

NORTH CAROLINA

REGISTER

IN THIS ISSUE



Volume 20, Issue 05
Pages 242 - 295

September 1, 2005

This issue contains documents officially filed through August 11, 2005.

Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Dana Sholes, Publications Coordinator
Linda Dupree, Editorial Assistant
Julie Brincefield, Editorial Assistant

I. IN ADDITION
Brownfields Property, OVP Holdings, Inc.242

II. PROPOSED RULES
Administration
Council of State, State Property Office243
Administrative Hearings, Office of
Rules Division & Hearings Division249 - 252
Environment and Natural Resources
Environmental Management Commission246 – 249
Health and Human Services
Social Services Commission244 - 246
Licensing Boards
Cosmetic Art Examiners, Board of249

III. RULES REVIEW COMMISSION.....2253 - 262

IV. CONTESTED CASE DECISIONS
Index to ALJ Decisions.....263 – 265

Text of Selected Decisions
04 DHR 1062266- 269
04 EHR 1469270 – 290
04 OSP 1558.....291 - 295

For the CUMULATIVE INDEX to the NC Register go to:
<http://reports.oah.state.nc.us/cumulativeIndex.pl>

North Carolina Register is published semi-monthly for \$195 per year by the Office of Administrative Hearings, 424 North Blount Street, Raleigh, NC 27601. *North Carolina Register* (ISSN 15200604) to mail at Periodicals Rates is paid at Raleigh, NC. POSTMASTER: Send Address changes to the *North Carolina Register*, 6714 Mail Service Center, Raleigh, NC 27699-6714.

NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterator	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
24*	INDEPENDENT AGENCIES	32 Medical Examiners	
25	STATE PERSONNEL	33 Midwifery Joint Committee	
26	ADMINISTRATIVE HEARINGS	34 Funeral Service	
27	NC STATE BAR	36 Nursing	
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	37 Nursing Home Administrators	
		38 Occupational Therapists	
		40 Opticians	
		42 Optometry	
		44 Osteopathic Examination (Repealed)	
		45 Pastoral Counselors, Fee-Based Practicing	
		46 Pharmacy	
		48 Physical Therapy Examiners	
		50 Plumbing, Heating & Fire Sprinkler Contractors	
		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
		58 Real Estate Commission	
		60 Refrigeration Examiners	
		61 Respiratory Care	
		62 Sanitarian Examiners	
		63 Social Work Certification	
		64 Speech & Language Pathologists & Audiologists	
		65 Therapeutic Recreation Certification	
		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2005 – December 2005

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 (first legislative day of the next regular session)	270 th day from publication in the Register
19:13	01/03/05	12/08/04	01/18/05	03/04/05	03/21/05	05/01/05	05/06	09/30/05
19:14	01/18/05	12/22/04	02/02/05	03/21/05	04/20/05	06/01/05	05/06	10/15/05
19:15	02/01/05	01/10/05	02/16/05	04/04/05	04/20/05	06/01/05	05/06	10/29/05
19:16	02/15/05	01/25/05	03/02/05	04/18/05	04/20/05	06/01/05	05/06	11/12/05
19:17	03/01/05	02/08/05	03/16/05	05/02/05	05/20/05	07/01/05	05/06	11/26/05
19:18	03/15/05	02/22/05	03/30/05	05/16/05	05/20/05	07/01/05	05/06	12/10/05
19:19	04/01/05	03/10/05	04/16/05	05/31/05	06/20/05	08/01/05	05/06	12/27/05
19:20	04/15/05	03/24/05	04/30/05	06/14/05	06/20/05	08/01/05	05/06	01/10/06
19:21	05/02/05	04/11/05	05/17/05	07/01/05	07/20/05	09/01/05	05/06	01/27/06
19:22	05/16/05	04/25/05	05/31/05	07/15/05	07/20/05	09/01/05	05/06	02/10/06
19:23	06/01/05	05/10/05	06/16/05	08/01/05	08/22/05	10/01/05	05/06	02/26/06
19:24	06/15/05	05/24/05	06/30/05	08/15/05	08/22/05	10/01/05	05/06	03/12/06
20:01	07/01/05	06/10/05	07/16/05	08/30/05	09/20/05	11/01/05	05/06	03/28/06
20:02	07/15/05	06/23/05	07/30/05	09/13/05	09/20/05	11/01/05	05/06	04/11/06
20:03	08/01/05	07/11/05	08/16/05	09/30/05	10/20/05	12/01/05	05/06	04/28/06
20:04	08/15/05	07/25/05	08/30/05	10/14/05	10/20/05	12/01/05	05/06	05/12/06
20:05	09/01/05	08/11/05	09/16/05	10/31/05	11/21/05	01/01/06	05/06	05/29/06
20:06	09/15/05	08/25/05	09/30/05	11/14/05	11/21/05	01/01/06	05/06	06/12/06
20:07	10/03/05	09/12/05	10/18/05	12/02/05	12/20/05	02/01/06	05/06	06/30/06
20:08	10/17/05	09/26/05	11/01/05	12/16/05	12/20/05	02/01/06	05/06	07/14/06
20:09	11/01/05	10/11/05	11/16/05	01/03/06	01/20/06	03/01/06	05/06	07/29/06
20:10	11/15/05	10/24/05	11/30/05	01/17/06	01/20/06	03/01/06	05/06	08/12/06
20:11	12/01/05	11/07/05	12/16/05	01/30/06	02/20/06	04/01/06	05/06	08/28/06
20:12	12/15/05	11/22/05	12/30/05	02/13/06	02/20/06	04/01/06	05/06	09/11/06

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

Note from the Codifier: This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
OVP Holdings, LLC**

Pursuant to N.C.G.S. § 130A-310.34, OVP Holdings, LLC has filed with the North Carolina Department of Environment and Natural Resources (“DENR”) a Notice of Intent to Redevelop a Brownfields Property (“Property”) in Arden, Buncombe County, North Carolina. The Property, which is known as the former Fishburne Equipment Co. site, consists of approximately two acres and is located at 25 Bradley Branch Road. Environmental contamination may exist on the Property in soil and groundwater. OVP Holdings, LLC has committed itself to only light manufacturing, warehousing, public storage and commercial/retail uses on the Property. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and OVP Holdings, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) any proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Town of Fletcher Library, 120 Library Road, Fletcher, NC 28732 by contacting Ms. Sherry Waldrop at that address or at (828) 687-1218; or at the office of the N.C. Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 by contacting Shirley Liggins at that address (where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents), at shirley.liggins@ncmail.net, or at (919) 508-8411.

Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if OVP Holdings, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on September 1, 2005. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

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 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Council of State, State Property Office intends to amend the rule cited as 01 NCAC 06B .0307.

Proposed Effective Date: January 1, 2006

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Requests for public hearing shall be submitted in writing to T. Brooks Skinner, Jr., General Counsel, Department of Administration, 1301 MSC, Raleigh, NC 27699-1301 within 15 days of the publication of this notice in the North Carolina Register.

Reason for Proposed Action: This Rule authorizes the Department of Agriculture and Consumer Services to enter into leases of buildings and space on the State Fairgrounds, and contracts for rides and shows, for up to 15 days, without prior approval of the Council of State. The proposed amendment would expand this exemption to include leases and contracts for up to 20 days per year for up to three years. The amendment would include the Western North Carolina Agriculture Center under this Rule. Leases and contracts that provide for a payment to the State of more than \$100,000.00 per year would have to be awarded through a competitive bid process. These changes will allow these fee-supported facilities to operate more efficiently and to improve services to users of the facilities and the general public.

Procedure by which a person can object to the agency on a proposed rule: Objections to this Rule shall be submitted in writing to David S. McLeod, General Counsel, Dept. of Agriculture and Consumer Services, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Written comments may be submitted to: David S. McLeod, General Counsel, Dept. of Agriculture and Consumer Services, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Comment period ends: October 31, 2005

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. If the Rules Review Commission receives written and signed objections 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 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 06 - STATE PROPERTY AND CONSTRUCTION

SUBCHAPTER 06B - REAL PROPERTY

SECTION .0300 - DISPOSITION OF REAL PROPERTY

01 NCAC 06B .0307 LEASES AT STATE FAIRGROUNDS AND WNC AG CENTER

~~The Department of Agriculture, without prior approval of the Council of State, is authorized to enter into leases of buildings on the State Fair Grounds, leases of space on the State Fair Grounds, and contracts for the furnishing of rides, shows and other services on the State Fair Grounds, provided that the duration of such leases, rental agreements and contracts shall not exceed 15 days. The Department of Agriculture and Consumer Services, without prior approval of the Council of State, is authorized to enter into leases of buildings or land, and contracts for the furnishing of rides, shows and other related services on the State Fairgrounds and the Western North Carolina Agricultural Center, provided that the duration of each lease, rental agreement or contract shall not exceed 20 days per year for up to three years, plus up to 10 days before and after an event for move-in and move-out. A lease, rental agreement or contract for more than one year, which provides for a payment to the State of more than one hundred thousand dollars (\$100,000) per year, shall be awarded to the highest qualified bidder, as determined by the Department.~~

Authority G.S. 143-341(4)d.f; Council of State Resolution of July 1, 1975.

TITLE 10A-DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to repeal the rules cited as 10A NCAC 67B .0201-.0204, .0301-.0302, .0401-.0404, .0501-.0505.

Proposed Effective Date: January 1, 2006

Public Hearing:

Date: October 12, 2005

Time: 10:00 a.m.

Location: Albemarle Building, Room 832; 325 North Salisbury Street; Raleigh, NC 27603

Reason for Proposed Action: *The State and Department of Health and Human Services contracts and procurement offices have developed and published contracting manuals and procedures. In addition, as the Department moved into performance based contracting, the manuals and procedures were further revised and refined. These procedures and appropriate templates and required forms are available at the DHHS Center of Excellence website at <http://coe.dhhs.state.nc.us>. These are the procedures required for State level contracts and the practices that are being followed by the Division. Upon review of the rules in this Subchapter and the existing written policies in the Family Services Manual, the Division recognized how out-of-date and conflicting they were with current Department contracting policies as published. In order to bring consistency into the contracting process for county departments of social services and hopefully to provide sufficient guidance to eliminate the recurrent audit exceptions and procedures provided on the above cited DHHS Center of Excellence website.*

Procedure by which a person can object to the agency on a proposed rule: *Carlotta Dixon, NC Division of Social Services, 325 North Salisbury Street, MSC 2401, Raleigh, NC 27699-2401, phone (919)733-3055 or email Carlotta.dixon@ncmail.net.*

Written comments may be submitted to: *Carlotta Dixon, NC Division of Social Services, 325 North Salisbury Street, MSC 2401, Raleigh, NC 27699-2401, phone (919)733-3055, fax (919)733-9386 or email Carlotta.dixon@ncmail.net.*

Comment period ends: October 31, 2005

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. If the Rules Review Commission receives written and signed objections 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 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 67 – SOCIAL SERVICES - PROCEDURES

SUBCHAPTER 67B – CONTRACT SERVICES

SECTION .0200 - APPLICATION

10A NCAC 67B .0201 APPLICATION REQUIREMENTS

~~Purchase of services contracts may not be negotiated with another agency or organization unless the agency or organization submits a formal application written in the format specified by the central office of the Division of Social Services. County departments of social services or the regional or central office will provide assistance if necessary.~~

Authority G.S. 143B-153.

10A NCAC 67B .0202 GUIDELINES FOR APPLICATION

~~Guidelines for writing applications shall be published and for no charge made available to the public. The guidelines may be obtained from the regional or central office of the Division of Social Services.~~

Authority G.S. 143B-153.

10A NCAC 67B .0203 APPROVAL BY COUNTY BOARD

~~Before a county department of social services enters into a purchase contract the application must be reviewed and approved by the county board of social services and approved in accordance with G.S. 159-28.~~

Authority G.S. 143B-153.

10A NCAC 67B .0204 PROCESSING APPLICATIONS

~~(a) Before a purchase contract can be entered into by a county department of social services, the application must be reviewed and approved by the county department of social services to assure compliance with all applicable rules, including state and federal statutes and regulations.~~

~~(b) Before a purchase contract can be entered into by the Division of Social Services, the application must be reviewed and approved by the Division of Social Services to assure compliance with all applicable rules including state and federal statutes and regulations.~~

Authority G.S. 143B-153.

SECTION .0300 – FEES

10A NCAC 67B .0301 ADMINISTRATIVE FEES

~~Each purchase contract where reimbursement from State or Federal sources or both, is less than 100 percent, may be charged an administrative fee by the Division of Social Services not to exceed five percent of the non federal share. The fee will be paid by the provider and will be based on expenditures made during each month and will be used to offset the administrative costs of purchasing services.~~

Authority G.S. 143B-153.

10A NCAC 67B .0302 CERTIFICATION FEE

~~(a) Each purchase contract provider receiving less than 100 percent reimbursement from state or federal sources, in order to help offset the costs of determining the eligibility of persons receiving services delivered by the provider, may be required to pay a certification fee not to exceed five percent of the non federal share. The fee will be based on expenditures made during each month.~~

~~(b) This fee will not be charged to providers who are not delivering services directly to clients.~~

Authority G.S. 143B-153.

SECTION .0400 - CONTRACT REQUIREMENTS

10A NCAC 67B .0401 PRIVATE ORGANIZATIONS

~~(a) No purchase contract shall be executed with a private organization unless the organization is incorporated as private non-profit.~~

~~(b) Vendor agreements for the purchase of services may be negotiated with private non-profit organizations and private for profit organizations.~~

Authority G.S. 143B-153.

10A NCAC 67B .0402 CONTRIBUTION OF MATCHING FUNDS

~~(a) When a matching share is required for claiming state or federal participation in a purchase contract, the contract shall not be executed until the applicant contributes or arranges for the funds to be considered as the matching share.~~

~~(b) Arrangements for the matching share shall be made in accordance with either of the following methods:~~

- ~~(1) a cash transfer of the matching share to the Division of Social Services or county department of social services as appropriate; documented on the form set forth by the Division of Social Services; or~~
- ~~(2) certification that the matching share is available, through a certifying statement in the contract or other document specified by the division.~~

Authority G.S. 143B-153.

10A NCAC 67B .0403 MONITORING

~~(a) Each purchase contract negotiated by the Division of Social Services will be monitored by staff of the division. A visit to each provider agency service delivery site will be scheduled at least annually to monitor the provider's adherence to the terms of the contract and to assess the quality of services delivered. A monitoring report identifying areas of non-compliance and establishing corrective action requirements will be sent to all parties to the contract.~~

~~(b) Each purchase contract and each vendor agreement which the county department of social services negotiates will be monitored annually by the county department of social services.~~

Authority G.S. 143B-153.

10A NCAC 67B .0404 MONITORING FORMS

~~A monitoring form, available from the state or regional office, shall be used by the Division of Social Services as a guide for monitoring the compliance of individual purchase of services contract providers with the terms of the signed contract. The form shall include specific technical points of evaluation.~~

Authority G.S. 143B-153.

SECTION .0500 - REIMBURSEMENT FOR PURCHASED SERVICES

10A NCAC 67B .0501 PURCHASE CONTRACTS

~~Services may be purchased from public or private providers through a purchase contract at total allowable cost or at a unit cost established by the Division of Social Services. Reimbursement will be made in accordance with each individually negotiated contract and, when reimbursed at a unit cost rate, adjusted by the division in accordance with 10A NCAC 67B .0505(b).~~

Authority G.S. 143B-153.

10A NCAC 67B .0502 VENDOR AGREEMENT

~~(a) Services may be purchased through a vendor agreement on the basis of a standard fixed rate or individual fixed rate established by an organizational unit of the Department of Human Resources. Vendor agreements reimbursed with Title XX of the Social Security Act funds are allowable for the purchase of services from public and private providers. Vendor agreements reimbursed from other federal funding sources are allowable for the purchase of services from private providers only.~~

~~(b) The rates may not exceed maximum rates established by the Social Services Commission and specified in service policy. Vendor agreements negotiated at a higher or lower rate than the established rate will be reimbursed from state or federal funds at the established rate or the rate specified in the vendor agreement, whichever is lower.~~

Authority G.S. 143B-153.

10A NCAC 67B .0503 BUDGETS

(a) Budget requirements for each reimbursement method shall be as follows:

- (1) Budgets shall be required under the total cost and unit cost methods and shall be limited to allowable costs;
- (2) Budgets shall be required under the individual fixed rate method, but shall not be limited to allowable costs;
- (3) Budgets shall not be required under the standard fixed rate method.

(b) Where required, budgets shall be prepared in accordance with the application guidelines specified in 10A NCAC 67B .0202.

(c) Total cost and unit cost budgets shall be reviewed and approved by the county department of social services when the county department is a party to the contract. Other budgets will be reviewed and approved by the state Division of Social Services.

Authority G.S. 143B-153.

10A NCAC 67B .0504 INTERNAL BUDGET REVISIONS

(a) Under the total cost method, internal budget revisions to transfer funds between objects of expenditure within the approved budget in accordance with guidelines established by the division shall require prior written approval. The responsibility for approval rests with the county department of social services when the county department of social services is a party to the contract, and with the state Division of Social Services when the division is a party to the contract. Internal budget revisions must be submitted on the form specified by the Division of Social Services.

(b) Internal budget revisions shall not require prior approval for unit cost and fixed rate methods.

Authority G.S. 143B-153.

10A NCAC 67B .0505 REIMBURSEMENT METHODS

(a) Under the total cost method, financial participation shall be allowable up to the total approved budgeted amount for each object of expenditure except that "other expenditures" are limited to the amount budgeted per line item, "salary expenses" are limited to the total approved budgeted amount for the object of expenditure and classification of positions budgeted, and total reimbursement shall not exceed the total budgeted amount. Amounts of no more than ten percent of a budgeted line item or schedule transferred between the above objects of expenditures or line items in the approved budget will be allowable in accordance with division guidelines.

(b) Under the unit cost method, financial participation shall be allowable on the basis of a provisional unit cost rate per unit of service for eligible individuals and, where reimbursement exceeds actual allowable costs, shall be adjusted to actual allowable expenditures at least on an annual basis.

(c) Under the standard fixed rate method, financial participation shall be allowable at or below the approved standard fixed rate per unit of service for eligible individuals as specified in the vendor agreement.

(d) Under the individual fixed rate method, financial participation shall be allowable at the negotiated individual fixed rate per unit of service for eligible individuals as specified in the vendor agreement.

Authority G.S. 143B-153.

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 rule cited as 15A NCAC 02B .0240.

Proposed Effective Date: May 1, 2006

Public Hearing:

Date: October 11, 2005

Time: 7:00 p.m.

Location: Archdale Building, Ground Floor Hearing Room, 512 N. Salisbury St., Raleigh, NC

Date: October 18, 2005

Time: 7:00 p.m.

Location: Nash Community College, Business & Industry Center, 522 N. Old Carriage Rd., Rocky Mount, NC

Reason for Proposed Action: The Environmental Management Commission (EMC) has proposed to amend the existing Nutrient Offset Payments rule. These amendments will accomplish two goals: 1) The amendments will allow the Nutrient Offset Payments Program to be expanded to the Tar-Pamlico River Basin, and 2) The amendments will modify the manner in which future payments to the Nutrient Offset Program are calculated. This change in the payment calculation methodology will allow the existing fees to be updated and will also incorporate land acquisition costs into the nutrient offset fees.

Procedure by which a person can object to the agency on a proposed rule: You may attend one of the Public Hearings and make relevant verbal comments, and/or submit written comments, data or other relevant information by November 14, 2005. The Hearing Officers may limit the length of time that you may speak at the Public Hearing, if necessary, so that all those who wish to speak may have an opportunity to do so. The EMC is very interested in all comments pertaining to the proposed amendments. In particular, the EMC is soliciting any comments that may contain verifiable data regarding the design, construction, and maintenance costs of one acre of constructed wetlands. This cost data may be used by the Hearing Officers to adjust the proposed Nitrogen and Phosphorous fees contained within the proposed amendments. All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments on the proposed amendments. The EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this notice unless the EMC publishes the text of the proposed different rule and accepts comments on the new text (see G.S.

150B-21.2(g). Written comments may be submitted to Tom Reeder of the DWQ Wetlands and Stormwater Branch at the postal address, email address or fax number listed in this notice.

Written comments may be submitted to: Tom Reeder, DENR/DWQ, Wetlands and Stormwater Branch, 1617 Mail Service Center, Raleigh, NC 27699-1617, phone 919-733-5083, ext. 528, fax (919) 733-9612, email tom.reeder@ncmail.net.

Comment period ends: November 14, 2005

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. If the Rules Review Commission receives written and signed objections 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 919-733-2721.

Fiscal Impact

- State
Local
Substantive (≥\$3,000,000)
None

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02B - SURFACE WATER AND WETLAND STANDARDS

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

15A NCAC 02B .0240 NUTRIENT OFFSET PAYMENTS

(a) Nutrient offset payments made as part of fulfilling requirements of the Neuse River Nutrient Sensitive Waters Management Strategy shall be paid to the North Carolina Wetland Restoration Fund. Monies paid to this fund pursuant to this Rule shall be targeted toward restoration of wetlands and riparian areas within the Neuse River Basin.

(b) A cost effectiveness rate shall be established by the Division that represents the cost to achieve a reduction of one kilogram (1 kg) or one pound (1 lb) of total nitrogen per year through the use of nitrogen reduction measures. The rate shall be periodically updated by the Division based on the availability of new cost or effectiveness data. The rate shall be twenty three dollars per kilogram per year (\$23/kg/year) or eleven dollars per pound per year (\$11/lb/year).

(c) The offset payment shall be an amount sufficient to fund 30 years of nitrogen reduction. For loading offset in the wastewater discharge found in 15A NCAC 2B .0234, payment shall be made prior to permit issuance. For loading offset in the stormwater rule found in 15A NCAC 2B .0235, payment shall be made prior to approval of the development plan.

(d) The nitrogen reduction credit associated with restored wetlands and riparian areas funded under this Rule shall be awarded exclusively to the person, municipality, discharger or group of dischargers who paid the offset fee.

(a) The purpose of this Rule is to establish procedures for the optional payment of fees to partially offset nutrient loading requirements. This Rule may apply to any area of the State as directed by the Environmental Management Commission (EMC).

(b) Specifically, this Rule authorizes the partial offsetting of the nitrogen loading requirements specified in 15A NCAC 02B .0234 and 02B .0235 for the Neuse River Basin and the partial offsetting of the nitrogen and phosphorous loading requirements specified in 15A NCAC 02B .0258 for the Tar-Pamlico River Basin by payment into the Riparian Buffer Restoration Fund administered by the North Carolina Ecosystem Enhancement Program (EEP) according to the equations presented in this Rule.

(c) Payments to offset nitrogen loading in both the Neuse and Tar-Pamlico River Basins shall be calculated by using the following equation:

N Payment = [(\$/lb)(# of lbs/year)(30 years) + (Land Cost \$/Ac)(1 Ac / 35 Ac)(Devel. in Ac)] X (1.1 Ad Costs)

Where,

\$/lb = The cost of mitigation in dollars per pound of nitrogen mitigation. For stormwater offsets required under 15A NCAC 2B .0235 and 2B .0258, this factor will be initially established at \$57/lb for calendar years 2005 and 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the Engineering News Record (ENR). For group compliance association wastewater discharge offsets required under 15A NCAC 2B .0234(9), this factor will be initially established at \$57/lb for calendar years 2005 and 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the

PROPOSED RULES

construction cost index factor published every December in the Engineering News Record (ENR). For new and expanding wastewater discharge offsets required under 15A NCAC 2B .0234(7) and (8), this factor will be initially established at \$28.50/lb for calendar years 2005 and 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the Engineering News Record (ENR). The annual updating of these costs will be performed by the In-Lieu Fee Program Coordinator in the Ecosystem Enhancement Program.

P Payment = [(\$/0.1 lb)(# of 0.1 lbs/year)(30 yrs) + (Land Cost \$/Ac)(1 Ac/35 Ac)(Devel in Ac)] X (1.1 Ad Costs)

Where,

- # of lbs/year = The number of pounds of nitrogen exported or discharged each year for which mitigation is being requested.
- Land Cost \$/Ac = The current property value, in dollars per acre, of the property being developed, based upon the most recent county tax assessment.
- 1 Ac / 35 Ac = An adjustment factor, indicating that one acre of mitigation is required for every 35 acres of development.
- Devel in Ac = The overall size of the development, for which the mitigation is requested, in acres.
- (1.1 Ad Costs) = An adjustment factor, necessary to cover the administrative costs associated with the requested mitigation.

- \$/0.1 lb = The cost of mitigation in dollars per tenth of a pound of phosphorous mitigation. This factor will be initially established at \$45/0.1 lb for calendar years 2005 and 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the Engineering News Record (ENR). The annual updating of this cost will be performed by the In-Lieu Fee Program Coordinator in the Ecosystem Enhancement Program.
- # of 0.1 lbs/year = The number of tenths of a pound of phosphorous exported or discharged each year for which mitigation is being requested.
- Land Cost \$/Ac = The current property value, in dollars per acre, of the property being developed, based upon the most recent county tax assessment.
- 1 Ac / 35 Ac = An adjustment factor, indicating that one acre of mitigation is required for every 35 acres of development.
- Devel in Ac = The overall size of the development, for which the mitigation is requested, in acres.
- (1.1 Ad Costs) = An adjustment factor, necessary to cover the administrative costs associated with the requested mitigation.

(d) Payments to offset phosphorous loading in the Tar-Pamlico River Basin shall be calculated by using the following equation:

(e) In those cases where offset reductions are required for both nitrogen and phosphorous, the appropriate calculations shall be performed for both the nitrogen and phosphorous offset payments, as detailed in Paragraphs (c) and (d) of this Rule. In these cases, only the greater value of the two payments shall be

required to satisfy the offset reductions for both the nitrogen and phosphorous limits.

(f) For loading offset in the Neuse River Basin in wastewater discharge found in 15A NCAC 02B .0234, payment shall be made prior to permit issuance. For loading offset in the Neuse River Basin in stormwater discharge as specified in 15A NCAC 02B .0235, payment shall be made prior to approval of the development plan.

(g) For loading offset in the Tar-Pamlico River Basin in stormwater discharge as specified in 15A NCAC 02B .0258, payment shall be made prior to approval of the development plan.

(h) The nitrogen and phosphorous reduction credits associated with restored wetlands and riparian areas funded under this Rule shall be awarded exclusively to person, municipality, discharger, or group of dischargers who paid the offset fee.

Authority G.S. 143-214.1.

TITLE 21 – OCCUPATIONAL LICENSING BOARD

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Cosmetic Art Examiners intends to amend the rule cited as 21 NCAC 14H .0108.

Proposed Effective Date: January 1, 2006

Public Hearing:

Date: September 16, 2005

Time: 9:00 a.m.

Location: 1201 Front Street, Suite 110, Raleigh, NC

Reason for Proposed Action: To clarify floor covering regulations

Procedure by which a person can object to the agency on a proposed rule: You can object by mail, email or fax to Stefanie Shore, 1201 Front Street, Suite 110, Raleigh, NC 27609, phone 919-715-3171, fax 919-733-4127, email sshore@intrex.net.

Written comments may be submitted to: Stefanie Shore, 1201 Front Street, Suite 110, Raleigh, NC 27609, phone 919-715-3171, fax 919-733-4127, email sshore@intrex.net.

Comment period ends: October 31, 2005

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. If the Rules Review Commission receives written and signed objections 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 919-733-2721.

Fiscal Impact

- State
Local
Substantive (>=\$3,000,000)
None

SUBCHAPTER 14H - SANITATION

SECTION .0100 - SANITATION

21 NCAC 14H .0108 FLOOR COVERINGS

All floor coverings shall be nonabsorbent washable and kept clean and in good repair.

Authority G.S. 88-23.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings intends to adopt the rule cited as 26 NCAC 02C .0308 and amend the rules cited as 26 NCAC 02C .0105, .0108, .0302, .0405; 03 .0101.

Proposed Effective Date: January 1, 2006

Public Hearing:

Date: October 24, 2005

Time: 9:00 a.m.

Location: 422 N. Blount Street, Raleigh, NC

Reason for Proposed Action: To implement electronic filing for the NC Register; to update software references; to change the filing deadline for the Register from 15 days to 10 days prior to publication; to change a format requirement in citing the rule number and name; and to change how to highlight when proposed new text is not adopted.

Procedure by which a person can object to the agency on a proposed rule: Mail objections to Debra Gray, Rulemaking Coordinator, Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714. Letters of objections must be received no later than October 31, 2005.

Written comments may be submitted to: Debra Gray, Rulemaking Coordinator, 6714 Mail Service Center, Raleigh, NC 27699-6714, phone 919-733-2679, email debra.gray@ncmail.net.

Comment period ends: October 31, 2005

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. If the Rules Review Commission receives written and signed objections 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 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 2 - RULES DIVISION

SUBCHAPTER 02C - SUBMISSION PROCEDURES FOR RULES AND OTHER DOCUMENTS TO BE PUBLISHED IN THE NORTH CAROLINA REGISTER AND THE NORTH CAROLINA ADMINISTRATIVE CODE

SECTION .0100 - GENERAL

26 NCAC 02C .0105 ELECTRONIC VERSION

- (a) The electronic version shall be a 3 1/2 inch (1.44 Mb) high density diskette or CD compatible with or convertible to the most recent version of ~~Word for Windows~~. Microsoft Word. The filed electronic version shall identify the name of the document to be retrieved and the software used. OAH shall refuse to accept for publication any document in which the electronic version is not compatible with or convertible to the most recent version of ~~Word for Windows~~. Microsoft Word.
- (b) An electronic version shall not be required if an agency that is unable to provide an electronic version that is compatible with or convertible to the most recent version of ~~Word for Windows~~. Microsoft Word submits a written statement to the Codifier of Rules to that effect. This statement shall be signed by the agency head or rule-making coordinator.

Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19.

26 NCAC 02C .0108 GENERAL FORMAT INSTRUCTIONS

An agency shall format each rule submitted to OAH for publication in the Register or Code as follows:

- (1) Paper Specifications:
 - (a) 8½ by 11 inch plain white paper, 16 to 32 lb.;
 - (b) one side of the sheet only;
 - (c) black ink;

- (d) 10 point font size;
- (e) portrait print (8½ x 11), no landscape printing (11 x 8½);
- (f) numbered lines on the left margin with each page starting with line 1;
- (g) 1.5 line spacing;
- (h) page numbers centered at the bottom of the page for each rule that has more than one page of text; and
- (i) no staples.
- (2) Tab and Margin Settings:
 - (a) tab settings for all rules shall be set relative from the left margin at increments of .5;
 - (b) text shall be with a one inch margin on all sides.
- (3) The Introductory Statement shall start on page 1, line 1 of each rule.
- (4) When a new chapter, subchapter, or section of rules is adopted, the Chapter, Subchapter, and Section names shall be provided in bold print with the first rule following the introductory statement. One line shall be skipped between the introductory statement and each chapter, subchapter, and section name.
- (5) One line shall be skipped before starting the line that provides the rule ~~number~~citation and rule name. The ~~decimal in the rule~~ first digit of the title number shall be placed in position 1. One tab shall be between the rule number and rule name. The rule name shall be in capital letters and the rule number and name shall be in bold print.
- (6) Body of the Rule:
 - (a) the body of the rule shall start on the line immediately following the rule name with the following markings:
 - (i) adoptions - new text shall be underlined;
 - (ii) amendments - any text to be deleted shall be struck through and new text shall be underlined;
 - (iii) repeals - text of the rule shall not be included;
 - (b) there shall be no lines skipped in the body of the rule except before and in tables;
 - (c) the first level of text shall be flush left and with two spaces after the closing parenthesis if the paragraph is identified by a letter;
 - (d) the second level of text shall start with one tab and one hanging indent after the closing parenthesis;
 - (e) the third level of text shall start with two tabs and one hanging indent after the closing parenthesis;

- (f) the fourth level of text shall start with three tabs and one hanging indent after the closing parenthesis;
 - (g) the fifth level of text shall start with four tabs and one hanging indent after the closing parenthesis;
 - (h) the sixth level of text shall start with five tabs and one hanging indent after the closing parenthesis.
- (7) Punctuation shall be considered part of the word when there are no spaces between the punctuation and the word. When underlining or striking through text:
- (a) when a word is deleted, the punctuation shall also be struck through with the previous word; and
 - (b) when punctuation is added, the existing word shall be struck through and followed by the word and punctuation underlined.
- The smallest unit of text to be struck through or underlined shall be an entire word or block of characters separated from other text by spaces.
- (8) Charts or Tables shall be in a format that is accommodated by the most recent version of Word for Windows-Microsoft Word.
- (9) History Note Specifications:
- (a) shall be in italic font;
 - (b) shall start on the second line following the body of the rule;
 - (c) the first line of the History Note shall start in the first position; all lines following shall be two tabs;
 - (d) the first line shall start with the words "History Note:", followed by one tab and the word "Authority". The agency shall then cite the authority(ies) in numerical order for that rule;
 - (e) the effective date of the original adoption of the rule shall be the next line following the authority. The abbreviation "Eff." shall be followed by this date;
 - (f) on the line following the "Eff." date, the amended dates shall be preceded with the words "Amended Eff." and the dates shall be listed in chronological order, with the most recent amended date listed first;
 - (g) a temporary rule shall be listed as a separate item in the history note with the following words: "Temporary (Adoption, Amendment, or Repeal) Eff. (date)";
 - (h) an emergency rule shall be listed as a separate item in the history note with the following words: "Emergency (Adoption, Amendment, or Repeal) Eff. (date)";
- (i) the repealed date of a rule shall be the last line of the history note and start with the words "Repealed Eff." followed by the date;
 - (j) all items in the history note shall be separated by semicolons with the last line ending with a period;
 - (k) all history of a rule shall be in chronological order following the authority for the rule;
 - (l) all dates in the history note shall be complete with the month spelled out, and shall not contain any abbreviations.
- (10) Numbers within the text shall be as follows:
- (a) numbers from one to nine shall be spelled out;
 - (b) figures shall be used for numbers over nine;
 - (c) if a phrase contains two numbers, only one of which is over nine, figures shall represent both.
- (11) Monetary figures within the text shall be spelled out followed by the numerical figure in parenthesis. Decimal and zeros shall be used only for even dollar amounts of sums less than one thousand dollars (\$1,000).

Note: Examples of proper formatting can be found on the OAH website located at www.ncoah.com/rules.

Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19.

SECTION .0300 - THE NORTH CAROLINA REGISTER

26 NCAC 02C .0302 SUBMISSION AND PUBLICATION SCHEDULE

- (a) Submissions for publication in the Register shall be received in OAH by the closing date for the issue as determined under Paragraph (b) of this Rule.
- (b) OAH shall publish the Register on the first and fifteenth 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, OAH shall publish the Register on the next State business day. The last day for filing for any issue of the Register shall be ~~15~~10 days before the issue date excluding Saturdays, Sundays, and holidays for State employees. In computing the time prescribed or allowed by this Rule, the day of publication of the Register shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or State holiday, in which event the period shall run until the preceding day which is not a Saturday, Sunday, or State holiday. OAH shall publish in each issue of the Register a table of publication deadlines and schedules for at least the next 12 issues. This

table is published as a public service and the computation of time periods are not to be deemed binding or controlling.

Authority G.S. 150B-21.17.

26 NCAC 02C .0308 ELECTRONIC FILING

(a) An agency may file rules and other documents for publication in the Register by electronic mail. The electronic mail shall include an attached document(s) that is compatible with or convertible to the most recent version of Microsoft Word.

(b) Electronic mail with attachment(s) shall be sent by electronic transmission to: oah.rules@ncmail.net. The agency shall simultaneously send a facsimile (fax) copy of the attachment(s).

(c) Electronic submission shall be deemed submitted for publication pursuant to 26 NCAC 02C .0302 on the business day when both the electronic mail with attachment(s) and the faxed copy are received.

Authority G.S. 150B-21.17.

SECTION .0400 - NORTH CAROLINA ADMINISTRATIVE CODE

26 NCAC 02C .0405 BODY OF THE RULE

(a) The agency shall prepare for publication in the Code any permanent rule not published in the Register or that does not differ in any way from the proposed rule published in the Register according to the general format instructions in Rule .0108 of this Subchapter.

(b) If a permanent rule differs in any way from the proposed rule published in the Register, the following shall apply:

- (1) An agency shall identify changes in an adopted rule by striking through deleted portions, and underlining added portions. The unchanged text shall not be underlined.
- (2) An agency shall identify changes in an amended rule as follows:
 - (A) when text has been added, the text added shall be underlined and highlighted on a copy of the rule;
 - (B) when existing text has been deleted, the text deleted shall be struck through and highlighted on a copy of the rule;
 - (C) when text that was proposed to be deleted has been restored, the restored text shall be highlighted, but not underlined or struck through, on a copy of the rule; and
 - (D) when text that was proposed to be added has been deleted, the deleted proposed text shall not be shown, but extra space with a highlight mark an open bracket with five highlighted spaces and a closed bracket shall be

inserted where the proposed text is omitted; and

(E) when text is required to be highlighted, the highlighting shall be by highlight marker or shall be computer generated. The text shall clearly show through the highlight.

(3) If the agency repeals a rule originally noticed to be amended, then the agency shall submit the rule as a permanent repeal.

Authority G.S. 150B-21.19.

CHAPTER 3 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The Rules of Civil Procedure as contained in G.S. 1A-1, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

(b) The Office of Administrative Hearings shall supply forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.

(c) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail by an attached file either in PDF format or a document that is compatible with or convertible to the most recent version of ~~Word for Windows~~ Microsoft Word. Electronic mail with attachment shall be sent by electronic transmission to: oah.clerks@ncmail.net. The faxed or electronic documents shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed document and one copy is received by OAH within seven business days following the faxed or electronic transmission. Other electronic transmissions, for example, electronic mail without attached file as specified in this Paragraph, shall not constitute a valid filing with the Office of Administrative Hearings.

(d) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.

(e) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

Authority G.S. 7A-750; 7A-751(a); 150B-40(c).

This Section contains information for the meeting of the Rules Review Commission on Thursday September 15, 2005, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Monday, September 12, 2005 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Thomas Hilliard, III
Robert Saunders
Jeffrey P. Gray

Appointed by House

Jennie J. Hayman - Chairman
Graham Bell
Lee Settle
Dana E. Simpson
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

September 15, 2005
November 17, 2005

October 20, 2005
December 15, 2005

**RULES REVIEW COMMISSION
AUGUST 18, 2005
MINUTES**

The Rules Review Commission met on Thursday, August 18, 2005, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Graham Bell, Jim Funderburk, Jeffrey Gray; Jennie Hayman; Thomas Hilliard, Robert Saunders; Lee Settle, David Twiddy; and John Tart.

Staff members present were: Joseph DeLuca, Staff Counsel; Bobby Bryan, Rules Review Specialist; and Lisa Johnson, Administrative Assistant.

The following people attended:

John Randall	Board of Examiners for Speech & Language Pathologists
Julie Brincefield	OAH
Carlotta Dixon	Division of Social Services
Rhonda McLamb	Division of Social Services
Vicky Church	Division of Aging & Adult Services
Mark Hensley	Division of Aging & Adult Services
Jim Chavis	RDI
Tyrone McRae	Omega ILS
Barry Gupton	NC Building Code Council
Frank Folger	Department of Insurance
Ellie Sprenkel	Department of Insurance
Bob Potter	Department of Insurance
Donald Laton	Department of Justice
Erin Kimrey	NC Conservation Network
James Gulick	Department of Justice
Grady McCallie	NC Conservation Network
Camille Winston	OAH
Lisa Martin	Home Builders Association
Rick Zechini	Association of Realtors
Nancy Pate	DENR
Diane Miller	Attorney General's Office

David Williams	DENR
Katy West	DENR
Craig Bromby	Hunton & Williams
Mary Penny Thompson	DENR
Larry Barther	Impact Youth
Sondra Panico	Department of Justice
Amy Pickle	Southern Environmental Law Center of NC
Christine Winnsche	NCPIRG
Cassie Gavin	NCPIRG
Bill Lamb	Social Work Certification & Licensure Board
Elizabeth Oxley	Social Work Certification & Licensure Board
Molly Masich	OAH

APPROVAL OF MINUTES

The meeting was called to order at 10:10 a.m. with Chairman Hayman presiding.

She reminded the Commissioners of their obligations under the governor’s Executive Order #1 to refrain from taking part in consideration of any rules for which they have or may appear to have a conflict of interest.

Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the July 21, 2005 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10A NCAC 09 .2608: Child Care Commission – No action was taken.

10A NCAC 27G .1301; .1701-.1708; .1901-.1904: Commission for Mental Health – There has been no response from Office of State Budget and Management, so no action was taken.

10A NCAC 71S .0101; .0201; .0202: Social Services Commission – The Commission approved the rewritten rules submitted by the agency.

12 NCAC 09F .0104; .0106: Criminal Justice Education & Training Standards Commission – The Commission approved the rewritten rules submitted by the agency.

15A NCAC 02H .0126; .0150-.0156; .1014-.1019: Environmental Management Commission – The Commission extended the period of review based on the following:

- Written requests from interested parties detailing their need for more time to study the rules;
- The length and complexity of the rules;
- Understanding the impact of Judge Stephens’ order on the review process;
- The enactment of SB 1210 in the 2004 session of the General Assembly; and
- The agency is not opposed to this recommendation.

The relationship between these rules, the court order, and most importantly, the 2004 legislation, as well as the other existing authority is complex and deserving of additional study, review, and analysis. The Rules Review Commission staff is explicitly directed to address this issue.

During the extended review period, the agency is authorized to respond to the technical change requests as set out in G.S. 150B-21.10. In addition to this the agency is authorized to make any additional changes in the rules, in response to comments received, as they desire. The RRC would consider any of these changes in the course of its review process. Commission Saunders did not vote nor participate in any discussion concerning these rules.

15A NCAC 06E .0103: Soil and Water Conservation Commission – The Commission approved the rewritten rule submitted by the agency.

15A NCAC 18A .2815; .2819; .2824: Commission for Health Services – The Rules Review Commission had received letters from various day care facilities with concerns. However the RRC returned the letters because the rules have not been adopted by the agency.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules. All rules were approved unanimously with the following exceptions:

Commissioner Twiddy did not vote or participate in any discussion concerning the Department of Insurance rule.

21 NCAC 26 .0209-.0211; .0306; .0510: Board of Landscape Architects – These rules were withdrawn by the agency and refiled for next month.

21 NCAC 54 .1708: Board of Psychology – This rule was withdrawn by the agency.

21 NCAC 54 .2009: Board of Psychology – This rule was withdrawn by the agency.

23 NCAC 02E .0306: Board of Community Colleges – The Commission objected to the rule due to ambiguity. It is not clear what would constitute a “Human Resource Development Program”.

041214 Item B-7: Building Code Council – This rule was withdrawn by the agency and refiled for next month.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission discussed no new business.

The meeting adjourned at 10:46 a.m.

The next meeting of the Commission is Thursday, September 15, 2005 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

LIST OF APPROVED PERMANENT RULES

August 18, 2005 Meeting

HEALTH AND HUMAN SERVICES, DEPARTMENT OF

Purpose and Definitions	10A NCAC 05I .0101
Requirements	10A NCAC 05I .0201
Initial and Annual Reviews	10A NCAC 05I .0202
Collection of Consumer Contribution Revenue	10A NCAC 05I .0203
Termination	10A NCAC 05I .0204
Deducting Consumer Contribution Revenues from Monthly Ser...	10A NCAC 05I .0205

HHS-MEDICAL ASSISTANCE

Durable Medical Equipment	10A NCAC 22O .0121
---------------------------	--------------------

SOCIAL SERVICES COMMISSION

Purpose of Consumer Contributions	10A NCAC 71S .0101
Services Subject to Consumer Contributions	10A NCAC 71S .0201
Initial and Annual Reviews	10A NCAC 71S .0202
Additional Mandatory Verifications	10A NCAC 71U .0208

INSURANCE, DEPARTMENT OF

Determining Reserve Liabilities for Credit Life Insurance... 11 NCAC 11F .0701

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Instructor Qualifications 12 NCAC 09F .0104
 Sanctions 12 NCAC 09F .0106

MARINE FISHERIES COMMISSION

Definitions 15A NCAC 03I .0101
 Leaving Devices Unattended 15A NCAC 03I .0105
 Possession or Transportation Limits 15A NCAC 03I .0120
 Gill Nets, Seines, Identification, Restrictions 15A NCAC 03J .0103
 Trawl Nets 15A NCAC 03J .0104
 Channel Nets 15A NCAC 03J .0106
 Pound Net Sets 15A NCAC 03J .0107
 Pots 15A NCAC 03J .0301
 Size Limit and Culling Tolerance 15A NCAC 03L .0201
 Crab Trawling 15A NCAC 03L .0202
 Peeler Crabs 15A NCAC 03L .0206
 American Lobster (Northern Lobster) 15A NCAC 03L .0301
 Flounder 15A NCAC 03M .0503
 Dolphin 15A NCAC 03M .0515
 Wahoo 15A NCAC 03M .0517
 Shellfish Bottom and Water Column Lease 15A NCAC 03O .0202
 Lease Renewal 15A NCAC 03O .0205
 Procedures and Requirements to Obtain Permits 15A NCAC 03O .0501
 Permit Conditions, General 15A NCAC 03O .0502
 Permit Conditions Specific 15A NCAC 03O .0503
 Special Rules, Joint Waters 15A NCAC 03Q .0107
 Primary Nursery Areas 15A NCAC 03R .0103
 Designated Pot Areas 15A NCAC 03R .0107

SOIL AND WATER CONSERVATION COMMISSION

Allocation Guidelines and Procedures 15A NCAC 06E .0103

PSYCHOLOGY BOARD

Practice by Postdoctoral Trainees 21 NCAC 54 .1611
 Information Required 21 NCAC 54 .1701
 Types 21 NCAC 54 .1901

SOCIAL WORK CERTIFICATION AND LICENSURE BOARD

Provisional Licenses 21 NCAC 63 .0210
 Work Experience 21 NCAC 63 .0211
 Review of Examination by Unsuccessful Applicants 21 NCAC 63 .0305

RULES REVIEW COMMISSION

Continuing Education Requirements	21	NCAC	63	.0401
Required Reporting By Licensee of Changes to Board	21	NCAC	63	.0405
Purpose and Scope	21	NCAC	63	.0501

SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR

Standards of Practice for Audiological Evaluations	21	NCAC	64	.0215
Standard of Practice for Speech and Language Evaluations	21	NCAC	64	.0216
Benefit from Treatment Defined	21	NCAC	64	.0217

**AGENDA
RULES REVIEW COMMISSION
September 15, 2005, 10:00 A.M.**

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow-Up Matters
 - A. Child Care Commission – 10A NCAC 09 .2608 (Bryan)
 - B. Commission for Mental Health – 10A NCAC 27G .1301; .1701-.1708; .1901-.1904 (DeLuca)
 - C. Environmental Management Commission – 15A NCAC 02H .0126; .0150-.0156; .1014-.1019 (DeLuca)
 - D. Board of Community Colleges – 23 NCAC 02E .0306 (Bryan)
- IV. Review of Rules (Log Report #225)
- V. Review of Temporary Rules (If any)
- VI. Commission Business
- VII. Next meeting: October 20, 2005

***Commission Review/Permanent Rules
Log of Filings
July 21, 2005 through August 22, 2005***

* Approval Recommended, ** Objection Recommended, *** Other

MEDICAL CARE COMMISSION

The rules in chapter 13 are from the NC Medical Care Commission. The rules in Subchapter 13B set standards for the licensing of hospitals including supplemental rules for the licensure of skilled intermediate, adult care home beds in a hospital (.1900); specialized rehabilitative and rehabilitative services (.2000); general information (.3000); procedure (.3100); general requirements (.3200); patients' bill of rights (.3300); supplemental rules for the licensure of critical care hospitals (.3400); grievance and management (.3500); management and administration of operations (.3600); medical staff (.3700); nursing services (.3800); medical record services (.3900); outpatient services (.4000); emergency services (.4100); special care units (.4200); maternal-neonatal services (.4300); respiratory care services (.4400); pharmacy services and medication administration (.4500); surgical and anesthesia services (.4600); nutrition and dietetic services (.4700); diagnostic imaging (.4800); laboratory services and pathology (.4900); physical rehabilitation services (.500); infection control (.5100); psychiatric services (.5200); nursing and adult care beds

(.5300); comprehensive inpatient rehabilitation (.5400); physical plant (.6000); general requirements (.6100); and construction requirements (.6200).

Minimum Provisions of Patient's Bill of Rights Amend/*	10A NCAC 13B .3302
Medication Administration Amend/*	10A NCAC 13B .4511

HHS-FACILITY SERVICES

The rules in Chapter 14 concern services provided by the Divisions of Facility Services. The rules in Subchapter 14C are Certificate of Need regulations including general provision (.0100); applications and review process (.0200); exemptions (.0300); appeal process (.0400); enforcement and sanctions (.0500); and criteria and standards for nursing facility or adult care home services (.1100); intensive care services (.1200); pediatric intensive care services (.1300); neonatal services (.1400); hospices, hospice inpatient facilities, and hospice residential care facilities (.1500); cardiac catheterization equipment and cardiac angioplasty equipment (.1600); open heart surgery services and heart-lung bypass machines (.1700); diagnostic centers (.1800); radiation therapy equipment (.1900); home health services (.2000); surgical services and operating rooms (.2100); and stage renal disease services (.2200); computed tomography equipment (.2300); immediate care facility/mentally retarded (ICF/MR) (.2400); substance abuse/chemical dependency treatment beds (.2500); psychiatric beds (.2600); magnetic resonance imaging scanner (.2700); rehabilitation services (.2800); bone marrow transplantation services (.2900); solid organ transplantation services (.3000); major medical equipment (.3100); lithotripter equipment (.3200); air ambulance (.3300); burn intensive care services (.3400); oncology treatment centers (.3500); gamma knife (.3600); positron emission tomography scanner (.3700); acute care beds (.3800).

Information Required of Applicant Amend/*	10A NCAC 14C .1602
Definitions Amend/*	10A NCAC 14C .1901
Information Required of Applicant Amend/*	10A NCAC 14C .1902
Definitions Amend/*	10A NCAC 14C .2101
Performance Standards Amend/*	10A NCAC 14C .2103
Information Required of Applicant Amend/*	10A NCAC 14C .2202
Performance Standards Amend/*	10A NCAC 14C .2203
Definitions Amend/*	10A NCAC 14C .2701
Information Required of Applicant Amend/*	10A NCAC 14C .2702
Performance Standards Amend/*	10A NCAC 14C .2703
Support Services Amend/*	10A NCAC 14C .2704
Staffing and Staff Training Amend/*	10A NCAC 14C .2705
Performance Standards Amend/*	10A NCAC 14C .3703
Information Required of Applicant Amend/*	10A NCAC 14C .3802

HEALTH SERVICES, COMMISSION FOR

The rules in Chapter 39 are adult health rules from the Commission for Health Services. The rules in Subchapter 39A deal with chronic diseases including those affecting migrant health (.0100); home health services (.0200); chronic renal disease control program (.0300); adult health promotion and disease prevention program (.0500); medication assistance program for the disabled (.0600); health care services in the home demonstration program (.0700); home and community based HIV health services program (.0800); Ryan White HIV care program (.0900); HIV medication program (.1000); breast and cervical cancer screening and certification program (.1200); and prescription drug assistance program (.1300).

Covered Medications Amend/*	10A NCAC 39A .1002
Applications Process Amend/*	10A NCAC 39A .1005
Program Operation Adopt/*	10A NCAC 39A .1006

The rules in Chapter 41 are Health and Epidemiology rules adopted by the Commission for Health Services. The rules in Subchapter 41A concern communicable disease control including rules about reporting (.0100); control measures (.0200 and .0300); immunizations (.0400); purchase and distribution of vaccine (.0500); special program and project funding (.0600); licensed nursing home services (.0700); grants and contracts (.0800); and the biological agent registry (.0900).

Dosage & Age Requirements for Immunization Amend/*	10A NCAC 41A .0401
---	--------------------

The rules in Chapter 41 are Health and Epidemiology rules adopted by the Commission for Health Services. The rules in Subchapter 41B concern injury control including definitions (.0100); blood alcohol test regulations (.0200); breath alcohol test regulations (.300); controlled drinking programs (.0400); and alcohol screening test devices (.0500).

Consultant Panel and Medical Review Board Fees Repeal/*	10A NCAC 41B .0102
Approved Alcohol Screening Test Devices; Calibration Amend/*	10A NCAC 41B .0503

The rules in Chapter 43 are from the Department of Health and Human Services and concern personal health. The rules in Subchapter 43D concern WIC/Nutrition including definition (.0100); WIC program general information (.0200); selection of local WIC agencies (.0300); eligibility for WIC program participation (.0400); WIC program food package (.0500); WIC program nutrition education (.0600)WIC program food distribution system (.0700); WIC program administrative appeals (.0800); WIC program participant fair hearings (.0900); consultation services (.1000); and maternal and child health block grant nutrition program (.1200).

Authorized WIC Vendors Amend/*	10A NCAC 43D .0706
-----------------------------------	--------------------

The rules in Chapter 45 are from the Department of Health and Human Services and concern general procedures for public health programs. The rules in Subchapter 45B concern procedural rules including petitions (.0100).

Declaratory Rulings Amend/*	10A NCAC 45B .0104
--------------------------------	--------------------

The rules in Chapter 46 are from the Department of Health and Human Services and concern local standards including general (.0100); standards for local health departments (.0200); local health department staff (.0300); sanitation inspections (.0400); and sanitation standards for centers (.0500).

Definitions Repeal/*	10A NCAC 46 .0401
Approval of Construction	10A NCAC 46 .0402

Repeal/*	
Inspections and Reports	10A NCAC 46 .0403
Repeal/*	
Scoring Approval/Disapproval	10A NCAC 46 .0404
Repeal/*	
Sanitation Requirements	10A NCAC 46 .0501
Repeal/*	
Procedure When Infection Suspected	10A NCAC 46 .0502
Repeal/*	
Severability	10A NCAC 46 .0503
Repeal/*	

INSURANCE, DEPARTMENT OF

The rules in Chapter 1 are departmental rules including those covering general matters (.0100); departmental rules (.0200); declaratory rulings (.0300); administrative hearings (.0400); and departmental policies (.0600).

Location and Mailing Address	11 NCAC 01 .0103
Amend/*	

MANUFACTURED HOUSING BOARD

The rules in Chapter 8 are the engineering and building codes including the State Building Code (.0200); approval of school maintenance electricians (.0400); qualification board-limited certificate (.0500); qualification board-probationary certificate (.0600); qualification board-standard certificate (.0700); disciplinary actions and other contested matters (.0800); manufactured housing board (.0900); NC Home Inspector Licensure Board (.1000); home inspector standards of practice and code of ethics (.1100); disciplinary actions (.1200); and home inspector continuing education (.1300).

Escrow Account for Consumer Deposits	11 NCAC 08 .0913
Adopt/*	

WILDLIFE RESOURCES COMMISSION

The rules in Chapter 10 are promulgated by the Wildlife Resources Commission and concern wildlife resources and water safety. The rules in Subchapter 10B are hunting and trapping rules and cover general hunting and wildlife provisions (.0100), hunting specific animals (.0200), trapping (.0300), and tagging furs (.0400).

Turkey	15A NCAC 10B .0209
Amend/*	

The rules in Subchapter 10H concern activities regulated by the Commission including controlled hunting preserves for domestically raised game birds (.0100), holding wildlife in captivity (.0300), commercial trout ponds (.0400), fish propagation (.0700), falconry (.0800), game bird propagators (.0900), taxidermy (.1000), furbearer propagation (.1100), and controlled fox hunting preserves (.1200).

General Requirements	15A NCAC 10H .0301
Amend/*	
Minimum Standards	15A NCAC 10H .0302
Amend/*	

HEALTH SERVICES, COMMISSION FOR

The rules in Chapter 13 are from the Commission for Health Services and cover hazardous and solid waste management, inactive hazardous substances, and waste disposal sites. The rules in Subchapter 13A cover hazardous waste management, and specifically

HWTSD (hazardous waste treatment, storage, or disposal) facilities.

Interim Status Stds for Owners-Op Amend/*	15A NCAC 13A .0110
Land Disposal Restrictions-Part 268 Amend/*	15A NCAC 13A .0112

The rules in Chapter 18 are from the Commission for Health Services and cover environmental aspects of health such as sanitation (18A), mosquito control (18B), water supplies (18C), and water treatment facility operators (18D). The rules in Subchapter 18C are water supply rules including their protection and location (.0100-.0200), submission of plans, etc. (.0300), design criteria (.0400-.0500), raw surface water facilities (.0600), surface water treatment facilities (.0700), hydropneumatic storage tanks (.0800), distribution systems (.0900), disinfection (.1000), protection of unfiltered and filtered supplies (.1100-.1200), variances (.1300), fluoridation (.1400), water quality standards and variances (.1500-.1600), systems grants (.1700), local plan approval (.1800), administrative penalties (.1900), filtration and disinfection (.2000) and operating permits (.2100).

Enhanced Filtration and Disinfection Amend/*	15A NCAC 18C .2007
---	--------------------

COSMETIC ART EXAMINERS, BOARD OF

The rules in Chapter 14 are from the Cosmetic Art Examiners. The rules in Subchapter 14F govern all aspects of licensing a beauty salon.

Inspection of Cosmetic Art Shops Amend/*	21 NCAC 14F .0108
Postponement of Re-inspection Repeal/*	21 NCAC 14F .0112

The rules in Subsection 14G give the requirements for the establishment of cosmetic art schools.

Equipment and Teachers Amend/*	21 NCAC 14G .0107
-----------------------------------	-------------------

The rules in Subchapter 14H are from the Cosmetic Art Examiners and cover sanitation for both operators and facilities.

Cleanliness of Clinic Area: Supplies: Combs and Brushes Amend/*	21 NCAC 14H .0112
Footspa Sanitation Amend/*	21 NCAC 14H .0120

The rules in Subchapter 14J cover the cosmetology curriculum including the beginners' department (.0100); the advanced department (.0200); combined studies (.0300); the course of study (.0400); and credit for study outside of North Carolina (.0500).

Live Model/Mannequin Performance Requirement Amend/*	21 NCAC 14J .0207
---	-------------------

LANDSCAPE ARCHITECTS, BOARD OF

The rules in Chapter 26 are from the N. C. Board of Landscape Architects and include statutory and administrative provisions (.0100); practice of registered landscape architects (.0200); examination and licensing procedures (.0300); rules, petitions and hearings (.0400); and board disciplinary procedures (.0500).

Unprofessional Conduct Amend/*	21 NCAC 26 .0209
-----------------------------------	------------------

Dishonest Practice Amend/*	21 NCAC 26 .0210
Incompetence Amend/**	21 NCAC 26 .0211
Reinstatement After Revocation Amend/**	21 NCAC 26 .0306
Disciplinary Review Adopt/**	21 NCAC 26 .0510

MEDICAL BOARD

The rules in Chapter 32 are from the Medical Board and include the licensing and practice standards of doctors, approval of nurse practitioners and physician assistants, regulation of professional corporations and mobile intensive care, and other aspects of medical practice and the regulatory procedures. The rules in Subchapter 32U cover the administration of vaccines by pharmacists.

Administration of Vaccines by Pharmacists Adopt/*	21 NCAC 32U .0101
--	-------------------

NURSING, BOARD OF

The rules in Chapter 36 are the rules of the Board of Nursing including rules relating to general provisions (.0100); licensure (.0200); approval of nursing programs (.0300); unlicensed personnel and nurses aides (.0400); professional corporations (.0500); articles of organization (.0600); implementation of Nurse Licensure Compact Act (.0700); and approval and practice parameters for nurse practitioners (.0800).

Clinical Nurse specialist Practice Amend/*	21 NCAC 36 .0228
---	------------------

PHARMACY, BOARD OF

The rules in Chapter 46 are from the Board of Pharmacy and cover organization of the Board (.1200); general definitions (.1300); hospitals and other health facilities (.1400); admission requirements and examinations (.1500); licenses and permits (.1600); drugs dispensed by nurse and physician assistants (.1700); prescriptions (.1800); forms (.1900); administrative provisions (.2000); elections (.2100); continuing education (.2200); prescription information and records (.2300); dispensing in health department (.2400); miscellaneous provisions (.2500); devices (.2600); nuclear pharmacy (.2700); sterile parenteral pharmaceuticals (.2800); product selection (.2900); disposal of unwanted drugs (.3000); clinical pharmacist practitioner (.3100); and impaired pharmacist peer review program (.3200).

Administration of Vaccines by Pharmacists Amend/*	21 NCAC 46 .2507
--	------------------

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. 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

Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter

James L. Conner, II
Beryl E. Wade
A. B. Elkins II

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL AND BEVERAGE COMMISSION</u>				
Richard S Blazak, Park View Lounge v. ABC	96 ABC 0053	Gray	07/06/05	
ABC Comm. & City of Asheville v. Elijah Ulysses Jones T/A Jones Convenience Store	98 ABC 0962	Gray	07/12/05	
ABC Comm v. Rudean Robinson Harris T/A Rudean's Diner & Lounge 3	03 ABC 1214	Conner	06/28/05	
ABC Comm v. Desperado's Inc T/A Desperado's	04 ABC 1192	Wade	07/20/05	
Cameron's One Stop, Sank Cameron v. ALE Agent B Haynes, Ann H. Johnson, Permit Comm Mgr	05 ABC 0799	Elkins	07/28/05	
<u>ACUTIONEERS LICENSING BOARD</u>				
Robert H. Rankin, Jr., NCAL #6727 v. Auctioneers Licensing Board	04 CFA 1497	Mann	05/13/05	
<u>COMMERCE, DEPARTMENT OF</u>				
Land-of-Sky Regional Council v. Dept of Commerce, Div of Emp/Trng	96 COM 1921	Gray	07/05/05	
<u>CRIME VICTIMS COMPENSATION</u>				
Dwight D Hoover Sr. v. Victims Compensation Commission	04 CPS 0988	Conner	07/07/05	
Myrtle Perry v. Crime Victims Compensation Commission	04 CPS 1190	Chess	06/21/05	
Cecelia Reid v DCCPS, Div of Vic Comp Svcs, Crime Vic Comp Comm	05 CPS 0220	Lassiter	08/08/05	
Rhonda Lynnette Rhodes v. Crime Victims Compensation Program	05 CPS 0484	Gray	06/23/05	
Jamaal O Staten v. Crime Victims Compensation Commission	05 CPS 0711	Elkins	07/28/05	
<u>BOARD OF ELECTIONS</u>				
Republican Governors Association & Holly Lynn Koerber v. State Board of Elections	04 BOE 2051	Morrison	06/30/05	20:02 NCR 100
<u>HEALTH AND HUMAN SERVICES</u>				
MedVisit, Inc. v. Div. of Medical Assistance (DHR)	94 DHR 0012	Gray	07/12/05	
Patsy Norris v. Department of Human Resources	94 DHR 0895	Gray	07/06/05	
Small World DC II, Trena McDaniel v DHHS, Div of Child Dev.	00 DHR 2202 ²	Gray	08/08/05	
Trena S McDaniel & Small World DC II v. DHHS, Div of Child Dev.	01 DHR 0321 ²	Gray	08/08/05	
Richard McKinley Whited v. DHHS	02 DHR 0024	Gray	08/04/05	
Thomas Reiter, a minor, by his mother & legal guardian, Kathryn Reiter	03 DHR 1253	Gray	06/27/05	20:03 NCR 144
Louise Li Lai Fong v. DHHS, Division of Facility Services	03 DHR 1714	Wade	06/27/05	
Lenwood E Hargrove, Wilma Hargrove v. Div. of Medical Assistance	03 DHR 1737	Conner	07/27/05	
Jeffrey D. Cannon v. DHHS, Walter B Jones ADOACT	03 DHR 0488	Conner	06/29/05	
Geana E. Anderson v. DHHS, Division of Facility Services	03 DHR 2063	Gray	06/24/05	
Otis D. Wyche, Jr., v. DHHS, Div. of Facility Services	04 DHR 0294	Chess	05/16/05	
North Brook Rest Home, Inc v. DHHS, Adult Licensure Section	04 DHR 0407	Conner	07/26/05	
Priscilla Thomas d/b/a Thomas, Priscilla Small Day Care Home-ID#4605036 v. DHHS, Division of Child Development	04 DHR 0539 ¹	Mann	06/03/05	
Jamie Lynn Hensley v. DHHS, Div. of Facility Services	04 DHR 0917	Wade	05/16/05	
Patricia A. Reece v. DHHS, Division of Facility Services	04 DHR 1062	Mann	07/27/05	20:05 NCR 266
Charleese K Garrison, mother of Jasmine C Garrison v. DHHS, Division of Medical Assistance	04 DHR 1168	Gray	08/03/05	

CONTESTED CASE DECISIONS

Priscilla Thomas d/b/a Thomas, Priscilla Small Day Care Home-ID#4605036 v. DHHS, Division of Child Development	04 DHR 1413 ¹	Mann	06/03/05
Wake Forest University Health Sciences (Lessor) and Huntersville Dialysis Center of WFU d/b/a Huntersville Dialysis Center (Lessee) v. DHHS, Div. of Facility Svcs, CON Section and Bio-Medical Applications of NC, Inc. & Total Renal Care of North Carolina, LLC	04 DHR 1406	Conner	05/18/05
Dawn Allison v. Div. of Medical Assistance	04 DHR 1444	Mann	05/27/05
Gaile Thomas v. DHHS, Division of Facility Services	04 DHR 0110	Lassiter	06/21/05
Dorothy S Coleman v DHHS	04 DHR 2247	Elkins	07/28/05
Tara Sue Clark-Grubb v. Guilford Co Dept. of Social Services, Laura Blackwell, Tonya Dupree Freeman, Stacy Taylor-Greene	05 DHR 0243	Conner	06/10/05
Teresa Sharon Pyles v. Mecklenburg Co. DSS, Kuralt Centre	05 DHR 0264	Wade	06/20/05
Belinda Darnell Hawkins v. DHHS, Div of Facility Services	05 DHR 0265	Elkins	06/09/05
LaQuasha K Massey v. DHHS, Division of Social Services	05 DHR 0294	Lassiter	07/11/05
Wade R Kearney II v. DHHS, Office of Emer Medical Services	05 DHR 0325	Lassiter	07/25/05
Cherry Bruce Kearney, Operator 7 th Heaven Day Care v. DHHS, Div of Facility Services	05 DHR 0382	Wade	06/20/05
DSS, Deloise Bryant v Halifax County Adoption Agency	05 DHR 0388	Lassiter	07/14/05
Tammy Trejo v. Office of Administrative Hearings	05 DHR 0452	Gray	06/15/05
Maria Shante Holley v DHHS, DFS	05 DHR 0461	Wade	07/18/05
Albert Ansah Amoatey v. DHHS	05 DHR 0459	Mann	07/20/05
Erdem Narter v. DHHS, Division of Facility Services	05 DHR 0463	Mann	06/16/05
Jerry Lemar Pettus v Off. Of Emergency Medical Services	05 DHR 0496	Mann	07/19/05
D'Jetta D Miley for Jordana Correa v. Wake Co. Dept. of Human Services	05 DHR 0570	Lassiter	06/02/05
William Henry Lane v. DHHS, Div. of Medical Assistance	05 DHR 0571	Chess	05/31/05
PJ's Child Care Learning Center #2 v DHHS, Div of Child Development	05 DHR 0633	Lassiter	08/10/05
Candace L Wood/ Caitlyn A Wood v. OPC Men Hlth Area Prog	05 DHR 0649	Conner	08/01/05
Candace L Wood/Waylon S Keeter v. OPC Men Hlth Area Prog	05 DHR 0650	Conner	08/01/05
Candace L Wood/Caitlyn A Wood v Alamance Caswell MHDDSA	05 DHR 0651	Conner	07/12/05
Candace L Wood/Caitlyn A Wood v Alamance Caswell MHDDSA	05 DHR 0652	Conner	07/12/05
Rose McRae v. DHHS, Division of Health Services	05 DHR 0662	Elkins	07/18/05
Walter G Dunston v. DHHS, Division of Facility Services	05 DHR 0688	Elkins	07/11/05
Pinebrook Residential Fac #1 v DHHS, DFS, Adult Care Licensure Sec.	05 DHR 0704	Conner	07/26/05
Barbara Munch v. DHHS	05 DHR 0725	Morrison	07/22/05
Gwendolyn Bain v. Hoke Co Dept of Social Svcs, Ms Christin Basil	05 DHR 0749	Lassiter	07/22/05
Amanda M Walters v. DHHS	05 DHR 0779	Elkins	07/28/05
Tamesha Taft v. DHHS	05 DHR 0836	Gray	08/04/05
Linda M Currie v. Medicaid	05 DHR 0854	Gray	07/07/05
Geneva Walton v DHHS, Division of Facility Services	05 DHR 0861	Chess	07/21/05
Claire Diggs v. Moore County, Program Integrity Unit	05 DHR 0915	Gray	08/10/05
Francesca L Camp v Nurse Aide 1 & Health Care Registry	05 DHR 0919	Lassiter	07/27/05
Benny Brown v. DHHS, Division of Facility Services	05 DHR 0949	Elkins	07/28/05

A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncsoh.com/decisions.

DEPARTMENT OF JUSTICE

Andrew Arnold Powell, Jr. v. Crim Just Educ & Trng Stds Comm.	01 DOJ 1771	Chess	07/19/05
Carlos Orellana v. Private Protective Services Board	04 DOJ 0813	Conner	08/01/05
David Upchurch v. Criminal Justice Education and Training Stds. Comm.	04 DOJ 1157	Lassiter	05/13/05
Phillip William Engle v Sheriffs' Education and Training Stds. Comm.	04 DOJ 1283	Mann	06/28/05
Edward Keith Royal v. Criminal Justice Education & Training Stds. Comm.	04 DOJ 2194	Gray	06/28/05
Tabitha Ann Boyland v. Sheriffs' Educ. & Training Standards Comm.	05 DOJ 0156	Elkins	07/08/05
Teddy Lynn Warren v. Criminal Justice Education & Training Stds. Comm.	05 DOJ 0505	Conner	06/23/05
Amanda Gayle Talbert v. Criminal Justice Educ. and Training Stds. Comm.	05 DOJ 0648	Lassiter	06/15/05
Amanda Gale Hughes v Sheriffs' Educ Trng Stds. Comm.	05 DOJ 0666	Wade	07/18/05
Jeremy Westbrook v. Alarm Systems Licensing Board	05 DOJ 0693	Lassiter	07/19/05

20:03 NCR 148

DEPARTMENT OF STATE TREASURER

Roy Kevin Tripp v. Dept of St Treasurer, St Retirement Agency	04 DST 1422	Conner	07/27/05
George L Brown v Dept of St. Treasurer, Retirement Systems Division	05 DST 0147	Morrison	07/22/05

ENVIRONMENT AND NATURAL RESOURCES

Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0225	Gray	07/06/05
Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0774	Gray	07/06/05
JFG, Inc, Mr. Wayne Pierce, Pres. v. Onslow Co Health Dept & DEH&NR, Division of Environmental Health	95 EHR 0110	Gray	07/06/05
Southwinds Homeowners Association v. DEHNR, Div. of Env. Health	95 EHR 0271	Gray	07/06/05
Sandy Mitchell/E Ward Norris v. Mecklenburg Co Hlth Dept and DEHNR	95 EHR 0306	Gray	07/06/05
Ralph K & Carolyn Emery v. Montgomery Co Health & Env. Section	95 EHR 0317	Gray	07/06/05
Deerfield Shores Utility Co v. Carteret Co Environmental Health Dept.	95 EHR 0354	Gray	07/05/05
Ron Launder v. Vance Co. Health Department	95 EHR 0515	Gray	07/05/05
Heater Utilities, Inc v. NCDENR, Division of Water Quality	02 EHR 0009	Gray	07/06/05
John & Elizabeth Kaylor v. DENR	03 EHR 0046	Conner	06/29/05
Federal Land & Timer Corp v. DENR	03 EHR 1718	Gray	07/28/05
Robert L. Grissett v. DENR	04 EHR 1237	Chess	05/16/05
Ellen Darrigrand & Charles Darrigrand v. DENR, Div/Coastal Mgmt	04 EHR 1469	Mann	06/30/05
Glenda Daniel v. Halifax Co Health Dept, Env Health Division	04 EHR 1583	Conner	07/27/05
Matthew and Kathy Johnson v. DENR	04 EHR 2163	Conner	06/01/05

20:05 NCR 270

CONTESTED CASE DECISIONS

Affordable Appliance, Jack Steale v. DENR	04 EHR 2164	Conner	05/31/05
Robert W Hudson v. Division of Marine Fisheries	05 EHR 0886	Morrison	07/05/05
Daniel J Smith v State of NC Environmental Health	05 EHR 0925	Lassiter	08/08/05
John C Gallop, Jane Gallop Newbern v. DENR/Div of Coastal Mgmt	05 EHR 0941	Gray	07/29/05

OFFICE OF STATE PERSONNEL

Eddie Ray Creech v. Department of Corrections	03 OSP 0831	Wade	05/17/05
Kathy Sledge v. Department of Corrections	03 OSP 1092	Conner	06/27/05
James A Ray v. UNC at Greensboro, Facility Services	04 OSP 0751	Elkins	06/28/05
Willie Steve Tellado v Dept. of Transportation	04 OSP 0858	Wade	07/18/05
Loretta G Hooks v. Department of Corrections	04 OSP 1266	Wade	07/11/05
Daisy L. Smith v. Cumberland Co Mental Health Center	04 OSP 1558	Elkins	07/28/05
Shelli Henderson Rice v. ESC of NC	04 OSP 1574	Gray	06/27/05
V Wayne Johnson v Department of Transportation	04 OSP 1716	Elkins	07/06/05
Regina C Gaither v. Forsyth Co Department of Social Services	05 OSP 0047	Conner	06/27/05
Thomas A Horton v. Dept. of Crime Control and Public Safety	05 OSP 0389	Lassiter	06/02/05
Anthony Bruce Allen v Department of Transportation	05 OSP 0418	Chess	06/09/05
Derek H. Babson v. Department of Transportation	05 OSP 0515	Chess	05/31/05
Mary K French Fornes v DOC Eastern Correctional Institution	05 OSP 0584	Gray	07/08/05
Gloria Woodard v. Lyndo Tippet, Secretary, NC DOT	05 OSP 0588	Lassiter	06/24/05
Deborah Faye Murray v NW Peidmont Council of Governments	05 OSP 0802	Chess	07/13/05
Milton W. Nobles v. DHHS/Dorothea Dix Hospital	05 OSP 0815	Gray	06/15/05
Sandra Thomas v Department of Correction	05 OSP 0824	Wade	07/21/05
Stacy D Bazemore v NCSU CVM-VTH	05 OSP 0874	Gray	08/01/05

20:05 NCR 291

SECRETARY OF STATE

Monica A Chitwood v. Dept. of Secretary of State	05 SOS 0237	Conner	06/17/05
Janice W. Craver v. Dept. of Secretary of State	05 SOS 0286	Conner	06/06/05
Richard C Capps v. Dept of Secretary of State	05 SOS 0560	Gray	07/14/05

UNC HOSPITALS

Amanda Mathis Miller v. UNC Hospitals	05 UNC 0247	Lassiter	06/02/05
Darian C. Jones Ph.D v. UNC Hospitals	05 UNC 0315	Lassiter	06/02/05
Tereasa King v. UNC Hospitals	05 UNC 0376	Lassiter	06/02/05
Ellen Griffith v. UNC Hospitals	05 UNC 0585	Conner	07/26/05
Dawn B & John A Gladden v. UNC Hospitals via Dept. of Revenue	05 UNC 0608	Conner	07/26/05
Bettie Brame v UNC Hospitals	05 UNC 0638	Conner	08/01/05
Margarida Goulart v UNC Hospitals	05 UNC 0683	Conner	07/26/05
Tashuia Williams v UNC Hospitals	05 UNC 0684	Conner	07/26/05
DeJuana Middleton v UNC Chapel Hill Hospital	05 UNC 0701	Conner	07/26/05

1 – Combined Cases
2 – Combined Cases

3. J.S. was a resident of the Home with a medical diagnosis of Autism and mild mental retardation. J.S. stands approximately six feet tall and weighs approximately 200 pounds. One of J.S.'s behaviors is that he will eat whenever he can. J.S. was to be redirected away from eating unless the eating was appropriate. (T p. 28, 57; R. Ex. 5)

4. J.S. previously lived in another group home. May 3, 2004 was his first day at the Home. J.S. was agitated as a result of the move. The Petitioner had been seeing that J.S. appropriately followed his behavior program. This was the first day that Petitioner had worked with J.S. (T pp. 11, 20, 23, 58)

5. Later in the day, when J.S. was scheduled to be doing exercises, he went into the kitchen pantry and began eating a box of cookies. (T pp. 11, 20-21, Resp. Ex. 7, 8, 9)

6. Petitioner attempted to redirect J.S. out of the pantry and was trying to talk to J.S. in a manner to calm him down. J.S. became increasingly agitated and began grumbling loudly. J.S. then slapped the Petitioner severely across the face. (T pp. 12, 21, 58; Resp. Ex. 7, 8, 9, 10, 11)

7. The Petitioner placed her hand against J.S.'s face in the manner of a slap but with very little force and without intent to harm. J.S. did not have any apparent reaction to being touched in this manner. It did not seem to phase him at all. J.S. just walked away. J.S. did not stop what he was doing. (T pp. 12, 18, 23, 35, 63, 65; Resp. Ex. 8, 9, 10, 11)

8. Petitioner looked shocked and stated, "I just made a mistake." (T pp. 12, 21, Resp. Ex. 8, 9)

9. Patricia McClintock asked Petitioner to leave the room and then checked J.S. to see if he had any injuries. She could not find any redness or irritation on his face. When she asked J.S. if he was okay, his only response was, "Tuesday, Right Group Home." Next, she reported the incident to the Executive Director, Karen Gettinger,. (T pp. 12-13, Resp. Ex. 6, 8, 9)

10. Patricia McClintock, the Assistant Director at the time and Ryan Jones another employee, witnessed the Petitioner "slap" J.S. Both employed the word "slap" to describe how the Petitioner's hand made contact with J.S.'s face. Patricia McClintock further described the motion as: "It didn't appear to be done out of anger but more as a quick response." "Her hand touched his cheek." "...it almost looked like a playful interaction." "I use the word 'slap' with reservations ... I don't know if the word 'slap' is the correct term for that as well." Mr. Jones described the motion as "a reaction." Petitioner described the touching as reflex reaction to a very large man striking her. In her testimony, Petitioner demonstrated something less than a slap without force and anger. There was no intent to cause harm to J.S. (T pp. 12, 14-15, 21, 58, 63; Resp. Ex. 6, 8, 9, 10, 11).

11. After receiving the report from Ms. McClintock, Karen Gettinger suspended the Petitioner and began an investigation. At the close of that investigation, Ms. Gettinger found that the Petitioner had slapped J.S. but she further described the motion in words utilized by Ms. McClintock's words: "very light" and "more like a pat." (T pp. 28-31, Resp. Ex. 14)

12. The incident was reported to the Respondent who made a determination to investigate the allegation. The Petitioner was properly notified of the Respondent's intent to investigate this allegation. (T p. 32, Resp. Ex. 1, 2, 3)

13. The Respondent's investigator, Connie Carswell, RN, interviewed the two eyewitnesses (Patricia McClintock and Ryan Jones). She observed J.S. but was unable to conduct a meaningful interview with him. (T pp. 36-49, Resp. Ex. 5, 8, 10)

14. Ms. Carswell made several attempts to contact the Petitioner to interview her, but those were unsuccessful. (T pp. 44-46, Resp. Ex. 4)

15. After completing the investigation the Respondent found that the actions of the Petitioner met the definition of abuse set forth in 42 CFR 488.301 and substantiated the allegation. (T pp. 48-49, Resp. Ex. 12)

16. The Petitioner was notified of the substantiation. (T pp. 49-50, Resp. Ex. 13)

17. The Petitioner testified that she had worked at the Home for 3 years and that she had been "attacked a lot worse than anything that happened with J.S." "I've been bitten, scratched and hit and kicked and every thin you can imagine and never had any problems." She also testified that "he slapped me so hard that it took me off guard." (T pp. 57-59, Resp. Ex. 7)

18. The Petitioner testified that she made a "reflex" action, but that she was able to catch herself before she slapped him and that "my hand just barely touched his face." (T pp. 58, 63-64, Resp. Ex. 7)

19. The Petitioner testified that she was in “shock” that she did that. (T pp. 58, 63-64, Resp. Ex. 7). Ryan Jones describes Petitioner: “I think she is a great employee and cares deeply about our residents. She is always willing to help out with extra work and has a good attitude on the job.” (Resp. Exh. 11)

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and have stipulated that Notice of this hearing was timely. The parties further stipulate that there are no known reasons why the undersigned should recuse himself of hearing this matter.

2. The North Carolina Department of Health and Human Services, Division of Facility Services, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel working in health care facilities against whom a finding of abuse, neglect, or misappropriation of resident and/or facility property has been substantiated.

3. The definition of abuse used by the Respondent comes from 42 CFR 488.301 and states that, “Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.”

4. North Carolina Group Home for Autistic Persons, Inc., is a health care facility as defined in N.C. Gen. Stat. § 131E-256(b). In order to provide these services to its residents the Home employs “Resident Teachers” which are health care personnel pursuant to N.C. Gen. Stat. § 131E-256(c).

5. Petitioner was employed as a Resident Teacher and therefore is a "health care personnel" and is subject to the provisions of N.C. Gen. Stat. § 131E-256.

6. The Respondent properly notified the Petitioner of the substantiation and properly notified her of her appeal rights.

7. Petitioner’s contention that she had a “reflex” or “reaction” to being struck by a large man and that she was then able to stop herself from actually “slapping” J.S. is found to be credible. Her testimony is reconcilable and not inconsistent with the other descriptions of this touching as given by other witnesses.

8. The touching was not intended to punish J.S. for having struck the Petitioner. A spontaneous touching in this manner could have been an abusive slap had Petitioner not restrained herself at the last instant.

9. The undersigned concludes that Respondent failed to carry its burden of proof by the preponderance of the evidence that J.S. experienced physical harm, pain or mental anguish, neither can it be presumed nor implied.

10. The evidence tends to show that J.S. was not injured or physically harmed and he had either no or *de minius* pain or mental anguish as a result. As such and in accordance with the applicable law, the undersigned cannot find cause in this case. Notwithstanding his diagnosis of Autism and mild mental retardation, and consequential evidentiary difficulty in establishing a reaction by such a person with that diagnosis, J.S., nevertheless must be found, either actual or implied, to have had a pronounced physical or emotional reaction. Petitioner did not intend harm, pain or mental anguish, nor did J.S. experience harm, pain or mental anguish because the evidence and description of the motion is consistent with the testimony that J.S. experienced no reaction nor can it be implied under these facts. Petitioner made a mistake, admitted such, and the likelihood of a more serious reoccurrence is minimal.

11. Respondent’s decision to substantiate this allegation of abuse against the Petitioner is not supported by a preponderance of the evidence.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following

DECISION

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW it is hereby ORDERED that the Respondent’s decision to substantiate the foregoing allegation of abuse against the Petitioner is not substantiated.

NOTICE

CONTESTED CASE DECISIONS

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

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) 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.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 27th day of July, 2005.

Julian Mann, III
Chief Administrative Law Judge

- A. Boney Survey dated May 9, 2003
- B. Aerial photograph showing the site– 2002
- B1. Site plans
- C. House plans prepared by Topsider Homes, dated May 19, 2003

Petitioners:

- 1. Affidavit of McHenry and McHenry survey
- 3. Boney Survey
- 4. Boney Survey with proposed residence shown
- 5. Large copy of Boney Survey with proposed residence shown
- 7. Notification of denial of permit
- 11. Oak Island zoning map
- 17. Respondent's Responses to Interrogatories
- 26. Aerial Photograph
- 27. Aerial Photograph
- 28. Aerial photograph
- 29. Aerial Photograph
- 30. Aerial Photograph-NCDOT
- 31. Aerial Photograph
- 32. Aerial Photograph
- 33. Aerial Photograph-NCDOT
- 34. Oak Island West Long-term average annual shoreline study and erosion factors
- 35. Aerial Photograph
- 35. Aerial Photograph
- 36. Photograph-ground level
- 37. Photograph-ground level
- 39. DENR surveyed line of stable vegetation for Oak Island overlaid onto aerial photos
- 39A. Read-me file from CD ROM of survey line (39 above)
- 40. DENR surveyed line of stable vegetation for Oak Island
- 41. Order, variance request and minutes for Babcock
- 42. Order, variance request and minutes for Mack
- 43. Order, variance request and minutes for Pate
- 44. Order, variance request and minutes for Town of Atlantic Beach
- 45. Order, variance request and minutes for Sea Turtle Rescue
- 46. Order, variance request and minutes for Stroud
- 48. Order, variance request and minutes for Anderson

Respondent:

- 1. CAMA Minor Permit Application
- 2. Boney survey dated May 9, 2003 with proposed structure shown (Exhibit A to Stipulations)
- 3. Survey showing revised CAMA setback line of July 5, 2003
- 5. Pre-project Vegetation Line Survey, February-March 2003
- 6. July 28, 2003 Letter Denying CAMA Minor Permit Application
- 7A-F. NCDOT Aerial photos dated 1978, 1984, 1989, 1995, 1998, 2000 on foam board
- 8A. Aerial Photo from 2002 showing the site at 1_ = 80' (Exhibit B to Stipulations)
- 8B. Aerial Photo from 2002 showing the site at 1_ = 40'
- 9. Plat Map of Long Beach from 1920's
- 10. List of Unbuildable Undeveloped Lots on the Ocean Front in Oak Island
- 11A-J. Letters from Kerri Knight to Property Owners (10 letters)
- 12. July 7, 2004 Letter from Steve Edwards to CRC Chairman Tomlinson
- 13. August 10, 2004 Memo from Jeff Warren to Implementation and Standards Committee
- 14. CAMA Minor Permit to Ted Wood issued October 7, 1994
- 15. CAMA Minor Permit Application from Ted Wood for 1994 permit
- 16. Historical Vegetation Line on Darrigrand Lot on top of Aerial Photo-orthophotograph

- 16A. Affidavit of Sean McGuire
- 17. 2003 Pre-project vegetation line survey overlaid on 2002 Aerial Photography

Respondent's Exhibit 4, the Long-Term Average Annual Shoreline Study & Erosion Factors (Updated through 1998) Oak Island – West, was substituted by Petitioner's Exhibit 34)

MOTIONS

1. On November 22, 2004, Respondent filed a Motion to Dismiss the petition for contested case hearing for lack of subject matter jurisdiction pursuant to N.C. R. Civ. P. 12(b)(1). Petitioners filed a Memorandum of Law in Response to Respondent's Motion. At the beginning of the November 30, 2004 contested case hearing, the undersigned heard oral arguments by both parties. Upon considering the briefs and oral arguments of the parties, the undersigned granted Respondent's Motion to Dismiss for lack of subject matter jurisdiction in part, and denied it in part. (T pp 47-48) Respondent's motion was granted in that OAH lacks subject matter jurisdiction over Petitioners' regulatory takings claim, and it was denied in that OAH has jurisdiction over Petitioners' variance request. This ruling was memorialized in an Order filed January 13, 2005.

2. On November 29, 2004, Petitioner filed a Motion in Limine to exclude the testimony of Charles S. Jones. At the beginning of the November 30, 2004 contested case hearing, the undersigned heard oral arguments by both parties. Upon considering the briefs and oral arguments of the parties, the undersigned granted Petitioners' Motion in Limine in part, and denied it in part. Mr. Jones was allowed to testify, but not as an expert witness. (T p 58) This ruling was memorialized in an order filed January 12, 2005.

OFFICIAL NOTICE

Pursuant to N.C.G.S. § 150B-30, the undersigned took official notice that the following major hurricanes hit the Oak Island area as follows: Hurricane Floyd in September of 1999, Hurricane Bonnie in August of 1998, Hurricane Fran in September of 1996, and Hurricane Bertha in July of 1996. (T pp 494-96)

PROCEDURAL HISTORY

- 1. On May 20, 2003, Petitioners applied for a minor permit under the Coastal Area Management Act (CAMA) to construct a single family residence on their property at Oak Island, Brunswick County, North Carolina.
- 2. On June 28, 2003, the CAMA local permit officer denied the permit application pursuant to N.C.G.S. § 113A-120(a)(8) based on the proposed development not meeting the 60-foot minimum erosion setback for oceanfront development.
- 3. On August 18, 2003, Petitioner timely filed a Petition for a Consolidated Contested Case Hearing and CAMA Variance Request. (Stip Fact 23)
- 4. By Order dated January 13, 2005, Petitioners' contested case was dismissed for lack of subject matter jurisdiction on the basis that Petitioners only challenged the permit denial to the extent that it constituted a taking, and OAH does not have jurisdiction over takings claims. The remaining issue is whether Petitioners should be granted a variance by the Coastal Resources Commission (CRC) under the four criteria the CRC must find to issue a variance pursuant to N.C.G.S. § 113A-120.1.

STIPULATED FACTS

The parties agreed to and the undersigned approved and entered the following stipulated facts filed October 27, 2004:

The Property

- 1. Ellen Darrigrand and husband, Charles Darrigrand, (collectively "Petitioners") are the owners of an undeveloped residentially zoned lot located at 4815 West Beach Drive, Smithfield Township, Oak Island, Brunswick County, North Carolina (the "Property"). The Property is more particularly described as Lot Number Eight (8) and the western one half of Lot Number Seven (7), Block One Hundred Sixteen (116) of West Long Beach, as shown on a map recorded at Map Book 2 ½, Page 182 189, Brunswick County Registry of Deeds. The Property's Tax Parcel Identification Number is 233MF031.03. (Stipulated Fact 1)
- 2. The Property is zoned Residential 7 ("R7") pursuant to the Town of Oak Island's ("Town") zoning code (the "Code"). Only single family residential uses and limited accessory uses are permitted on the Property by the Code. (Stipulated Fact 2)

3. The Property extends from the beach landward to the right-of-way of West Beach Drive. (Stipulated Fact 3)
4. The dimensions of the lot as platted are 75' wide (along the beach) by 150' deep (from the beach to the right-of-way) as shown on a survey prepared for the Petitioners by Boney Land Surveyors, Inc., dated May 9, 2003 and entitled "Property Survey for Charlie Darrigrand, 4815 W. Beach Drive, Oak Island, Smithville Township, Brunswick Co., NC" (the "Survey"). The square footage of the lot shown on the survey is 11,250 sq. ft. A copy of the survey was filed as Stipulated Exhibit A and is incorporated herein by reference. Exhibit A is a true and accurate depiction of the Property. (Stipulated Fact 4)
5. With the exception of one vacant lot located immediately East of the Property, the Property is located in a fully developed area along the oceanfront. Single family residences have been constructed on either side of the Property for at least six hundred (600) feet as shown on the aerial photograph filed as Stipulated Exhibit B and incorporated herein by reference. Exhibit B truly and accurately depicts the state of development in the area around and near the Property. (Stipulation Fact 5)
6. In the area where the Property is located, onsite septic systems are used for sewage disposal. There is no public sanitary sewer system serving either the Property or the surrounding area. Septic systems in this area are permitted and regulated by the Brunswick County Health Department, Environmental Health Section. (Stipulated Fact 6)
7. On or about October 4, 1994, a septic tank permit for the Property was issued to the immediately prior owner of the Property. This permit has expired. (Stipulated Fact 7)
8. On October 7, 1994, a minor development permit allowing the construction of a single family residence on the Property in compliance with CAMA (as defined below), was issued to the immediately prior owner of the Property. This permit has expired. (Stipulated Fact 8)
9. Petitioners acquired the Property on or about September 28, 1995, for \$70,000.00. (Stipulated Fact 9)
10. Brunswick County determined for tax purposes that the assessed value of the Property in 2003 and 2004 was \$240,000.00. (Stipulated Fact 10)
11. The Petitioners have paid all property taxes due on the Property since 1995. The combined Town and Brunswick County property tax for the Property in 2003 was \$2,261.00. (Stipulated Fact 11)
12. The Brunswick County property tax for the Property in 2004 was \$1,397.00. (Stipulated Fact 12)
13. The Petitioners paid a \$1,206.78 assessment levied by the Town against the Property for a one-time large scale beach nourishment project completed in March 2002. (Stipulated Fact 13)
14. The Petitioners have been notified that the Town will assess Petitioners a minimum of \$4,200.00 for a proposed sewer installation project affecting the Property. (Stipulated Fact 14)

The Petitioner's Application for a Minor Development Permit

15. On or about January 15, 2003, the Petitioners retained Topsider Homes, Inc. ("Topsider") to design and build a proposed residence on the Property. Topsider is an international company based in Clemmons, North Carolina, that specializes in post and beam construction which is designed to be resistant to hurricanes and other extreme weather. Topsider specializes in building hurricane resistant homes in coastal areas in both North and South America. (Stipulated Fact 15)
16. The proposed residence designed by Topsider for the Petitioners for construction on the Property, is a two story, pile supported four bedroom residence with a total heated floor area of approximately two thousand six hundred (2,600) square feet. The exterior footprint of the building (not including decking) is approximately one thousand six hundred ten (1,610) square feet ("House"). The plans for the House are shown on plans prepared by Topsider titled "A new residence for: Darrigrand Residence 4815 West Beach Dr., Oak Island, North Carolina," dated May 19, 2003, and sealed by Walter Carl Taylor, a North Carolina Licensed Professional Engineer. A copy of the plans for the House were filed as Stipulated Exhibit C and are incorporated herein by reference. (Stipulated Fact 16)
17. In a permit application dated May 20, 2003, Petitioners applied to the Town for a minor development permit to construct a single family residence on the Property as required by N.C.G.S. § 113A-118, et seq. and 15A N.C.A.C. 7J .0200, et seq. (Stipulated Fact 17)

18. In their permit application, the Petitioners included a plan showing the "average line of construction" of the oceanward side of the residences within six hundred (600) feet of each side of their lot. The average line of construction is the approximate line formed by the oceanward sides of the residential dwellings which are already constructed on lots to the East and West of the Property. As shown on Stipulated Exhibit A, the Petitioners propose to locate the oceanward side of the House along the average line of construction. (Stipulated Fact 18)
19. In accordance with CAMA, N.C.G.S. § 113A-119 and 15A N.C.A.C. 7J.0200, et seq., written notification of the Petitioners' proposed development was provided to the adjacent property owners, was posted on the site, and was published in the State Port Pilot newspaper. No objections to the proposed development were filed or otherwise raised by anybody. (Stipulated Fact 19)
20. On June 16, 2003, the Brunswick County Health Department approved the Petitioners' application for a septic tank and issued a permit to locate a septic tank on the Property subject to several conditions, including the requirements that the septic tank would not be allowed within five (5) feet of any property line and that no driving, parking, paving, or structure would be allowed over the septic tank area. The permit approves installation of a septic tank that will treat four hundred eighty (480) gallons of wastewater per day. The bed dimensions for disposal field are 15 by 40 feet, and no repair area is required. (Stipulated Fact 20)
21. On July 28, 2003, the Town, acting on behalf of the North Carolina Department of Environment and Natural Resources ("DENR"), denied the Petitioners' application for a minor development permit to construct the House (Permit No. OI-03-53) pursuant to N.C.G.S. § 113A 120(a)(8) based upon the application of the Erosion Setback (as defined below) to the Property. (Stipulated Fact 21)
22. The Petitioners filed an application for a variance of the Town Setback on March 25, 2004, in an effort to minimize the extent of any variance of the Erosion Setback that would be needed from the CRC in order to make the Property developable. (Stipulated Fact 27)
23. The Town's local CAMA permitting officer acted as an agent of the State of North Carolina pursuant to N.C.G.S. § 113A-116 and N.C.G.S. § 113A-121. (Stipulated Fact 22)
24. On August 18, 2003, the Darrigrands timely filed a Petition for a Consolidated Contested Case Hearing and CAMA Variance Request, pursuant to N.C.G.S. § 150B-23, N.C.G.S. § 113A-120.1, N.C.G.S. § 113A-121.1, 15A N.C.A.C. 7J .0701 and other applicable laws. (Stipulated Fact 23)
25. In addition to the sixty (60) foot Erosion Setback (as defined below) imposed upon the Property by CAMA, § 18-117 of the Town's Code imposes a twenty-five (25) foot setback (the "Town Setback") from the right-of-way of the street running in front of the Property (West Beach Drive). Prior to 2000, the Town Setback was thirty (30) feet. (Stipulated Fact 24)
26. The Erosion Setback and the Town Setback overlap by between approximately two (2) to five (5) feet. This overlap creates a "Negative Building Envelope" (as further defined below) on the Property. The Negative Building Envelope prevents the Petitioners from constructing any single family residence on the Property. (Stipulated Fact 25)
27. Sometime prior to March 25, 2004, Respondents' counsel requested that Petitioners seek a variance from the Town Setback pursuant to the applicable provision of the Town's Code. (Stipulated Fact 26)
28. Such a variance, even if it eliminated the entire Town Setback, would not have been sufficient to permit the construction of the House on the Property. (Stipulated Fact 28)
29. On April 8, 2004, the Town denied the Petitioners' application for a variance of the Town Setback. (Stipulated Fact 29)

The State Legal Framework

30. As determined by the Coastal Resources Commission ("CRC"), the Property is located within both the Ocean Erodible and Ocean High Hazard Flood Areas of Environmental Concern ("AEC"). These two subcategories of the Ocean Hazard AEC are designated by the CRC in 15A N.C.A.C. 7H .0304. AEC's are located within the twenty (20) coastal counties of North Carolina, including Brunswick County. (Stipulated Fact 30)
31. The Property is subject to an erosion setback requirement set forth in 15A N.C.A.C. 7H .0306(a). (Stipulated Fact 31)

32. This rule requires that single family residential structures be set back at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation (the "Vegetation Line"). In areas where the erosion rate is less than two (2) feet per year, the setback line shall be sixty (60) feet from the Vegetation Line or the "measurement line," where applicable. 15A N.C.A.C. 7H .0306(a)(1). The CRC has not designated a measurement line for the area in the vicinity of the Property. 15A N.C.A.C 7H .0304(4). (Stipulated Fact 32)
33. Based on the current rates of erosion adopted by the CRC, the average annual erosion rate in the vicinity of the Property is approximately two (2) feet per year. Therefore, according to 15 N.C.A.C. 7H .0306(a)(1), the erosion setback applicable to the Property is sixty (60) feet (30 years x 2 feet) ("Erosion Setback"). (Stipulated Fact 33)
34. The Erosion Setback is generally measured from the first line of stable natural vegetation to the foundation pilings of a structure. The first line of stable natural vegetation "represents the boundary between the normal dry sand beach which is subject to constant flux due to waves, tides, storms and wind and more stable upland areas. It is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment." 15A N.C.A.C. 7H .0305(e). (Stipulated Fact 34)
35. The CRC does not use the actual first line of stable natural vegetation in areas that have received large scale beach nourishment. The CRC's rule provides: "In areas within the boundaries of a large scale beach nourishment or spoil deposition project, the vegetation line that existed prior to the onset of the [beach nourishment project] shall be used as the vegetation line for determining oceanfront setbacks after the project is completed ..." 15A N.C.A.C. 7H .0305(f). (Stipulated Fact 35)
36. Because a large scale beach nourishment project was completed in front of the Property on or about March of 2002, the first line of stable natural vegetation that existed prior to the beach nourishment project ("Pre-existing Vegetation Line") is used by the CRC to measure the Erosion Setback, not the actual first line of stable natural vegetation that currently exists in front of the Property ("Actual Vegetation Line"). At the time the Petitioners applied for a minor development permit to construct the House, the difference between the Pre-existing Vegetation Line and the Actual Vegetation Line was approximately eight (8) feet. (Stipulated Fact 36)
37. The beach nourishment project deposited in excess of 200,000 cubic yards of sand along the oceanfront at Oak Island, consisting of approximately 50.8 cubic yards of sand per linear foot of shoreline. (Stipulated Fact 37)
38. DCM produces erosion rate maps that depict the long-term annual erosion rate for the North Carolina coast. The maps illustrate average rates of shoreline change over approximately the past fifty (50) years. (Stipulated Fact 38)
39. DCM uses and maintains scaled aerial photography as a regular part of its business activities. The photography dates back to 1978, the year that the permitting component of the CAMA came into effect. (Stipulated Fact 39)
40. Scaled aerial photography taken on November 26, 1995 by the N.C. Division of Highways Photogrammetry Unit shows that, as of that date, the distance from the actual first line of stable natural vegetation to the West Beach Drive right of way was approximately 115 feet. Therefore, after applying the Erosion Setback and the Town Setback, a 25 foot building envelope was available to construct a single family residence on the Property. Thus, a single family residence could have been constructed on the Property in compliance with all setbacks imposed upon the Property by applicable State and local law in 1995. (Stipulated Fact 40)
41. Between 1996 and 1999, several hurricanes including Hurricane Floyd struck the southern coast of North Carolina, causing accelerated erosion of the ocean shoreline in many areas, including the shoreline where the Property is located. (Stipulated Fact 41)
42. Scaled aerial photography taken on October 20, 2000, by the N.C. Division of Highways Photogrammetry Unit shows that the distance on the Darrigrand lot from the actual first line of stable natural vegetation to the West Beach Drive right of way was approximately 80 feet. Therefore, after applying the Erosion Setback and the Town Setback, an overlap varying between two (2) and five (5) feet existed between the Erosion Setback and the Town Setback thus creating a negative building envelope (the "Negative Building Envelope"). Due to the resulting Negative Building Envelope, no residence could be built on the Property in 2000 without a variance being granted by the CRC. (Stipulated Fact 42)
43. Scaled aerial photography taken on July 4, 2002, by the N.C. Division of Highways Photogrammetry Unit shows that the distance on the Darrigrand lot from the actual first line of stable natural vegetation to the West Beach Drive right of way still

was approximately 80 feet. Therefore, the application of the Erosion Setback to the Property still creates a Negative Building Envelope, and therefore still prohibits the construction of a single family residence on the Property. (Stipulated Fact 43)

44. If a single family residence were built on the Property, the Code would permit the septic tank system, driveway, and other associated improvements to be located within the Town Setback. (Stipulated Fact 44)
45. Rule 15A N.C.A.C. 7H .0309(a) allows certain types of development seaward of the Erosion Setback, but in all cases this development must be landward of the vegetation line. Only the following uses/structures are allowed in the Erosion Setback: (1) campsites; parking areas with clay, packed sand or gravel; (2) elevated decks not exceeding a footprint of 500 square feet; (3) beach accessways; (4) unenclosed, uninhabitable gazebos; (5) uninhabitable, single story storage sheds; (6) temporary amusement stands; (7) swimming pools; and (8) sand fences (the "CAMA Use Exceptions"). (Stipulated Fact 45)
46. Of the CAMA Use Exceptions permitted by Rule 15A N.C.A.C. 7H .0309(a), § 18-116 of the Town Code prohibits campsites, storage sheds, amusement stands and swimming pools. Therefore, the only CAMA Use Exceptions permitted on the Property in the absence of a single family dwelling are: (1) private parking areas; (2) elevated decks having a footprint of five hundred (500) square feet or less; (3) beach accessways; (4) uninhabitable gazebos; and (5) sand fences. (Stipulated Fact 46)

Jurisdiction

47. DENR is a department of the State and is the State agency with responsibility for preserving and protecting the State's natural resources, including beaches. (Stipulated Fact 47)
48. DENR regulates the coastal areas of the State pursuant to authority conferred upon it by the 1974 Coastal Area Management Act which is found in Chapter 113A, Article 7 of the North Carolina General Statutes (including N.C.G.S. §§ 113A-100 through 113A-129) and various regulations promulgated thereunder by the CRC, and codified at Title 15A, Chapter 7 of the North Carolina Administrative Code (collectively, "CAMA"). (Stipulated Fact 48)
49. DENR is organized into various divisions, including DCM. (Stipulated Fact 49)
50. The CRC was established by N.C.G.S. § 113A-104 of CAMA. (Stipulated Fact 50)
51. The CRC is the State commission with responsibility for adopting rules, regulations, policies and orders regulating and managing development in AEC's pursuant to CAMA. (Stipulated Fact 51)
52. The CRC is also the agency responsible for making final agency decisions relating to CAMA permit applications pursuant to N.C.G.S. § 113A-122. (Stipulated Fact 52)
53. The CRC's rules that apply to development within the State's twenty (20) coastal counties are codified in the North Carolina Administrative Code of Title 15A, Chapter 7. (Stipulated Fact 53)
54. DCM has been delegated authority by DENR to administer and enforce regulations affecting development in AECs, as defined by CAMA. (Stipulated Fact 54)
55. DCM provides staffing services to the CRC, implements and executes CRC rules, and issues CAMA permits. (Stipulated Fact 55)
56. The Town has an approved "implementation and enforcement program" pursuant to N.C.G.S. § 113A-116 and 117 and therefore has been delegated the responsibility to process CAMA minor permits. (Stipulated Fact 56)
57. N.C.G.S. § 113A-128 provides that "nothing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States." (Stipulated Fact 57)
58. The Office of Administrative Hearings is authorized to review denials of Minor CAMA Development Permits pursuant to N.C.G.S. § 150B-23, *et seq.*, to determine if DENR, acting through DCM:
 - a. exceeded its authority or jurisdiction;
 - b. acted erroneously;

- c. failed to use proper procedure;
 - d. acted arbitrarily or capriciously; or
 - e. failed to act as required by law or rule. (Stipulated Fact 58)
59. The Office of Administrative Hearings is authorized to consider and rule on variances from CAMA regulations pursuant to 15A N.C.A.C. 7J .0701, *et seq.* and 15A N.C.A.C. 7J .0301, *et seq.* Pursuant to N.C.G.S. § 113A-120.1 and 15A N.C.A.C. 7J .0701, the standards for granting a variance from CAMA are:
- a. That unnecessary hardships would result from strict application of the rules, standards, or orders issued by the CRC;
 - b. That hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property;
 - c. That such hardships did not result from actions taken by the petitioner; and
 - d. That the requested variance is consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice. (Stipulated Fact 59)
60. Unnecessary hardships will result from the strict application of the Erosion Setback to the Property. (Stipulated Fact 60)
61. The inability to build a single family residence on the Property is not the result of the actions of the Petitioners. (Stipulated Fact 61)
62. Petitioners bear the burden of proof to demonstrate that Respondents erred in denying the Petitioners' permit to build the House under N.C.G.S. § 150B-23 *et seq.* (Stipulated Fact 62)

Factual Stipulations Entered Into During Hearing

63. As depicted on aerial photography from 1978 to 2002, most of the other residences in the vicinity of the Darrigrand lot were constructed prior to 1978. (R Exs 7A-7F, 8A-8B; T pp 533-34)
64. Respondent's Exhibit 16 is a depiction of the vegetation line on the Darrigrand lot over time. Using digital orthorectified photography from 1971, 1978, 1988, 1998, and 2002, Geographic Information Systems (GIS) Analyst and DCM employee Sean McGuire created an illustrative depiction of the first line of stable natural vegetation near the Darrigrand lot, as described in his affidavit, Respondent's Exhibit 16A. (R Exs 16-16A) The parties stipulated to the admissibility of Respondent's Exhibit 16 and 16A upon the stipulation that it is a compilation of data based on review of historical aerial photography and an interpretation by Mr. McGuire of the location of the vegetation line on those photographs, and not based on any field observations. (T pp 581-82)

STIPULATED CONCLUSIONS OF LAW

Based upon the foregoing stipulated findings of fact, the parties agreed to and the undersigned approved and entered the following stipulated conclusions of law October 27, 2004:

- 1. Unnecessary hardships will result from the strict application of the Erosion Setback to the Property. (Stipulated Conclusion of Law 1)
- 2. The inability to build a single family residence on the Property is not the result of the actions of the Petitioners. (Stipulated Conclusion of Law 2)
- 3. Petitioners bear the burden of proof to demonstrate that Respondents erred in denying the Petitioners' permit to build the House under N.C.G.S. § 150B-23 *et seq.* (Stipulated Conclusion of Law 3)
- 4. Local governments are exempted from the Administrative Procedures Act. N.C.G.S. § 150B-2(1a). (Stipulated Conclusion of Law 4)
- 5. The Town should be dismissed as a party to this proceeding because its actions in relation to the Property regarding CAMA were taken solely in its capacity as an agent for DCM pursuant to N.C.G.S. § 133A-116 and N.C.G.S. § 113A-121. (Stipulated Conclusion of Law 5)

6. The Town's denial of the zoning variance is not at issue in this proceeding. (Stipulated Conclusion of Law 6)
7. If Petitioners are denied the relief requested in this contested case proceeding, N.C.G.S. § 113A-123(b) states that "[t]he method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be exclusive and such issue shall not be determined in any other proceeding." (Stipulated Conclusion of Law 7)

FINDINGS OF FACT

In addition to the preceding stipulated facts and stipulated conclusions of law, the undersigned makes the following Findings of Fact and Conclusions of Law:

1. Petitioners are Ellen Darrigrand and husband, Charles Darrigrand, owners of an undeveloped oceanfront lot located at 4815 West Beach Drive, Oak Island, Brunswick County, North Carolina (the "Property").
2. The Respondent is the North Carolina Department of Environment and Natural Resources, Division of Coastal Management (DCM), the state agency authorized to issue permits and enforce regulations under the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.*
3. The petition for contested case hearing also named the Town of Oak Island as a respondent. In this case, the Town's local permit officer (LPO) for CAMA acted as an agent of the State in denying Petitioners' application for a minor development permit. The parties stipulated that local governments are exempted from the Administrative Procedures Act (APA), and that the Town should be dismissed as a party to this proceeding because its actions in relation to the Property regarding CAMA were taken solely in its capacity as an agent for DCM pursuant to N.C.G.S. § 113A-116 and N.C.G.S. § 113A-121. (Stipulated Conclusions of Law 4-5)
4. Oak Island is a small barrier island with a south facing beach. It is approximately 14 miles long, bordered by the Cape Fear River on the east end near Bald Head Island, and Lockwoods Folly Inlet on the west end by Holden Beach. (T pp 489-490)
5. At one time there were three municipalities on the island: Caswell Beach, Yaupon Beach, and Long Beach. In 1999, Yaupon Beach and Long Beach merged to form what is called Oak Island today. (T p 490)
6. The Darrigrand's property is located at 4815 West Beach Drive on the western end of Oak Island between 48th and 50th Streets. (Tpp 79-80) The lot is in an area that was formerly Long Beach. (T p 498)
7. The property has a small frontal dune on the oceanward side of the lot and is fairly well vegetated behind the landward toe of the frontal dune. (T p 638) Spot elevations on the property as surveyed by Boney Land Surveyors depict it at 9.6 feet, 14.4 feet, and 18.6 feet. (T p 622)
8. The Property is zoned Residential 7 ("R7") pursuant to the Town of Oak Island's ("Town") zoning code (the "Code"). Only single family residential uses and limited accessory uses are permitted on the Property by the Code. Stipulated Facts ¶2.
9. The Property extends from the beach landward to the right-of-way of West Beach Drive. Stipulated Facts 3.
10. The dimensions of the lot as platted are 75' wide (along the beach) by 150' deep (from the beach to the right-of-way) as shown on a survey prepared for the Petitioners by Boney Land Surveyors, Inc., dated May 9, 2003 and entitled "Property Survey for Charlie Darrigrand, 4815 W. Beach Drive, Oak Island, Smithville Township, Brunswick Co., NC" (the "Survey"). The square footage of the lot shown on the survey is 11,250 square feet. Stipulated Facts ¶4.
11. With the exception of one vacant lot located immediately east of the Property, the Property is located in a fully developed area along the oceanfront. Single family residences have been constructed on either side of the Property for at least six hundred (600) feet as shown on the aerial photograph attached hereto and incorporated herein by reference as Exhibit B. Exhibit B truly and accurately depicts the state of development in the area around and near the Property. Stipulated Facts ¶5.
12. The testimony of James Spangler established that the Property is one of only 13 unbuildable ocean front lots on Oak Island on which a single family residence can be constructed between the Pre-existing Vegetation Line (as defined below) and the West Beach Drive right of way.

13. James Spangler, Charles Darrigrand, Hector Ingram and Steve Edwards all established through testimony that the Property has unique physical characteristics in that it is located at the highest elevation on Oak Island, and therefore is less subject to the effects of erosion.
14. James Spangler, Charles Darrigrand and Hector Ingram established through testimony that the Property has unique physical characteristics in that it is adjacent to an undeveloped maritime forest that provides a buffer which will protect properties to the rear of the Property from debris in the event that the House (as defined below) suffers some catastrophic failure. Testimony presented by both Petitioners and Respondents established that the North Carolina Department of Environment and Natural Resources (“DENR”) uses a presumed rate of erosion of two (2) feet per year rather than the actual rate of erosion where the actual rate of erosion along a particular beach is less than two (2) feet per year. In this case, James Spangler, Steve Edwards and Charles Jones established by testimony that the actual rate of erosion is less than two (2) feet per year in the area adjacent to the property, but DENR uses a presumed rate of erosion of two (2) feet per year.
15. Charles Darrigrand and James Spangler each established by testimony that the Property has unique physical characteristics in that it is disproportionately impacted by the Respondents’ presumed erosion rate and the use of the Pre-existing Vegetation Line because the Property is located in an indented area of Oak Island that contains a larger dune line which is set farther back into the Property than other properties in the vicinity. This testimony was not contradicted by the Respondents.
16. Charles Darrigrand and James Spangler each established through testimony that the Property has unique physical characteristics because it is located on a south facing beach which reduces the erosive effect of wave action on the beach adjacent to the Property, thereby further reducing the impact of erosion on the Property.
17. James Spangler established by testimony that the Property has unique physical characteristics in that the Respondents’ documents and studies used to establish the presumed 2 foot per year erosion rate applicable to the beach adjacent to the Property established an erosion rate greater than the actual erosion rate impacting the Property. This information was not contradicted or challenged by Respondents.
18. In the area where the Property is located, onsite septic systems are used for sewage disposal. There is no public sanitary sewer system serving either the Property or the surrounding area. Septic systems in this area are permitted and regulated by the Brunswick County Health Department, Environmental Health Section. Stipulated Facts
19. On or about October 4, 1994, a septic tank permit for the Property was issued to the immediately prior owner of the Property. This permit has expired. Stipulated Facts ¶7.
21. On October 7, 1994, a minor development permit allowing the construction of a single family residence on the Property in compliance with the Coastal Area Management Act (“CAMA”) (as defined below), was issued to the immediately prior owner of the Property. This permit has expired. Stipulated Facts ¶8.
22. Petitioners acquired the Property on or about September 28, 1995, for \$70,000.00. Stipulated Facts ¶9.
23. Brunswick County determined for tax purposes that the assessed value of the Property in 2003 and 2004 was \$240,000.00. Stipulated Facts ¶10.
24. Based upon Hector Ingram’s appraisal of the Property and analysis of similarly situated properties in the vicinity of the Property, he established through testimony that the Property would have a value of \$415,000.00 as a buildable lot, while in its unbuildable state, its value would be substantially less. Determining a precise fair market value for an unbuildable lot is impossible because there is only a speculative market for such property and speculative markets do not reflect a true market value.
25. Charles Darrigrand testified that he purchased the Property with the expectation of building a retirement home on the Property and that without the ability to do so, he and his wife will have lost all economically beneficial use of the Property.
26. Mr. Darrigrand testified that they were aware that there were setback regulations. (T p 109) Prior to purchasing the property, they were also aware that there was a building permit that had been issued for the property and was still valid. They built a provision into the purchase and sale agreement that the property had to measure at least 107 feet in depth at the time of closing. (T p 85) He stated that prior to closing on October 3, 1995, the CAMA local permit officer at that time measured the property and concluded that it did meet his requirement that the lot have 107 feet. (T p 85) Mr. Darrigrand stated that the rationale behind requiring 107 feet was that applying the 25-foot [Town] setback and 60-foot [CAMA] setback for a total of 85 feet in setbacks, they would still have at least 22 feet of space to build a home using cantilever construction. (T p 109)

Because the Town setback was 30 feet rather than 25 feet in 1995 (Stipulated Fact 40), Mr. Darrigrand's requirement that the lot have at least 107 feet in depth would have actually yielded a building area of 17 feet rather than 22 feet.

27. At the time Petitioners purchased the property, there was a CAMA Minor Permit issued to Ted Wood for construction of a single family residence on what is now the Darrigrand lot. The permit was issued October 7, 1994. (R Exs 14-15; T pp 647-50; Stipulated Fact 8)
28. The Petitioners have paid all property taxes due on the Property since 1995. The combined Town and Brunswick County property tax for the Property in 2003 was \$2,261.00. Stipulated Facts ¶11.
29. The Brunswick County property tax for the Property in 2004 was \$1,397.00. Stipulated Facts ¶12.
30. The Petitioners paid a \$1,206.78 assessment levied by the Town against the Property for a one-time large scale beach nourishment project completed in March 2002. Stipulated Facts ¶13.
31. The Petitioners have been notified that the Town will assess Petitioners a minimum of \$4,200.00 for a proposed sewer installation project affecting the Property. Stipulated Facts ¶14.
32. The permit application included an "AEC Hazard Notice" to provide the applicant with information about hazards associated with oceanfront development. (T P. 652) The hazard notice indicated that the erosion rate for the area was 2 feet per year. It further stated that: "Studies also indicate that the shoreline could move as much as 325 feet landward in a major storm," and "[t]he flood waters in a major storm are predicted to be about 19 feet deep in this area." (R Ex 16; T p 652)
33. Over the past 25 years, the beach in front of what is now the Darrigrand lot has eroded, and the vegetation line has migrated landward.
34. Based on the above facts, the vegetation line migrated landward approximately 35 feet between 1978 and 1995, a period of 17 years. The vegetation line therefore migrated landward at an approximate rate of 2 feet per year (17 years at 2 feet per year = 34).
35. Respondent's Exhibit 16 also demonstrates the landward migration of the vegetation line on the Darrigrand lot. Using digital orthorectified photograph from 1971, 1978, 1988, 1998 and 2002, Geographic Information Systems (GIS) Analyst and DCM employee Sean McGuire created an illustrative depiction of the first line of stable natural vegetation near the Darrigrand lot. (R Exs 16-16A; T p 661) The parties stipulated to the admissibility of Respondent's Exhibit 16 and 16 A upon the stipulation that it is a compilation of data based on review of historical aerial photography and an interpretation by Mr. McGuire of the location of the vegetation line on those photographs, and not based on any field observations. (T pp 581-82)
36. On or about January 15, 2003, the Petitioners retained Topsider Homes, Inc. ("Topsider") to design and build a proposed residence on the Property. Topsider is an international company based in Clemmons, North Carolina, that specializes in post and beam construction which is designed to be resistant to hurricanes and other extreme weather. Topsider specializes in building hurricane resistant homes in coastal areas in both North and South America. Stipulated Facts ¶15.
37. In a permit application dated May 20, 2003, Petitioners applied to the Town for a minor development permit to construct a single-family residence on the Property as required by N.C.G.S. § 113A-118, *et seq.* and 15A N.C.A.C. 7J .0200, *et seq.* Stipulated Facts ¶17.
38. The proposed residence designed by Topsider for the Petitioners for construction on the Property, is a two story, pile-supported four bedroom residence with a total heated floor area of approximately two thousand six hundred (2,600) square feet. The exterior footprint of the building (not including decking) is approximately one thousand six hundred ten (1,610) square feet (29.85 feet wide and 53.59 feet long). The plans for the House are shown on plans prepared by Topsider titled "A new residence for: Darrigrand Residence 4815 West Beach Dr., Oak Island, North Carolina," dated May 19, 2003, and sealed by Walter Carl Taylor, a North Carolina Licensed Professional Engineer (the "House"). Stipulated Facts ¶16.
39. James Spangler and Peter Anthony established by testimony that the House is itself a unique and peculiar characteristic of the Property in the context of the Petitioners' application at issue in this contested case proceeding because of its peculiar design and construction.

40. These experts also testified that the House utilizes fewer pilings which minimizes the impact of erosion on the House. These pilings are also driven deeper into the ground than typical residential structures located on Oak Island.
41. Peter Anthony and James Spangler established by testimony that the footprint of the House is smaller than other homes in the vicinity of the Property. Additionally, these experts and Charles Darrigrand further demonstrated by testimony and exhibits in the record that the House uses an octagonal shape and substantially stronger construction techniques which will reduce the effects of wind on the structure, both of which will lessen the likelihood that it will suffer a catastrophic failure either from chronic erosion or traumatic storm events.
42. In their permit application, the Petitioners included a plan showing the “average line of construction” of the oceanward side of the residences within six hundred (600) feet of each side of their lot. The average line of construction is the approximate line formed by the oceanward roofline of the residential dwellings which are already constructed on lots to the east and west of the Property. As shown on Exhibit A attached hereto and incorporated herein, the Petitioners propose to locate the oceanward side of the House along the average line of construction. Stipulated Facts ¶18.
43. In accordance with CAMA, N.C.G.S. § 113A-119 and 15A N.C.A.C. 7J.0200, *et seq.*, written notification of the Petitioners’ proposed development was provided to the adjacent property owners, was posted on the site, and was published in the State Port Pilot newspaper. No objections to the proposed development were filed or otherwise raised by anybody. Stipulated Facts ¶19.
44. On June 16, 2003, the Brunswick County Health Department approved the Petitioners’ application for a septic tank and issued a permit to locate a septic tank on the Property subject to several conditions, including the requirements that the septic tank would not be allowed within five (5) feet of any property line and that no driving, parking, paving, or structure would be allowed over the septic tank area. The permit approves installation of a septic tank that will treat four hundred eighty e determined.
45. On July 28, 2003, the Town, acting on behalf of DENR, denied the Petitioners’ application for a minor development permit to construct the House (Permit No. OI-03-53) pursuant to N.C.G.S. § 113A-120(a)(8) based upon the application of the Erosion Setback (as defined below) to the Property. Stipulated Facts ¶21.
46. The Town’s local CAMA permitting officer acted as an agent of the State of North Carolina pursuant to N.C.G.S. § 113A-116 and N.C.G.S. § 113A-121. Stipulated Facts ¶22.
47. On August 18, 2003, the Darrigrands timely filed a Petition for a Consolidated Contested Case Hearing and CAMA Variance Request, pursuant to N.C.G.S. § 150B-23, N.C.G.S. § 113A-120.1, N.C.G.S. § 113A-121.1, 15A N.C.A.C. 7J .0701 and other applicable laws. Stipulated Facts ¶23.
48. In addition to the sixty (60) foot Erosion Setback (as defined below) imposed upon the Property by CAMA, § 18-117 of the Town’s Code imposes a twenty-five (25) foot setback (the “Town Setback”) from the right-of-way of the street running in front of the Property (West Beach Drive). Prior to 2000, the Town Setback was thirty (30) feet. Stipulated Facts ¶24.
49. The Erosion Setback and the Town Setback overlap by between approximately two (2) to five (5) feet. This overlap creates a “Negative Building Envelope” (as further defined below) on the Property. The Negative Building Envelope prevents the Petitioners from constructing any single family residence on the Property. Stipulated Facts ¶25.
50. Sometime prior to March 25, 2004, Respondents’ counsel requested that Petitioners seek a variance from the Town Setback pursuant to the applicable provision of the Town’s Code. Stipulated Facts ¶26.
51. The Petitioners filed an application for a variance of the Town Setback on March 25, 2004, in an effort to minimize the extent of any variance of the Erosion Setback that would be needed from the Coastal Resources Commission (“CRC”) in order to make the Property developable. Stipulated Facts ¶27.
52. Such a variance, even if it eliminated the entire Town Setback, would not have been sufficient to permit the construction of the House on the Property. Stipulated Facts ¶28.
53. On April 8, 2004, the Town denied the Petitioners’ application for a variance of the Town Setback. Stipulated Facts ¶29.

54. DENR is a department of the State and is the State agency with responsibility for preserving and protecting the State's natural resources, including beaches. Stipulated Facts ¶47.
55. DENR regulates the coastal areas of the State pursuant to authority conferred upon it by the 1974 Coastal Area Management Act which is found in Chapter 113A, Article 7 of the North Carolina General Statutes (including N.C.G.S. §§ 113A-100 through 113A-129) and various regulations promulgated thereunder by the CRC, and codified at Title 15A, Chapter 7 of the North Carolina Administrative Code (collectively, "CAMA"). Stipulated Facts ¶48.
56. DENR is organized into various divisions, including the Division of Coastal Management ("DCM"). Stipulated Facts ¶49.
57. The CRC was established by N.C.G.S. § 113A-104 of CAMA. Stipulated Facts ¶50.
58. The CRC is the State commission with responsibility for adopting rules, regulations, policies and orders regulating and managing development in Areas of Environmental Concern ("AEC's") pursuant to CAMA. Stipulated Facts ¶51.
59. The CRC is also the agency responsible for making final agency decisions relating to CAMA permit applications pursuant to N.C.G.S. § 113A-122. Stipulated Facts ¶52.
60. The CRC's rules that apply to development within the State's twenty (20) coastal **counties** are codified in the North Carolina Administrative Code of Title 15A, Chapter 7. Stipulated Facts ¶53.
61. DCM has been delegated authority by DENR to administer and enforce regulations affecting development in AECs, as defined by CAMA. Stipulated Facts ¶54.
62. DCM provides staffing services to the CRC, implements and executes CRC rules, and issues CAMA permits. Stipulated Facts ¶55.
63. The Town has an approved "implementation and enforcement program" pursuant to N.C.G.S. § 113A-116 and 117 and therefore has been delegated the responsibility to process CAMA minor permits. Stipulated Facts ¶56.
64. N.C.G.S. § 113A-128 provides that "nothing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States." Stipulated Facts ¶57.
65. As determined by the CRC, the Property is located within both the Ocean Erodible and Ocean High Hazard Flood AEC. These two subcategories of the Ocean Hazard AEC are designated by the CRC in 15A N.C.A.C. 7H .0304. AEC's are located within the twenty (20) coastal counties of North Carolina, including Brunswick County. Stipulated Facts ¶30.
66. The Property is subject to an erosion setback requirement set forth in 15A N.C.A.C. 7H .0306(a). Stipulated Facts ¶31.
67. The testimony of James Spangler and Charles Jones, along with other evidence at the hearing, established that the purpose of the erosion setback is to protect beachfront structures from the effects of the ocean moving or removing soil from underneath those structures so that they are undermined, collapse and cause damage both to the owners and to other nearby structures when their debris is spread by the action of the waves. This evidence further established that the purpose of the erosion setback is to protect property from chronic, long-term erosion, rather than traumatic erosion caused by sudden, severe storm events.
68. This rule requires that single family residential structures be set back at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation (the "Vegetation Line"). In areas where the erosion rate is less than two (2) feet per year, the setback line shall be sixty (60) feet from the Vegetation Line or the "measurement line," where applicable. 15A N.C.A.C. 7H .0306(a)(1). The CRC has not designated a measurement line for the area in the vicinity of the Property. 15A N.C.A.C. 7H .0304(4). Stipulated Facts ¶32.
69. Based on the current rates of erosion adopted by the CRC, the average annual erosion rate in the vicinity of the Property is approximately two (2) feet per year. Therefore, according to 15 N.C.A.C. 7H .0306(a)(1), the erosion setback applicable to the Property is sixty (60) feet (30 years x 2 feet) ("Erosion Setback"). Stipulated Facts ¶33.
70. According to the testimony of James Spangler, Steve Edwards and Charles Jones, the Presumed Erosion Rate set by 15 A.N.C.A.C. 7H.0305(a)(1) is not necessarily reflective of the actual erosion rate occurring at any particular time on any given

point on the coast. The regulations prohibit the Presumed Erosion Rate from being less than two (2) feet per year, regardless of whether the actual erosion rate is less than two (2) feet per year.

- 71. The Erosion Setback is generally measured from the first line of stable natural vegetation to the foundation pilings of a structure. The first line of stable natural vegetation “represents the boundary between the normal dry sand beach which is subject to constant flux due to waves, tides, storms and wind and more stable upland areas. It is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment.” 15A N.C.A.C. 7H .0305(e). Stipulated Facts ¶34.
- 72. The CRC does not use the actual first line of stable natural vegetation in areas that have received large scale beach nourishment. The CRC’s rule provides: “In areas within the boundaries of a large scale beach nourishment or spoil deposition project, the vegetation line that existed prior to the onset of the [beach nourishment project] shall be used as the vegetation line for determining oceanfront setbacks after the project is completed ...” (emphasis added) 15A N.C.A.C. 7H .0305(f). Stipulated Facts ¶35.
- 73. Because a large scale beach nourishment project was completed in front of the Property on or about March of 2002, the first line of stable natural vegetation that existed prior to the beach nourishment project (“Pre-existing Vegetation Line”) is used by the CRC to measure the Erosion Setback, not the actual first line of stable natural vegetation that currently exists in front of the Property (“Actual Vegetation Line”). Stipulated Facts ¶36.
- 74. However, the uncontradicted testimony of Jim Gregson and James Spangler established that Respondents did not estimate the location of the Pre-existing Vegetation Line until 2003, after the completion of the beach nourishment project, rather than before, and therefore that the Pre-existing Vegetation Line being applied to the Property in this case does not bear any connection to the vegetation line that existed on the Property prior to the outset of the beach nourishment project.
- 75. The evidence in the record, including the testimony of James Spangler, Steve Edwards, Charles Jones and Jim Gregson, establishes that nobody knows the location of the Pre-existing Vegetation Line in the vicinity of the Property. From the transcript the following is quoted:

- Q. On the Boney survey, which is Exhibit Number 3 or Exhibit Number 5 – is it – which one?
- A. It’s actually Exhibit A of the stipulated facts.
- Q. ...On those – on that survey which was performed in – was performed in 2003, is that Correct?
- A. Yes.
- Q. On that survey it was the line is denoted as being a hundred and fifty feet in depth, is that correct?
- A. That’s correct.
- Q. Is there a difference between the Boney Survey and the McHenry Survey?
- A. Yes. A difference of quite a few feet.
- Q. Okay. The Boney survey shows a larger lot, is that correct?
- A. It shows a lot larger lot, yes, sir. (Testimony James Spanger, T. Vol. II, p. 301-302)

- Q. Let me ask you, referring to Exhibits 39 and 40, is that what happened in this case?
Did the State use the actual line of vegetation that existed prior to the spoil deposition project in determining the line from which they were going to measure the beach renourishment – measure the erosion setback?
- A. It’s my understanding in interpreting this information here that the State did not – and also the stipulated facts that the State did not use actual first line of vegetation.
- Q. Did they use the line of vegetation that existed prior to the spoil deposition project?
- A. I find no evidence to support that contention.
- Q. What line did they use?
- A. They used a line that was developed in 2003 which was after the spoil deposition project.
- Q. When was the spoil deposition project completed?
- A. 2002. I believe it might have been as early as March of 2002.
- Q. So your understanding is that the line is being used to determine whether we have – where the erosion setback lies on the property was actually in determined in 2003 after the spoil deposition project was completed, is that correct?
- A. That’s correct. (T. Vol. II pp. 325, 326, Testimony of James Spangler)

- Q. Let’s stop there. So these surveyed lines were done in February and March of 2003; is that your understanding?

- A. That's my understanding from this document, yes, sir.
- Q. That's your understanding of what 39 and 40 show?
- A. That's correct.
- Q. So they don't show the actual existing lines of stable vegetation as of the date the application was denied?
- A. That's correct.
- Q. Okay. Go on, please.
- A. "North – NC –" otherwise known as North Carolina – "Geodetic Survey compiled preliminary results. The coordinates collected at each survey point were given to the North Carolina Division of Coastal Management and were then processed using ARC GIS 8.3. These data were used to generate a point – shape file. The 'vegetation line' was simply created by digitizing a single line from one survey point to another."
- Q. What does that last statement mean to you?
- A. It means they are interpolating between two specific points on the map and drawing a straight line between those two points.
- Q. Does that necessarily reflect any existing vegetation line on the ground?
- A. No, it does not.
- Q. Does it necessarily reflect any existing vegetation line that ever existed on the ground?
- A. No, it does not.
- Q. Okay. Please continue to read.
- A. "These data are based on preliminary results and should not be considered final nor as legal documentation for use in decision-making affecting public or personal property owners."
- Q. Stop there. To your knowledge, is there any other data that is being used for determining where the vegetation line on the Darrigrand property is?
- A. No. To my knowledge, this line is what was used and labeled on the map as CAMA—revised CAMA line of 7/5/03.
- Q. Okay. Please go ahead.
- A. "The North Carolina Division of Coastal Management does not guarantee the accuracy of these data."
- Q. So what does that mean to you?
- A. That says what it says. It says they don't guarantee that it's right or wrong.
- Q. So is that – what does that mean with regard to the integrity of the information that's included in Exhibits 39 and 40?
- A. That it should not be relied upon.
- Q. Okay. Go ahead.
- A. "For more information please contact your local CAMA Field Office."
- Q. All right. That's enough. And you're not aware of any other survey data which is being used to determine the preexisting line of vegetation pursuant to the regulation in the case?
- A. That's correct. I'm not aware of any data that is used for that purpose. (T. Vol. II, pp. 335-337, Testimony of James Spangler)

-
- Q. --- have you been able to make any estimation as to how far the property was from the water line in 1995 and how far it was when the photos were taken, which I believe was in 2002?
- A. Right. Yeah. I have been able to calculate that.
- Q. How did you do that?
- A. Simply by taking these scaled aerial photos and literally using a scale just like I did and scaling from the location of the edge of the right-of-way back out to towards the water, basically doing exactly what I did on aerial photo as opposed to on a survey.
- Q. Well, based on these exhibits, what was the distance from the Darrigrand property line to the wet-dry sand line in 1995? And looking also at the McHenry Survey.
- A. Yeah. Since we're talking property lines, the – in '95 the property line as shown on the McHenry survey is the red line, and so that would be the wet-dry line. So the distance would be zero.
- Q. Okay. And based on your analysis of these exhibits, what was the distance from the Darrigrand property to the wet-dry sand line in 2002?
- A. Approximately a hundred and twenty feet or more.
- Q. Okay. Based on your observation when you've been out on the property, what is the distance from the Darrigrand property to the wet-dry sand line in 2004?
- A. It's in excess of a hundred and fifty feet.

- Q. Okay. Using the same exhibits, the McHenry and Boney Surveys of 1995 and 2002 aerial photographs, are you able to determine looking at Exhibit Number 5, in particular, what the distance from the foundation of the proposed house to the wet-dry sand line would have been if the house were built in 1995?
- A. Yeah. ... it's about sixty-nine feet.
- Q. How about in 2002?
- A. One hundred and eighty-one feet.
- Q. Based on your observations, what would the distance be from the foundation of that house or the footprint of that house if it were built today to the wet-dry sand line in 2004?
- A. In excess of two hundred and eleven feet. (T. Vol. II, pp. 344-346; Testimony of James Spangler)

- Q. So ultimately, Mr. Edwards, the Darrigrands' minor permit was denied. We stipulated to that. What was the basis of that denial?
- A. The basis of denial was, based on the distance from the first line of vegetation, the setback couldn't be met. (T. Vol. III, p. 530, Testimony of Steven B. Edwards)
- Q. But the line used to deny the application for the Darrigrands' CAMA minor development permit was established in February – March, 2003, correct?
- A.. Yes, the line was established after the spoil deposition project. It was surveyed after the spoil deposition project.
- Q. So the line in 2003 doesn't accurately reflect the first line of actual stable vegetation as it existed in 2001, correct?
- A. I would say that it has grown since 2001, correct. (T. Vol. III, pp. 561-561; Testimony Steven B. Edwards)

- Q. In this case the spoil deposition project commenced in 2001, is that correct?
- A. Un-huh, that's correct.
- Q. And it was completed in 2002, is that correct?
- A. That's correct...
- Q. Now the line that is being applied to the Darrigrand property was determined in 2003 after the beneficial spoil deposition was already completed, is that correct?
- A. That's correct.
- Q. So that wasn't done until 2003?
- A. That's correct, but the rules – it doesn't say it has to be done prior to the nourishment project either.
- Q. But the project – but it wasn't done until 2003, is that correct?
- A. That's correct.
- Q. Mr. Jones, they were looking at data in 2003 and estimating what it was in 2001, is that correct?
- A. That's correct. (T. Vol. III, pp. 623-624, 626-627; Testimony of Charles S. Jones).

76. The testimony of Jim Gregson established that the only reason for DENR's failure to comply with 15A N.C.A.C. 7H .0305(f) was a dispute between the Town of Oak Island and DENR over who would pay for the cost of the required survey work which continued for so long that the renourishment project was complete before the Pre-existing Vegetation Line could be determined.
77. The beach renourishment project deposited in excess of 200,000 cubic yards of sand along the oceanfront at Oak Island, consisting of approximately 50.8 cubic yards of sand per linear foot of shoreline. Stipulated Facts ¶37.
78. DCM produces erosion rate maps that depict the long-term annual erosion rate for the North Carolina coast. The maps illustrate average rates of shoreline change over approximately the past fifty (50) years. Stipulated Facts ¶38.
79. DCM uses and maintains scaled aerial photography as a regular part of its business activities. The photography dates back to 1978, the year that the permitting component of the CAMA came into effect. Stipulated Facts ¶39.
80. Scaled aerial photography taken on November 26, 1995 by the N.C. Division of Highways Photogrammetry Unit shows that, as of that date, the distance from the actual first line of stable natural vegetation to the West Beach Drive right of way was approximately 115 feet. Therefore, after applying the Erosion Setback and the Town Setback, a 25 foot building envelope was available to construct a single family residence on the Property. Thus, a single family residence could have been constructed on the Property in compliance with all setbacks imposed upon the Property by applicable State and local law in 1995. Stipulated Facts ¶40.

81. Scaled aerial photography taken on July 4, 2002, by the N.C. Division of Highways Photogrammetry Unit shows that the application of the Erosion Setback to the Property creates a Negative Building Envelope, and therefore prohibits the construction of a single family residence on the Property. Stipulated Facts ¶43.
82. Based upon the evidence and testimony presented at the hearing on this contested case, including the testimony of James Spangler, Charles Jones, Steve Edwards and Jim Gregson, the application of the Erosion Setback based upon the Actual or Pre-existing First Line of Stable Vegetation ignores the fact that the beach adjacent to the Property actually increased in overall width from the West Beach Drive right of way to the wet/dry sand line.
83. Jim Gregson and Charles Jones both testified that the beach had actually increased in width between 1995 and the date upon which the Petitioners' application for a minor development permit was denied.
84. James Spangler testified that the beach had increased in width by more than 150 feet between 1995 and 2004.
85. Charles Darrigrand testified that the beach had increased in width by approximately 200 feet between 1995 and 2003.
86. Petitioners also produced a survey of the Property by Robert McHenry of McHenry Surveying prepared in 1995 that showed the Property being between 121.83 and 118.09 feet deep.
87. Petitioners produced a second survey prepared by Boney Land Surveyors, Inc. prepared in 2003 that showed the Property was 150 feet deep.
88. The accuracy of these surveys was not challenged by the Respondents.
89. These surveys demonstrate that the depth of the property increased between 1995 and 2003.
90. The width of the beach is directly relevant to the purpose of the erosion setback in that the purpose of the erosion setback is to protect structures from erosion caused by the ocean striking the beach. James Spangler established by testimony that the further from the ocean a structure is located, the less it is threatened by erosion.
91. If a single family residence were built on the Property, the Code would permit the septic tank system, driveway, and other associated improvements to be located within the Town Setback. Stipulated Facts ¶44.
92. Rule 15A N.C.A.C. 7H .0309(a) allows certain types of development seaward of the Erosion Setback, but in all cases this development must be landward of the vegetation line. Only the following uses/structures are allowed in the Erosion Setback: (1) campsites; parking areas with clay, packed sand or gravel; (2) elevated decks not exceeding a footprint of 500 square feet; (3) beach accessways; (4) unenclosed, uninhabitable gazebos; (5) uninhabitable, single-story storage sheds; (6) temporary amusement stands; (7) swimming pools; and (8) sand fences (the "CAMA Use Exceptions"). Stipulated Facts ¶45.
93. Of the CAMA Use Exceptions permitted by Rule 15A N.C.A.C. 7H .0309(a), § 18-116 of the Town Code prohibits campsites, storage sheds, amusement stands and swimming pools. Therefore, the only CAMA Use Exceptions permitted on the Property in the absence of a single family dwelling are: (1) private parking areas; (2) elevated decks having a footprint of five hundred (500) square feet or less; (3) beach accessways; (4) uninhabitable gazebos; and (5) sand fences. Stipulated Facts ¶46.
94. In further support of their application for a variance, Petitioners submitted into evidence eight orders issued by the CRC granting variances over the past 10 years.
95. Petitioners' expert witness, James Spangler, reviewed and evaluated all variances granted by the CRC over the prior 5 years and every variance granted by the CRC in Brunswick County for the previous 10 years.
96. Based upon his analysis, James Spangler testified that the "particularity" variance standard as applied by the CRC is applied to the individual, personal circumstances of an applicant rather than the physical characteristics of particular properties.
97. Charles Jones testified that the CRC looks at the overall circumstances of a variance request and tries to reach a reasonable outcome for all concerned.
98. James Spangler also established by testimony that the Petitioners' variance request is consistent with prior decisions to grant variances by the CRC. He testified specifically that the relevant findings, conclusions and decisions in the Mack Case

(Petitioners' Exhibit 42), the Babcock Case (Petitioners' Exhibit 41), the Pate Case (Petitioners' Exhibit 43), the Atlantic Beach Case (Petitioners' Exhibit 44), the Turtle Rescue Case (Petitioners' Exhibit 45) and the Webb Case (Petitioners' Exhibit 47) all are consistent with the Petitioners variance request.

99. Respondents did not contradict James Spangler's testimony or his conclusions. In fact, Charles Jones supported this testimony when he testified that he was aware that the CRC had previously granted at least 3 variances from the Erosion Setback for the construction of new residences on unbuildable lots, the same type of request for a variance sought by the Petitioners in this contested case.
100. DENR's witnesses testified that prohibiting coastal development is not the intent or purpose of the Erosion Setback. Rather, the testimony indicated that the Erosion Setback is intended to guide and promote good quality coastal development and to protect existing development from the effects of chronic erosion.
101. Petitioners' expert testimony showed that in this case, the Erosion Setback actually prohibits reasonable development on the Property despite the fact that it is less threatened by erosion than at any time in the last 10 years.
102. The testimony and evidence presented in this contested case shows that the House will be safer than most others typically constructed on the coast of North Carolina.
103. The House will be located substantially farther away from the water than it would have been had it been built as permitted in 1995.
104. The House will be built to the more stringent hurricane standards required of coastal construction in Florida. Therefore, the House is less likely than others in the vicinity to collapse due to wind, and which will be slower to collapse due to erosion.
105. Petitioners' expert, Peter Anthony, also testified that the unique construction of the House permits it to be relocated more easily than traditional homes constructed in the vicinity. Therefore, if the House becomes imminently threatened pursuant to 15A N.C.A.C. 7H .0308, it can be quickly and easily relocated as required by the CRC's rules.
106. DENR has stipulated that without a variance, the Petitioners will be unable to build a residence on the Property.
107. Hector Ingram, Petitioners' expert appraiser, testified that the Petitioners will incur a substantial financial loss if they are not granted a variance to construct the House.
108. Charles Darrigrand testified that he purchased the property with the expectation of building a retirement home on the Property and that without the ability to do so, he and his wife will have lost all economically beneficial use of the Property.
109. Given all the facts and circumstances, and in light of the applicable laws, rules and regulations substantial justice weighs in favor of the Petitioners in this contested case.
110. The Office of Administrative Hearings is authorized to consider and rule on variances from CAMA regulations pursuant to 15A N.C.A.C. 7J .0701, *et seq.* and 15A N.C.A.C. 7J .0301, *et seq.* Pursuant to N.C.G.S. § 113A-120.1 and 15A N.C.A.C. 7J .0701, the standards for granting a variance from CAMA are:
 - a. That unnecessary hardships would result from strict application of the rules, standards, or orders issued by the CRC;
 - b. That hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property;
 - c. That such hardships did not result from actions taken by the petitioner; and
 - d. That the requested variance is consistent with the spirit, purpose, and intent of the CRC's rules, standards, orders; will secure public safety and welfare; and will preserve substantial justice. Stipulated Facts ¶59.
111. Charles Jones, Jim Gregson and James Spangler all established by testimony that the variance criteria are the same for every variance request under CAMA. Therefore, cases granting variances from any CAMA regulation are instructive, regardless of whether they address the Erosion Setback.
112. The parties stipulated that Petitioners satisfied 2 of the 4 variance criteria.

113. Specifically, the parties stipulated that unnecessary hardships will result from the strict application of the Erosion Setback to the Property. Stipulated Facts ¶¶60.
114. Further, the parties stipulated that the inability to build a single family residence on the Property is not the result of the actions of the Petitioners. Stipulated Facts ¶¶61.
115. The facts presented during the contested case support a finding for Petitioners on the remaining 2 required findings:
- a. That hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property; and
 - b. That the requested variance is consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

CONCLUSIONS OF LAW

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

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.G.S. § 113A-12.1, 15A NCAC 7H.07029(c), N.C.G.S. § 150B-23.
2. All parties have been correctly designated and are properly before the Office of Administrative Hearings, and there is no question of misjoinder and nonjoinder of parties. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.
3. As determined by the Coastal Resources Commission ("CRC"), the Property is located within both the Ocean Erodible and Ocean High Hazard Flood Areas of Environmental Concern ("AEC"). These two subcategories of the Ocean Hazard AEC are designated by the CRC in 15A NCAC 7H .0304. (Stipulated Fact 30)
4. The Ocean Hazard AEC includes those AECs "that are considered natural hazard areas along the Atlantic Ocean shoreline where, because of their special vulnerability to erosion or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage." Rule 15A NCAC 7H .0301.
5. The significance of the Ocean Hazard Category is described in part as follows: "The location and form of the various hazard area landforms, in particular the beach, dunes, and inlets are in a permanent state of flux, responding to meteorologically induced changes in the wave climate. For this reason, the appropriate location of structures on and near these landforms must be reviewed carefully in order to avoid their loss or damage." Rule 15A NCAC 7H .0302(b).
6. The Ocean Erodible AEC in particular is defined as "the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation." Rule 15A NCAC 7H .0304(1).
7. The High Hazard Flood AEC in particular is defined as "the area subject to high velocity waters (including, but not limited to, hurricane wave wash) in a storm having a one percent chance of being equaled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development." Rule 15A NCAC 7H .0304(2).
8. The CRC's Ocean Hazard rules specifically recognize the volatility of the Atlantic shoreline:
 - (a) The primary causes of the hazards peculiar to the Atlantic shoreline are the constant forces exerted by waves, winds, and currents upon the unstable sands that form the shore. During storms, these forces are intensified and can cause significant changes in the bordering landforms and to structures located on them....
 - (b) The location and form of the various hazard area landforms, in particular the beaches, dunes, and inlets, are in a permanent state of flux, responding to meteorologically induced changes in the wave climate....

15A NCAC 7H .0302.

9. The CRC's setbacks for development on the oceanfront first became effective in 1979. (T p 589) The purpose of the CRC's oceanfront setback rules are outlined in 15A NCAC 7H .0303(a) and (b).
10. Petitioners bear the burden of proof on the issues. (Stipulated Conclusion of Law 3) Petitioners have the burden of demonstrating by a preponderance of the evidence that the requested variance meets each of the four statutory criteria for being granted a variance. Petitioners are "persons aggrieved" as their real property has been substantially affected by an administrative decision. N.C.G.S. § 150B-2(6).
11. Pursuant to N.C.G.S. § 113A-120.1(a)(1-4) and 15A N.C.A.C. 7J.0701, the standards for granting a variance from CAMA are:
 - 1) That unnecessary hardships would result from strict application of the rules, standards, or orders issued by the CRC:
 - 2) The hardships result from conditions that are peculiar to the property, such as the location, size, land topography
 - 3) That such hardships did not result from actions taken by the Petitioner, and;
 - 4) The requested variance is consistent with the spirit, purpose and intent of the rules, standards or orders; will secure the public safety and welfare; and will preserve substantial justice.
12. The parties have stipulated that factors (1) and (3) are met in this case. (Stipulated Facts 60-61, stipulated Conclusions of Law 1-2) Respondent concedes that Petitioners experienced both "hardships" and "unnecessary hardships." In light of the stipulations, the issues to be determined are whether (2) Petitioners' hardships result from conditions peculiar to the property, such as the location, size or topography of the property; and whether (4) the requested variance is consistent with the spirit, purpose and intent of the CRC's rules, standards, orders' will secure public safety and welfare; and will preserve substantial justice (N.C.G.S. § 113A-120.1(a)(2)).
13. Unnecessary hardships will result from the strict application of an uncertain Erosion Setback to the property, notwithstanding the laudable and necessary public policy rationale supporting the need for an Erosion Setback in the natural landward intrusion of the Atlantic Ocean and storm events.
14. Petitioners have demonstrated by a preponderance of the evidence that Petitioners' hardships result from conditions peculiar to the property, such as the location, size or topography of the property. N.C.G.S. § 113A-120.1(a)(2). According to the provisions of 15A NCAC 7H .0305(f) in the event of a major beach renourishment or spoil deposition project, the vegetation line *that existed prior to the onset of project construction* shall be used. (Emphasis added – other exceptions in this rule are not applicable.) This line was admittedly not established *prior* to the beach renourishment project on Oak Island. Petitioners should not be disadvantaged by this failure as that line is determinative of Petitioners' buildable lot size. This line has been estimated and interpolated but was never established. The applicability of N.C.G.S. § 113A-120.1(a)(2) depends on the determination of the vegetation line as of a specific date. The probability is that, had this line been established as required by this rule, Petitioners' lot would not be large enough to permit building the contemplated structure but it is not known and certainly cannot be characterized as impossible. Petitioners are entitled to know precisely. As a consequence, Petitioners have established a hardship "peculiar to the property" and are entitled to a variance under this section.
15. The inability to build a single family residence on the Property or otherwise make economically productive use of the Property, is not the result of the actions of the Petitioners.
16. Petitioners have demonstrated by preponderance of the evidence that the requested variance is consistent with the spirit, purpose and intent of the CRC's rules, standards or orders; will secure public safety and welfare, and will preserve substantial justice. N.C.G.S. § 113A-120.1(a)(4). *Inter alia*, the rationale applicable to Conclusion of Law #7 is also applicable to this conclusion of law because of the clear requirement of 15 NCAC 7H .0305(f). In addition, Petitioners have demonstrated that their proposed building design is superior to normal construction methods to withstand a major weather event. Thus, the public's safety, welfare and the avoidance of substantial injustice are enhanced by strictly requiring adherence to Rule 15 A NCAC 7H .305(f), and by the other findings supporting this conclusion. Petitioners have satisfied this condition for a variance.

17. Local governments are exempted from the Administrative Procedures Act. N.C.G.S. § 150B-2(1a).
18. The Town should be dismissed as a party to this proceeding because its actions in relation to the Property regarding CAMA were taken solely in its capacity as an agent for DCM pursuant to N.C.G.S. § 133A-116 and N.C.G.S. § 113A-121.

Upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, and based upon the preponderance of the evidence, giving regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency pursuant to N.C.G.S. § 150B-34(a), and based on the preceding findings of fact and conclusion of law howsoever named, the undersigned makes the following:

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners' Variance Petition should be granted by the Coastal Resources Commission. Petitioners have demonstrated by a preponderance of the evidence that they meet the four variance criteria required in N.C.G.S. § 113A-120.1.

ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C.G.S. § 150B-36(a).

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

This the 30th day of June, 2005.

Julian Mann, III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 1558

DAISY L. SMITH,)
Petitioner,)
)
v.)
)
CUMBERLAND COUNTY MENTAL)
HEALTH CENTER,)
Respondent.)

DECISION

THIS MATTER was heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on May 12, 2005 at the Cumberland County Courthouse, Fayetteville, North Carolina.

APPEARANCES

FOR PETITIONER: Steven J. O'Connor, Esq.
McCoy Weaver Wiggins Cleveland Rose Ray
P.O. Box 87009
Fayetteville, NC 28304-7009

FOR RESPONDENT: Douglas E. Canders, Esq.
Cumberland County Attorney's Office
P.O. Box 1829
Fayetteville, NC 28302-1829

PRELIMINARY MATTERS

- Respondent advanced a motion to dismiss at the beginning of the hearing, alleging Petitioner's failure to file a complaint with the Office of Administrative Hearings (OAH) in a timely manner.
- The jurisdiction of the OAH over the grievances of employees derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but describes the procedures for such review. See N.C.G.S. § 150B-23(a). The Fourth Circuit case, *CM, a minor, by and through her parents, JM and EM v. The Board of Education of Henderson County*, 241 F.3rd 374 (4th Circuit 2001), has a lengthy discussion regarding North Carolina's 60-day statute of limitations regarding special education. Though the above is not a special education case, the reasoning in *CM* is equally applicable in this case regarding statutes of limitations for time limited filings.
- The time frame for filing a petition with OAH was not found to be too short in *CM*, but this was based on specific notice requirements incumbent upon the agency. Citing from that opinion, "Section 150B-23(f) instructs that the 60-day limitations period begins only when aggrieved persons are provided written notice "of the agency decision;" the notice must "set forth the agency action" and inform aggrieved persons of "the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f). The Court went on to say, "The very reason that the North Carolina Supreme Court has refused to extend statutes of limitations by construction is to ensure that parties have notice of the time limits applicable to their cases. Unless parents are informed that an agency decision in their case has triggered the limitations period, simply notifying them of the general right, procedure, and time limitation to request a due process hearing is worthless."
- Using the *CM* reasoning, Respondent failed to give the detailed notice requirements particular to this Petitioner that would trigger the limitations period. Respondent's brief letter following their final agency action is without explanation as to notice rights for this particular Petitioner. Even if Petitioner was in possession of some general policies for grieving, such is directly comparable to providing parents a Parents' Rights Handbook, as was the case in *CM*, where the Fourth Circuit found it to be inadequate to trigger the limitations period. Moreover, notice requirements must be given following the final decision after internal reviews are exhausted. There being no fact-specific procedures to follow in the letter itself, and no specific instructions addressed to this particular Petitioner, leads to no other conclusion under the standards of review for motions to dismiss but that Respondent failed to give adequate notice to the grievant (Petitioner), which would trigger a limitations period.

5. Based on the above, the Undersigned ruled that the Petitioner had stated a claim upon which relief may be granted and had filed a timely petition. The Office of Administrative Hearings has jurisdiction of this contested case and jurisdiction over the Petitioner and Respondent. As announced at hearing, the Motion to Dismiss was denied.

ISSUE

Did Respondent have just cause to terminate Petitioner's employment for personal misconduct?

EXHIBITS

For Petitioner: Exhibits 1, 3, 5, and 7

For Respondent: Exhibits 1-4

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the 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. From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

FINDINGS OF FACT

1. Petitioner, Daisy Smith, was employed as a Rehabilitation Therapist with Respondent until she was dismissed by Respondent effective March 24, 2004. Petitioner resides in Fayetteville, North Carolina and has at all relevant times been a resident of Cumberland County, North Carolina.

2. Respondent is the Cumberland County Mental Health Center, an area mental health authority under N.C. Gen. Stat. §126-5(a)(2)a.

1) Petitioner was first employed as a Rehabilitation Therapist with the Respondent on December 4, 2000. On April 30, 2001, Petitioner was granted permanent employment status. On March 24, 2004, Petitioner's employment with Respondent was terminated, due to alleged unacceptable personal conduct. Petitioner's salary at the time of her dismissal was \$26,846.87.

2) Petitioner filed a petition for a contested case hearing appealing Petitioner's termination from employment with Respondent. Petitioner contends that the termination was without substantive just cause in violation of N.C. Gen. Stat. §126-35 in that Petitioner did not commit any act of unacceptable personal conduct.

3) The sole basis for Respondent's termination of Petitioner's employment was an incident alleged to have occurred on January 18, 2004, during Petitioner's approved secondary employment with another employer, Maxim Healthcare Services. Petitioner's alleged misconduct did not occur while she was an employee of Respondent. It is alleged that Petitioner pushed and struck (multiple times) a non-verbal autistic teenager, JM, at JM's home on January 18, 2004, at a time when Petitioner was employed by Maxim Healthcare Services to care for JM.

4) Mabelle Love and John Love, the grandparents and guardians of JM, testified that the alleged incident had occurred. John Love and his wife, Mabelle Love, selected Petitioner to work with their granddaughter who is diagnosed with autism, because Petitioner worked with Cumberland County Mental Health Developmental Disabilities and Substance Abuse Authority (CCMHDDSAA).

5) John Love testified that around 8:00 pm on January 18, 2004, he was downstairs in his bedroom, and Petitioner and JM were upstairs in JM's bedroom. Mr. Love stated he heard Petitioner say "be quiet" somewhat loudly. He stated that he observed, on a television monitor of unknown size in his bedroom, Petitioner push JM down in the bed. He stated he saw Petitioner sit down in a chair next to the bed and put her feet on JM's bed. Love testified that JM pushed Petitioner's feet off the bed and that Petitioner began "pounding" JM on the back of her feet and legs. Mr. Love testified he remained in the bedroom. John Love testified that he shortly thereafter called his wife, Mabelle, into their bedroom, and told her what he thought he saw. Mr. Love did not leave his bedroom at

any time during the alleged incident, or before Petitioner left the premises about 45 minutes after the alleged incident.

6) Mabelle Love testified that she came into her and Mr. Love's bedroom. She stated that she observed, on a television monitor of unknown size, in a room on a separate floor, Petitioner yelling at JM in JM's bedroom and hitting JM repeatedly and violently on the back of JM's feet, legs, back and head. Mabelle Love testified that she called Maxim Healthcare Services to report the alleged incident, and then went upstairs to JM's room and sent Petitioner home. Mabelle Love testified that she observed multiple bruises on JM the next day. Ms. Love stated that she called the Sheriff's Department the next night. Ms. Love testified that she took JM to her (JM's) mother's house on January 18, 2004. She stated that there are other children there, ages two, six and seven and that they probably played with JM.

9. Petitioner testified that she did not yell at or strike in any manner JM on January 18, 2004, or at any other time, and her care for and conduct towards JM was at all times appropriate and caring. Petitioner testified that JM had, on some occasions in the past, been self-injurious due to her condition, and had played with some of her siblings on the afternoon of January 18, 2004. Petitioner testified that Mabelle Love had come into JM's room about 8:45 p.m. on January 18, 2004, and told Petitioner she could go for the evening. Petitioner's shift was to end at 9:00 p.m. that night. Petitioner said that Mabelle Love acted slightly annoyed with JM, woke JM up and sent her downstairs to sleep in the bed with Mabelle Love and John Love. Petitioner testified that neither Mabelle Love nor John Love said anything to Petitioner on January 18, 2004, about any alleged assault or anything to the effect that something was out of the ordinary.

10. Deborah Pritchard, a Habilitation Technician with Maxim Health Care in January 2004, testified. She worked one on one with JM. Ms. Love asked her to examine JM. Ms. Pritchard testified that she observed some old bruises that had been on JM awhile, and saw nothing else.

11. At least one person observed JM the day after the alleged incident, and observed only one bruise on JM, being a quarter-sized bruise on her right bicep. No testimony was presented by anyone that Petitioner had struck JM on the right bicep. No photographs were presented. Hank Debnam, the Area Director for the Respondent employer, testified that he "supposed it (the bruise) could have come from normal childhood play."

12. Respondent did not present any evidence to support the credibility of its witnesses, Mabelle Love and John Love. Respondent did not present anyone from Maxim that might have received a call from Ms. Love. Petitioner presented multiple witnesses in support of her credibility.

13. Petitioner presented evidence of her excellent work record with the Respondent and with prior employers. No one presented any evidence that there had ever been any allegation of any prior incident of inappropriate behavior by Petitioner with any patient or client.

14. Jeff Tompkins, Petitioner's supervisor during her employment with Respondent, who was still employed with Respondent on the date of the hearing, testified that in a pre-dismissal conference regarding Petitioner's employment, he stated the following, which statement he stood by at the time of the hearing: "As far as Daisy's work up in the PSR program, I've often gone to her as a lead person when a lead therapist is absent. She's done a real good job with us. I'm still taken back. This is the first time I'm hearing these allegations. It completely contradicts anything I've ever observed or witnessed in Daisy or her character. I've never heard her so much as raise her voice to a client in our program."

15. Petitioner presented evidence of her excellent prior work record and credibility through witnesses Hampton Rutledge, Petitioner's former Maxim Healthcare Services supervisor, Arleane Riley, from the Cumberland County Coordinating Council on Older Adults, Inc., Sonja Daswani, from Maxim Healthcare Services, and Debra Pridgett, from Maxim Healthcare Services. The witnesses testified that Petitioner was a good employee and very reliable. She was conscientious and one of the most qualified workers with Maxim. They reported that clients had good things to say about Petitioner.

16. Hank Debnam, the Area Director for the Respondent, admitted that the information in Petitioner's personnel file with the Respondent tended to support Petitioner's credibility.

17. Denise Lucas, Assistant Area Director, Clinical Services, testified that she had done pre-investigatory fact finding and recommended termination. She based her recommendation on the Love's statements. She did not talk to the Love's before her recommendation, and she stated she did not look into the credibility of either one. Ms. Lucas testified that Petitioner had no prior incidents, a good personnel record, and good evaluations.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. 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 the matter. 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.
2. At the time of the termination of her employment, Petitioner was subject to the State Personnel Act in accord with N.C.G.S. § 126-5(a)(2)(c).
3. At the time of this termination, employees of Respondent were subject to the State Personnel Act pursuant to N.C.G.S. § 126-5(a)(2)(c). Respondent was subject to the State Personnel Act as codified in N.C.G.S. § 126-1 *et seq.* and all applicable regulations. Neither Respondent Mental Health Center nor the Board of County Commissioners for Cumberland County had applied for “substantial equivalency” designation from the State of North Carolina’s Office of State Personnel as to its employment policies regarding the matters in this case, and they had not otherwise received “substantial equivalency” exemption pursuant to N.C. Gen. Stat. § 126-11.
4. N.C.G.S. §126-35 provides that no career employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause. N.C.G.S. §126 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.
5. The Respondent has the burden of proof by a greater weight or preponderance of the evidence that its dismissal of Petitioner was for just cause. Black’s Law Dictionary cites that “preponderance means something more than weight; it denotes a superiority of weight, or outweighing.” The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.
6. Respondent has failed to prove by a preponderance of the evidence that Petitioner engaged in the conduct as described in the Notice of Dismissal. The evidence does not support a finding of termination.
7. The testimony of the two primary witnesses relied on by Respondent, cannot be accepted as credible regarding key factors in Respondent’s decision to dismiss. The inconsistencies of their testimony with other evidence (multiple violent strikes and one small bruise which was just as likely from other sources), illogical actions (inaction) of one observing an assault on a loved one, and the absence of corroboration (no presentation of any other witness such as the Maxim worker Ms. Love was to have spoken with) for the required elements for dismissal, lead the Undersigned to find that Respondent’s evidence does not overbear, in some degree, the weight upon the Petitioner’s side.
8. Respondent has failed to carry its burden of proving by a preponderance of the evidence that Petitioner committed unacceptable personal conduct on January 18, 2004, and Respondent has therefore failed to show substantive just cause for Petitioner’s termination from employment.
9. State Personnel Commission rules provide the Commission with various legal and equitable remedies when dismissal of an employee is not upheld, including reinstatement, back pay and attorney’s fees. Petitioner is entitled to be reinstated to her prior position (or a comparable position) with Respondent, and is entitled to an award of back pay from the date of her termination, March 24, 2004, through the date of her reinstatement, with a credit being allowed to Respondent on the back pay for sums received by Petitioner from other employment during such time period.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

It is the decision of the Undersigned that Respondent has failed to carry its burden of proof by a preponderance of the evidence that Petitioner was discharged for just cause. As such, it is the decision of the Undersigned that Respondent reinstate Petitioner to the same or similar position that she was in at the time of her dismissal, and that Petitioner be awarded back pay and the return of all lost benefits. Further, Petitioner should be awarded reasonable attorney fees pursuant to 25 N.C.A.C. 1B.0414 upon submission by the Petitioner’s counsel of a Petition to the North Carolina State Personnel Commission for Attorney Fees, with an accompanying itemized statement of the fees and costs incurred in representing the Petitioner.

NOTICE

The North Carolina State Personnel Commission in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to the Commission. N. C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36, the State Personnel Commission shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the Commission, the Commission shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the Commission in not adopting the finding of fact. For each new finding of fact made by the Commission that is not contained in the Administrative Law Judge's decision, the Commission shall set forth separately and in detail the evidence in the record relied upon by the Commission in making the finding of fact. The State Personnel Commission shall adopt the decision of the Administrative Law Judge unless the Commission demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

In so far as this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute § 126-5(a)(2), the decision of the State Personnel Commission, absent a finding of discrimination, shall be advisory to the local appointing authority. The local appointing authority shall issue a written, final decision either accepting, rejecting, or modifying the decision of the State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the Commission are in accordance with Appeal to Commission, Section 0.0400 *et seq.* of Title 25, Chapter 1, SubChapter B of the North Carolina Administrative Code (25 NCAC 01B .0400 *et seq.*). Further requirements of rights and notices to the Parties shall be forthcoming from the State Personnel Commission and/or the local appointing authority as the circumstances and stage of the process may dictate.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36.

IT IS SO ORDERED.

This the 28th day of July, 2005.

Augustus B. Elkins II
Administrative Law Judge