing, it shall designate who shall appear on behalf of the  
14 county board.

15 ~~(e)(f)~~ A county board of elections shall timely hear and decide all protests, unless

- 16 (1) the protest is administratively dismissed pursuant to 08 NCAC 02 .0114.0114; or  
17 (2) the county board of elections receives alternative instructions from the State Board issued under  
18 G.S. ~~163-182.12163A-1180.~~

19 If a protest does not concern the manner in which votes were counted or results tabulated, a county board of elections  
20 shall not delay canvass in order to hear the protest. A protest that alleges the occurrence of an election law violation  
21 regarding an insufficient number of votes to change the outcome of a contest within the jurisdiction of a county board  
22 of elections shall not delay canvass by a county board of elections.

23  
24 *History Note:* Authority G.S. ~~163-22163A-741; 163-182.10163-182-10163A-1178;~~  
25 *Temporary Adoption Eff. April 15, 2002;*  
26 *Eff. August 1, 2004.*  
27 *Readopted Eff. September 1, 2018.*  
28

08 NCAC 02 .0111 is readopted with changes as published in 31:23 NCR 2313-18 as follows:

### 08 NCAC 02 .0111 ELECTION PROTEST FORM

All persons bringing an election protest under Part 4 of Article 45A20 shall complete and timely file the following form. For the purposes of this rule, “timely” means within the time required by G.S. 163A-1177(b). Please note this form ~~should~~shall not be used to challenge the registration of an individual voter or to report an incident other than an irregularity affecting the outcome of an election.

#### ELECTION PROTEST

(Use of this form is required by G.S. ~~163-182.9(e)~~163A-1177(c))

This form must be filed with the county board of elections within the timeframes set out in G.S. ~~163-182.9(b)(4)~~163A-1177(b)(4). Please print or type your answers. Use additional sheets if needed to answer the below questions fully. Number the pages of all additional sheets. Please note that filings will be a public record. Please redact all confidential information, such as date of birth, Social Security number, and driver’s license number.

Respond to all prompts. Failure to complete this form as required may result in the dismissal of your protest. Attach additional sheets as necessary, including all exhibits and supplemental documents. All attachments are deemed incorporated and covered under the Protest Certification.

#### PROTESTOR

1. Provide your preferred contact information:

Name: _____	County of Residence: _____
Email: _____	Phone: _____
Mailing _____	Address: _____
_____	

NOTE: You will be deemed to consent to service at all of the above addresses (including email), unless you attach an addendum indicate otherwise.

2. Are you represented by counsel? ☐ Yes ☐ No

NOTE: If you answered *Yes*, above, your counsel must complete and you must attach the Counsel Certification Addendum.

1 3. Mark all that describe you:

2 ☐ Candidate for the office of \_\_\_\_\_

3 ☐ Registered voter eligible to participate in the protested election contest

4 ☐ Neither of the above\*

5                   *\*If you select this option, you are not eligible to file a protest.*

## 7 PROTEST SCOPE

9 4. List all election contests subject to your protest and calculate the margin of votes separating the apparent winner  
0 from the runner-up as of the date of filing. Your response does not waive your right to contest the validity of the  
1 current vote count. If your protest concerns all contests on the ballot, you must include the vote margin for each  
2 contest.

Protested Contest(s)	Current Vote Margin
(subtract runner-up totals from apparent winner's totals)	
<i>Example: Mayor of Townsville</i>	75

6 5. This protest alleges (*select at least one*):

7     ☐ A defect in the manner by which votes were counted or results tabulated sufficient to cast doubt on the apparent  
8     results of the election.

9     ☐ A violation of election law, irregularity, or misconduct sufficient to cast doubt on the apparent results  
10         of the election.

## 2 FACTUAL BASIS & LEGAL ARGUMENT

4 6. Provide all factual allegations in support of your protest. If any fact you allege is outside the scope of your personal  
5 knowledge, you may attach affidavits from those who have personal knowledge of that fact. All facts you allege in  
6 connection with this protest must be true and accurate to the best of your knowledge, and brought in the sincere belief  
7 that the facts alleged form a good faith basis to protest the conduct and results of the election.

1 \_\_\_\_\_  
2 \_\_\_\_\_  
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15 \_\_\_\_\_

16  
17  
18 7. List all individuals, if any, you may call as witnesses to substantiate facts listed in Prompt 6. If there are multiple  
19 individuals, summarize the facts of which the individual has personal knowledge.

20 \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_

23  
24  
25 8. Cite any statute or case, administrative rule or decisions, and election policy or procedure that supports your claim  
26 set out under Prompt 5.

27 \_\_\_\_\_  
28 \_\_\_\_\_

29  
30 RELIEF

31  
32 9. What effect do you believe the facts alleged in response to Prompt 6, if proven, will have on the electoral outcome  
33 in the protested contest(s)? Your response should account for the current vote margin calculated in response to  
34 Prompt 4.

- 35 ☐ The electoral outcome of the protested contest(s) will change.  
36 ☐ The electoral outcome of the protested contest(s) will not change.  
37 ☐ I am uncertain whether the outcome of the contest(s) will change.

☐ Other \_\_\_\_\_

10. What relief do you seek?

☐ Correct the vote count

☐ A new election

☐ Other: \_\_\_\_\_

#### ASSISTANCE

11. List all persons who assisted you in preparing the contents of this protest and indicate the nature of the assistance provided:

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Note: For protestors represented by an attorney, this protest is the initial filing in a *proceeding* as defined by N.C. State Bar Rules. *See* 27 N.C.A.C. 02 Rule 1.00(n).

12. Has any candidate, political party, organization, or person acting on behalf of the same requested that you bring this protest?

☐ Yes.

☐ No.

13. Have you received any financial or other benefit or promise of future financial or other benefit in exchange for filing this protest?

☐ Yes.

☐ No.

#### AFFECTED PARTIES & SERVICE

You must serve copies of all filings on every person with a direct stake in the outcome of this protest ("Affected Parties"). Affected Parties include every candidate seeking nomination or election in the protested contest(s) listed

under Prompt 4, not only the apparent winner and runner-up. If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served. Address information for registered voters is available from the county board of elections or using the Voter Lookup at [www.ncsbe.gov](http://www.ncsbe.gov).

Materials may be served by personal delivery, transmittal through U.S. Mail or commercial carrier service to the Affected Party's mailing address of record on file with the county board of elections or the State Board of Elections, or by any other means affirmatively authorized by the Affected Party. If you know the Affected Party is represented by an attorney, service must be made on his or her counsel. Service must occur within one (1) business day of filing materials with the county board of elections. If service is by transmittal through the U.S. Mail or commercial carrier service, service will be complete when the properly addressed, postage-paid parcel is deposited into the care and custody of the U.S. Mail or commercial carrier service. It is your responsibility to ensure service is made on all Affected Parties.

14. List all Affected Parties, including their service address:

<i>Affected Party</i>	<i>Service Address</i>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

#### PROTESTOR CERTIFICATION

15. By signing this protest application, you affirm the following:

I, \_\_\_\_\_ (*full name*), swear, under penalty of perjury, that the information provided in this protest filing is true and accurate to the best of my knowledge, and that I have read and understand the following:

(*initial*)

\_\_\_\_\_ I have reviewed the statutes and administrative rules governing election protests, including all deadlines.

\_\_\_\_\_ My protest must originate with a filing at the county board of elections.

\_\_\_\_\_ I must timely serve all Affected Parties.

\_\_\_\_\_ I must prove by *substantial evidence* either the existence of a defect in the manner by which votes were counted or results tabulated or the occurrence of a violation of election law, irregularity, or misconduct, either of which were sufficient to cast doubt on the apparent results of the election.



\_\_\_\_\_ It is a crime to interfere unlawfully with the conduct and certification of an election.

\_\_\_\_\_ It is a crime to interfere unlawfully with the ability of a qualified individual to vote and to have that vote counted in the election.

\_\_\_\_\_ The facts I allege in connection with this protest are true and accurate to the best of my knowledge, and I have a good faith basis to protest the conduct and results of the election.

**Submitting fraudulently or falsely completed declarations is a Class I felony under Chapter 163A of the General Statutes. This notice is provided pursuant to S.L. 2013-381, s. 5.4.**

Signature of Protestor: \_\_\_\_\_ Date: \_\_\_\_\_  
*(This signature must be signed in the presence of a notary)*

State of North Carolina, County of \_\_\_\_\_

Sworn to (or affirmed) and subscribed before me this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(Official Seal)

Official Signature of Notary

\_\_\_\_\_, Notary Public  
Printed Name

My commission expires: \_\_\_\_\_

Date/Time Filed with County Board

(completed by the county board)

**NOTE:** The county board must provide the State Board with a complete copy of a filed protest within one business day after it is filed. In addition, the county board shall provide a copy of the election audit with this copy of the protest.

Please direct any questions to your county board of elections or the North Carolina State Board of Elections & Ethics Enforcement, PO Box 27255, Raleigh, NC 27611-7255.

COUNSEL OF RECORD ADDENDUM

If you answered Yes to Prompt 2 on the above, your attorney must complete this form and you must file it with your Election Protest Application.

Attorney Must complete all of the following:

Protestor Name: \_\_\_\_\_ Protestor County: \_\_\_\_\_

Attorney Name: \_\_\_\_\_

Attorney Email: \_\_\_\_\_ Attorney Phone: \_\_\_\_\_

☐ I am a member in good standing with the North Carolina State Bar

☐ I am not licensed to practice law in North Carolina but am a member in good standing in \_\_\_\_\_  
(State or District of Columbia), and do hereby apply to appear *pro hac vice* and certify that I have or will file all appropriate documents required under G.S. § 84-4.1.

Law Firm: \_\_\_\_\_

Bar Number: \_\_\_\_\_

I (choose one) ☐ am ☐ am not:

Subject to any order of any court or administrative agency disbaring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law. If you are subject to any orders, explain in the space below.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I represent the Protestor whose name is provided above. I have read and understand the laws governing election protests in North Carolina General Statutes Chapter 163A and Title 8 of the N.C. Administrative Code. I swear/attest that the information I have provided in this Addendum is true and accurate to the best of my knowledge.

\_\_\_\_\_  
Attorney Signature

\_\_\_\_\_  
Date

*History Note:* Authority G.S. ~~163-22~~163A-741; ~~163-182.9~~163A-1177;  
Temporary Adoption Eff. April 15, 2002;  
Eff. August 1, 2004.

