

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: DEPARTMENT OF ADMINISTRATION

RULE CITATION: 01 NCAC 09 .0401-.0406

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

There is no authority cited for the Department of Administration to repeal these rules. It appears from the cited authority that the Governor's Office is the agency with rulemaking authority and nothing in the published notice implied that the Governor was repealing these rules.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

Article 55A.  
Balanced Growth Policy Act.

**§ 143-506.6. Title.**

This Article shall be known as the North Carolina Balanced Growth Policy Act. (1979, c. 412, s. 1.)

**§ 143-506.7. Purposes.**

The purposes of this Article are to declare as a policy that the State of North Carolina shall encourage economic progress and job opportunities throughout the State; support growth trends which are favorable to maintain a dispersed population, to maintain a healthy and pleasant environment and to preserve the natural resources of the State. (1979, c. 412, s. 2.)

**§ 143-506.8. Declaration of State Balanced Growth Policy.**

The General Assembly of North Carolina recognizes the importance of reaching a higher standard of living throughout North Carolina by maintaining a balance of people, jobs, public services and the environment, supported by the growing network of small and large cities in the State. The General Assembly of North Carolina, in order to assure that opportunities for a higher standard of living are available all across the State, declares that it shall be the policy of the State to bring more and better jobs to where people live; to encourage the development of adequate public services on an equitable basis for all of the State's people at an efficient cost; and to maintain the State's natural environmental heritage while accommodating urban and agricultural growth. (1979, c. 412, s. 3.)

**§ 143-506.9. Cooperation of agencies.**

The General Assembly encourages, to the fullest extent possible, all State agencies to review their existing policies, procedures and regulations to bring them into conformity with the provisions of this Balanced Growth Policy. (1979, c. 412, s. 4.)

**§ 143-506.10. Designation of growth centers; achieving balanced growth.**

It shall be the policy of the State of North Carolina to support the expansion of the State and to designate growth areas or centers with the potential, capacity and desire for growth. The Governor, with the advice of county and municipal government officials and citizens, is charged with designating growth areas or centers, which shall include at least one center in each North Carolina county. Designation of growth areas or centers shall be reviewed annually. These designations may be used for the purpose of establishing priority consideration for State and federal assistance for growth.

Progress toward achieving balanced growth shall be measured by the strengthening of economic activity and the adequacy of public services within each of the State's multi-county regions and, as to the geographical area included, the Southeastern Economic Development Commission. The Governor, with the advice of county and municipal government officials and citizens, shall develop measures of progress toward achieving balanced growth. (1979, c. 412, s. 5.)

**§ 143-506.11. Citizen participation.**

The Governor shall establish a process of citizen participation that assures the expression of needs and aspirations of North Carolina's citizens in regard to the purposes of this Article. (1979, c. 412, s. 6.)

**§ 143-506.12. Policy areas.**

The following program area guidelines shall become the policy for the State of North Carolina:

- (1) To encourage diversified job growth in different areas of the State, with particular attention to those groups which have suffered from high rates of unemployment or underemployment, so that sufficient work opportunities at high wage levels can exist where people live;
- (2) To encourage the development of transportation systems that link growth areas or centers together with appropriate levels of service;

- (3) To encourage full support for the expansion of family-owned and operated units in agriculture, forestry and the seafood industry as the basis for increasing productive capacity;
- (4) To encourage the development and use of the State's natural resources wisely in support of Balanced Growth Policy while fulfilling the State's constitutional obligation to protect and preserve its natural heritage;
- (5) To promote the concept that a full range of human development services shall be available and accessible to persons in all areas of the State;
- (6) To encourage the continued expansion of early childhood, elementary, secondary and higher education opportunities so that they are improving in both quality and availability;
- (7) To encourage excellent technical training for North Carolina workers that prepares them to acquire and hold high-skill jobs and that encourages industries which employ high-skill workers to locate in the State;
- (8) To encourage the availability of cultural opportunities to people where they live;
- (9) To encourage the expansion of local government capacity for managing growth consistent with this Balanced Growth Policy; and
- (10) To encourage conservation of existing energy resources and provide for the development of an adequate and reliable energy supply, while protecting the environment. (1979, c. 412, s. 7.)

**§ 143-506.13. Implementation of a State-local partnership.**

The Governor, with the advice of the State Goals and Policy Board, shall establish a statewide policy-setting process for Balanced Growth, in partnership with local government, that brings about full participation of both the State and local government. The purpose of this State-local partnership is to arrive at joint strategies and objectives for balanced statewide development and ensure consistent action by the State and local government for jointly agreed upon strategies and objectives. (1979, c. 412, s. 8.)

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AGENCY: DEPARTMENT OF ADMINISTRATION

RULE CITATION: 01 NCAC 11 .2102–.2105, .2111, .2116, .2201–.2204

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
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  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

There is no authority cited for the Department of Administration to repeal these rules. It appears from the cited authority that the Human Relations Commission is the agency with rulemaking authority and nothing in the published notice implied that the Human Relations Commission was repealing these rules.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **Chapter 41A.**

### **State Fair Housing Act.**

#### **§ 41A-1. Title.**

This Chapter shall be known and may be cited as the State Fair Housing Act. (1983, c. 522, s. 1.)

#### **§ 41A-2. Purpose.**

The purpose of this Chapter is to provide fair housing throughout the State of North Carolina. (1983, c. 522, s. 1.)

#### **§ 41A-3. Definitions.**

For the purposes of this Chapter, the following definitions apply:

- (1) The "Commission" means the North Carolina Human Relations Commission;
- (1a) "Covered multifamily dwellings" means:
  - a. A building, including all units and common use areas, in which there are four or more units if the building has one or more elevators; or
  - b. Ground floor units and ground floor common use areas in a building with four or more units.
- (1b) "Familial status" means one or more persons who have not attained the age of 18 years being domiciled with:
  - a. A parent or another person having legal custody of the person or persons; or
  - b. The designee of the parent or other person having custody, provided the designee has the written permission of the parent or other person.

The protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any person who has not attained the age of 18 years.
- (2) "Family" includes a single individual;
- (3) "Financial institution" means any banking corporation or trust company, savings and loan association, credit union, insurance company, or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds;
- (3a) "Handicapping condition" means (i) a physical or mental impairment which substantially limits one or more of a person's major life activities, (ii) a record of having such an impairment, or (iii) being regarded as having such an impairment. Handicapping condition does not include current, illegal use of or addiction to a controlled substance as defined in 21 U.S.C. § 802, the Controlled Substances Act. The protections against discrimination on the basis of handicapping condition shall apply to a buyer or renter of a dwelling, a person residing in or intending to reside in the dwelling after it is sold, rented, or made available, or any person associated with the buyer or renter.
- (4) "Housing accommodation" means any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals;
- (5) "Person" means any individual, association, corporation, political subdivision, partnership, labor union, legal representative, mutual company, joint stock company, trust, trustee in bankruptcy, unincorporated organization, or other legal or commercial entity, the State, or governmental entity or agency;
- (6) "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property, or who negotiates or attempts to negotiate any of these activities, or who holds himself out as engaged in these activities, or who negotiates or attempts to negotiate a loan secured or to be secured by mortgage or other encumbrance upon real property, or who is engaged in the business of listing real

property in a publication; or a person employed by or acting on behalf of any of these persons;

- (7) "Real estate transaction" means the sale, exchange, rental, or lease of real property;
- (8) "Real property" means a building, structure, real estate, land, tenement, leasehold, interest in real estate cooperatives, condominium, and hereditament, corporeal and incorporeal, or any interest therein. (1983, c. 522, s. 1; 1989, c. 507, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 1(1).)

#### **§ 41A-4. Unlawful discriminatory housing practices.**

(a) It is an unlawful discriminatory housing practice for any person in a real estate transaction, because of race, color, religion, sex, national origin, handicapping condition, or familial status to:

- (1) Refuse to engage in a real estate transaction;
- (2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;
- (2a), (2c) Repealed by Session Laws 2009-388, s. 1, effective October 1, 2009.
- (3) Refuse to receive or fail to transmit a bona fide offer to engage in a real estate transaction;
- (4) Refuse to negotiate for a real estate transaction;
- (5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or fail to bring a property listing to his attention, or refuse to permit him to inspect real property;
- (6) Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;
- (7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith; or
- (8) Otherwise make unavailable or deny housing.

(b) Repealed by Session Laws 1989, c. 507, s. 2.

(b1) It is an unlawful discriminatory housing practice for any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of race, color, religion, sex, national origin, handicapping condition, or familial status. As used in this subsection, "residential real estate related transaction" means:

- (1) The making or purchasing of loans or providing financial assistance (i) for purchasing, constructing, improving, repairing, or maintaining a dwelling, or (ii) where the security is residential real estate; or
- (2) The selling, brokering, or appraising of residential real estate.

The provisions of this subsection shall not prohibit any financial institution from using a loan application which inquires into a person's financial and dependent obligations or from basing its actions on the income or financial abilities of any person.

(c) It is an unlawful discriminatory housing practice for a person to induce or attempt to induce another to enter into a real estate transaction from which such person may profit:

- (1) By representing that a change has occurred, or may or will occur in the composition of the residents of the block, neighborhood, or area in which the real property is located with respect to race, color, religion, sex, national origin, handicapping condition, or familial status of the owners or occupants; or
- (2) By representing that a change has resulted, or may or will result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

(d) It is an unlawful discriminatory housing practice to deny any person who is otherwise qualified by State law access to or membership or participation in any real estate brokers' organization, multiple listing service, or other service, organization, or facility relating to the business of engaging in real estate transactions, or to discriminate in the terms or conditions of such access, membership, or participation because of race, color, religion, sex, national origin, handicapping condition, or familial status.

(e) It is an unlawful discriminatory housing practice to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by this Chapter.

(f) It is an unlawful discriminatory housing practice to:

- (1) Refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications are necessary to the handicapped person's full enjoyment of the premises; except that, in the case of a rental unit, the landlord may, where it is reasonable to do so, condition permission for modifications on agreement by the renter to restore the interior of the premises to the condition that existed before the modifications, reasonable wear and tear excepted.
- (2) Refuse to make reasonable accommodations in rules, policies, practices, or services, when these accommodations may be necessary to a handicapped person's equal use and enjoyment of a dwelling.
- (3) Fail to design and construct covered multifamily dwellings available for first occupancy after March 13, 1991, so that:
  - a. The dwellings have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual site characteristics; or
  - b. With respect to dwellings with a building entrance on an accessible route:
    1. The public and common use portions are readily accessible to and usable by handicapped persons;
    2. There is an accessible route into and through all dwellings and units;
    3. All doors designed to allow passage into, within, and through these dwellings and individual units are wide enough for wheelchairs;
    4. Light switches, electrical switches, electrical outlets, thermostats, and other environmental controls are in accessible locations;
    5. Bathroom walls are reinforced to allow later installation of grab bars; and
    6. Kitchens and bathrooms have space for an individual in a wheelchair to maneuver.

(g) It is an unlawful discriminatory housing practice to discriminate in land-use decisions or in the permitting of development based on race, color, religion, sex, national origin, handicapping condition, familial status, or, except as otherwise provided by law, the fact that a development or proposed development contains affordable housing units for families or individuals with incomes below eighty percent (80%) of area median income. It is not a violation of this Chapter if land-use decisions or permitting of development is based on considerations of limiting high concentrations of affordable housing. (1983, c. 522, s. 1; 1989, c. 507, s. 2; 1989 (Reg. Sess., 1990), c. 979, s. 3; 2009-388, s. 1; 2009-533, s. 1.)

#### **§ 41A-5. Proof of violation.**

(a) It is a violation of this Chapter if:

- (1) A person by his act or failure to act intends to discriminate against a person. A person intends to discriminate if, in committing an unlawful discriminatory housing practice described in G.S. 41A-4 he was motivated in full, or in any part at all, by race, color, religion, sex, national origin, handicapping condition, or familial status. An intent to discriminate may be established by direct or circumstantial evidence.

- (2) A person's act or failure to act has the effect, regardless of intent, of discriminating, as set forth in G.S. 41A-4, against a person of a particular race, color, religion, sex, national origin, handicapping condition, or familial status. However, it is not a violation of this Chapter if a person whose action or inaction has an unintended discriminatory effect, proves that his action or inaction was motivated and justified by business necessity.
  - (3) A person's act or failure to act violates G.S. 41A-4(f).
  - (4) A local government's act or failure to act in land-use decisions or in the permitting of development is intended to discriminate against affordable housing. A local government intends to discriminate if, in committing an unlawful discriminatory housing practice described in G.S. 41A-4(g), the local government was motivated in full, or in any part at all, by the fact that a development or proposed development contains affordable housing units for families or individuals with incomes below eighty percent (80%) of area median income. It is not a violation of this Chapter if land-use decisions or permitting of development is based on considerations of limiting high concentrations of affordable housing. An intent to discriminate may be established by direct or circumstantial evidence.
  - (5) A local government's act or failure to act has the effect, regardless of intent, of discriminating against affordable housing in land-use decisions or in the permitting of development, as set forth in G.S. 41A-4(g). It is not a violation of this Chapter if land-use decisions or permitting of development is based on considerations of limiting high concentrations of affordable housing. It is not a violation of this Chapter if a local government whose action or inaction has an unintended discriminatory effect proves that the action or inaction was motivated and justified by a legitimate, bona fide governmental interest.
- (b) It shall be no defense to a violation of this Chapter that the violation was requested, sought, or otherwise procured by another person. (1983, c. 522, s. 1; 1987, c. 603, s. 1; 1989, c. 507, s. 3; 2009-388, s. 2; 2009-533, s. 2.)

#### **§ 41A-6. Exemptions.**

- (a) The provisions of G.S. 41A-4, except for subdivision (a)(6), do not apply to the following:
  - (1) The rental of a housing accommodation in a building which contains housing accommodations for not more than four families living independently of each other, if the lessor or a member of his family resides in one of the housing accommodations;
  - (2) The rental of a room or rooms in a private house, not a boarding house, if the lessor or a member of his family resides in the house;
  - (3) Religious institutions or organizations or charitable or educational organizations operated, supervised, or controlled by religious institutions or organizations which give preference to members of the same religion in a real estate transaction, as long as membership in such religion is not restricted by race, color, sex, national origin, handicapping condition, or familial status;
  - (4) Private clubs, not in fact open to the public, which incident to their primary purpose or purposes provide lodging, which they own or operate for other than a commercial purpose, to their members or give preference to their members;
  - (5) With respect to discrimination based on sex, the rental or leasing of housing accommodations in single-sex dormitory property; and
  - (6) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 979, s. 4.
  - (7) The sale, rental, exchange, or lease of commercial real estate. For the purposes of this Chapter, commercial real estate means real property which is not intended for residential use.
- (b) No provision of this Chapter requires that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of other persons or whose tenancy would result in substantial physical damage to the property of others.



(c) No provision of this Chapter limits the applicability of any reasonable local or State restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit.

(d) Nothing in this Chapter shall be deemed to nullify any provisions of the North Carolina Building Code applicable to the construction of residential housing for the handicapped.

(e) No provision of this Chapter regarding familial status applies with respect to housing for older persons. "Housing for older persons" means housing:

- (1) Provided under any State or federal program specifically designed and operated to assist elderly persons as defined in the program;
- (2) Intended for and solely occupied by person 62 years or older. Housing satisfies the requirements of this subdivision even though there are persons residing in such housing on September 13, 1988, who are under 62 years of age, provided that all new occupants after September 13, 1988, are 62 years or older; or
- (3) Intended for and operated for occupancy by at least one person 55 years of age or older per unit as shown by such factors as (i) the existence of significant facilities and services specifically designed to meet the physical and social needs of older persons or, if this is not practicable, that the housing provides important housing opportunities for older persons, (ii) at least eighty percent (80%) of the units are occupied by at least one person 55 years of age or older per unit; and (iii) the publication of and adherence to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years or older. Housing satisfies the requirements of this subdivision even though on September 13, 1988, under eighty percent (80%) of the units in the housing facility are occupied by at least one person 55 years or older per unit, provided that eighty percent (80%) of the units that are occupied by new tenants after September 13, 1988, are occupied by at least one person 55 years or older per unit until such time as eighty percent (80%) of all the units in the housing facility are occupied by at least one person 55 years or older. Housing facilities newly constructed for first occupancy after March 12, 1989, shall satisfy the requirements of this subdivision if (i) when twenty-five percent (25%) of the units are occupied, eighty percent (80%) of the occupied units are occupied by at least one person 55 years or older, and thereafter (ii) eighty percent (80%) of all newly occupied units are occupied by at least one person 55 years or older until such time as eighty percent (80%) of all the units in the housing facility are occupied by at least one person 55 years of age or older.

Housing satisfies the requirements of subdivisions (2) and (3) of this subsection even though there are units occupied by employees of the housing facility who are under the minimum age or family members of the employees residing in the same unit who are under the minimum age, provided the employees perform substantial duties directly related to the management of the housing. (1983, c. 522, s. 1; 1985, c. 371, ss. 1, 2; 1989, c. 507, s. 4, c. 721, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 4.)

#### **§ 41A-7. Enforcement.**

(a) Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. A fair housing enforcement organization, as defined in regulations adopted under 42 U.S.C. § 3602 (1968), may file a complaint with the Commission on behalf of a person who claims to have been injured by or reasonably believes he will be irrevocably injured by an unlawful discriminatory housing practice. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Commission requires. Commission employees shall assist complainants in reducing complaints to writing and shall assist in setting forth the information in the complaint as may be required by the Commission. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the respondent a copy of the complaint and a notice advising the respondent of his procedural rights and obligations under this Chapter. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the

complainant a notice acknowledging the filing of the complaint and informing the complainant of his time limits and choice of forums under this Chapter.

No complaint may be filed with the Commission under this section during any period in which the Commission is not certified by the Secretary of the United States Department of Housing and Urban Development in accordance with 42 U.S.C. § 3610(f) to have jurisdiction over the subject matter of the complaint. Provided, however, that during any such period in which the Commission is not certified, any person who claims to have been injured by an unlawful discriminatory practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may bring a civil action directly in superior court in accordance with the provisions of subsection (j) of this section, except that any such civil action shall be commenced within one year after the occurrence or termination of the alleged unlawful discriminatory housing practice.

(b) A complaint under subsection (a) shall be filed within one year after the alleged unlawful discriminatory housing practice occurred. A respondent may file an answer to the complaint against him within 10 days after receiving a copy of the complaint. With the leave of the Commission, which shall be granted whenever it would be reasonable and fair to do so, the complaint and the answer may be amended at any time. Complaints and answers shall be verified. The Commission shall make final administrative disposition of a complaint within one year of the date the complaint is filed, unless it is impracticable to do so. If the Commission is unable to do so, it shall notify the complainant and respondent, in writing, of the reasons for not doing so.

(c) Whenever another agency of the State or any other unit of government of the State has jurisdiction over the subject matter of any complaint filed under this section, and such agency or unit of government has legal authority equivalent to or greater than the authority under this Chapter to investigate or act upon the complaint, the Commission shall be divested of jurisdiction over such complaint. The Commission shall, within 30 days, notify the agency or unit of government of the apparent unlawful discriminatory housing practice, and request that the complaint be investigated in accordance with such authority.

(d) Complaints may be resolved at any time by informal conference, conciliation, or persuasion. Nothing said or done in the course of such informal procedure may be made public by the Commission or used as evidence in a subsequent proceeding under this Chapter without the written consent of the person concerned.

(e) Within 30 days after the filing of the complaint, the Commission shall commence an investigation of the complaint to ascertain the facts relating to the alleged unlawful discriminatory housing practice. If the complaint is not resolved before the investigation is complete, upon completion of the investigation, the Commission shall determine whether or not there are reasonable grounds to believe that an unlawful discriminatory housing practice has occurred. The Commission shall make a determination within 90 days after the filing of the complaint. If the Commission is unable to complete the investigation and issue a determination within 90 days after the filing of the complaint, the Commission shall notify the complainant and respondent in writing of the reasons for not doing so. If the Commission concludes at any time following the filing of a complaint under this section that prompt judicial action is necessary to carry out the purposes of this Chapter, the Commission may commence a civil action for, and the court may grant, appropriate temporary or preliminary relief pending final disposition of the complaint. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with G.S. 1A-1, et seq., Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the continuation of the Commission's investigation or the initiation of a separate civil action pursuant to other subsections of this section.

(f) If the Commission finds no reasonable ground to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall dismiss the complaint and issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court in accordance with the provisions of subsection (j) of this section.

(g) If the Commission finds reasonable grounds to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall proceed to try to eliminate or correct the discriminatory housing practice by informal conference, conciliation, or persuasion. Each conciliation

agreement arising out of conciliation efforts by the Commission, whether reached before or after the Commission makes a determination of the complaint pursuant to subsection (e), shall be:

- (1) An agreement between the respondent and the complainant and shall be subject to the approval of the Commission. The Commission may also be a party to such conciliation agreements; and
  - (2) Made public unless the complainant and respondent otherwise agree, and the Commission determines that disclosure is not required to further the purposes of this Chapter.
- (h) If the Commission is unable to resolve the alleged unlawful discriminatory housing practice it shall notify the parties in writing that conciliation efforts have failed.
- (i) A complainant may make a written request to the Commission for a right-to-sue letter:
- (1) Within 10 days following the receipt of a notice of conciliation failure; or
  - (2) After 130 days following the filing of a complaint, if the Commission has not issued a notice of conciliation failure.

Upon receipt of a timely request, the Commission shall issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court in accordance with the provisions of subsection (j) of this section.

(j) A civil action brought by a complainant pursuant to subsections (f) or (i) of this section shall be commenced within one year after the right-to-sue letter is issued. The court may grant relief, as it deems appropriate, including any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff, actual and punitive damages, and may award court costs, and reasonable attorney's fees to the prevailing party. Provided, however, that a prevailing respondent may be awarded court costs and reasonable attorney's fees only upon a showing that the case is frivolous, unreasonable, or without foundation.

(k) After the Commission has issued a notice of conciliation failure pursuant to subsection (h) of this section, if the complainant does not request a right-to-sue letter pursuant to subsection (i) of this section, the complainant, the respondent, or the Commission may elect to have the claims and issues asserted in the reasonable grounds determination decided in a civil action commenced and maintained by the Commission.

- (1) An election for a civil action under this subsection shall be made no later than 20 days after an electing complainant or respondent receives the notice of conciliation failure, or if the Commission makes the election, not more than 20 days after the notice of conciliation failure is issued. A complainant or respondent who makes an election for a civil action pursuant to this subsection shall give notice to the Commission. If the Commission makes an election, it shall notify all complainants and respondents of the election.
- (2) If an election is made under this subsection, no later than 60 days after the election is made the Commission shall commence a civil action in superior court in its own name on behalf of the complainant. In such an action, the Commission shall be represented by an attorney employed by the Commission, and G.S. 114-2 shall not apply.

In a civil action brought under this subsection, the court may grant relief as it deems appropriate, including any permanent or temporary injunction, temporary restraining order, or other equitable relief and may award to any person aggrieved by an unlawful discriminatory housing practice compensatory and punitive damages. Parties to a civil action brought pursuant to this Chapter shall have the right to a jury trial as provided for by the North Carolina Rules of Civil Procedure.

(l) After the Commission has issued a notice of conciliation failure pursuant to subsection (h) of this section, if the complainant does not request a right-to-sue letter pursuant to subsection (i) of this section, and if an election for a civil action is not made pursuant to subsection (k) of this section, the Commission shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at a hearing of the case. Upon receipt of the application, the Director of the Office of Administrative Hearings shall, without undue delay, assign an administrative law judge to hear the case.

- (1) All hearings shall be conducted pursuant to the provisions of Article 3A of Chapter 150B of the General Statutes, except that the case in support of the complaint shall be presented at the hearing by the Commission's attorney or agent, and G.S. 114-2 shall not apply. The parties to the complaint shall otherwise be given an opportunity to participate in the hearing as provided in G.S. 150B-40(a).
- (2) The administrative law judge assigned to hear a case pursuant to this subsection shall sit in place of the Commission and shall have the authority of a presiding officer in a contested case under Article 3A of Chapter 150B of the General Statutes. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact, proposed conclusions of law, and proposed relief, if appropriate. The Commission may make its final decision only after carefully reviewing and considering the administrative law judge's proposal for decision, and after a copy of that proposal for decision is served on the parties and an opportunity is given each party to file exceptions and proposed findings of fact and to present oral and written arguments to the Commission.
- (3) The Commission's final decision may be made by a panel consisting of three Commission members appointed by the chairperson of the Commission. If the Commission, in its final decision, finds that a respondent has violated or is about to violate this Chapter, it may order such relief as may be appropriate, including payment to the complainant by the respondent of compensatory damages and injunctive or other equitable relief. The Commission's order may also assess a civil penalty against the respondent:
  - a. In an amount not exceeding ten thousand dollars (\$10,000) if the respondent has not been adjudged to have committed any prior unlawful discriminatory housing practices;
  - b. In an amount not exceeding twenty-five thousand dollars (\$25,000) if the respondent has been adjudged to have committed one other unlawful discriminatory housing practice during the five-year period ending on the date of the filing of the complaint; or
  - c. In an amount not exceeding fifty thousand dollars (\$50,000) if the respondent has been adjudged to have committed two or more unlawful discriminatory housing practices during the seven-year period ending on the date of the filing of the complaint.

If the acts constituting the unlawful discriminatory housing practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting an unlawful discriminatory housing practice, then the civil penalties set forth in sub-subdivisions b and c of this subsection may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

The clear proceeds of civil penalties assessed pursuant to this subdivision shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(m) Any person aggrieved by the final agency decision following a hearing may petition for judicial review in accordance with the provisions of G.S. 150B-43 through G.S. 150B-52. The court in a review proceeding may:

- (1) Affirm, modify, or reverse the Commission's decision in accordance with G.S. 150B-51;
- (2) Remand the case to the Commission for further proceedings;
- (3) Grant to any party such temporary relief, restraining order, or other order as it deems appropriate; or
- (4) Issue an order to enforce the Commission's order to the extent that the order is affirmed or modified.

(n) If, within 30 days after service on the parties of the Commission's decision and order following a hearing, no party has petitioned for judicial review, the Commission or the person entitled to

relief may file with the clerk of superior court in the county where the unlawful discriminatory housing practice occurred, or in the county where the real property is located, a certified copy of the Commission's final order. Upon such a filing, the clerk of the court shall enter an order enforcing the Commission's final order. (1983, c. 522, s. 1; 1985, c. 371, ss. 3-5; 1987, c. 603, ss. 2-4; 1989, c. 721, s. 2; 1989 (Reg. Sess., 1990), c. 979, ss. 1(2), 5, 6; 1998-215, s. 1; 2003-136, s. 1.)

**§ 41A-8. Investigation; subpoenas.**

(a) In conducting an investigation, the Commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: Provided, however, that the Commission first complies with the provisions of the Fourth Amendment to the United States Constitution relating to unreasonable searches and seizures.

(b) The Commission may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in the general court of justice.

(c) Upon written application to the Commission, a respondent shall be entitled to the issuance of a reasonable number of subpoenas subject to the same limitations as subpoenas issued by the Commission. Subpoenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

(d) In case of contumacy or refusal to obey a subpoena, the Commission or the respondent may petition for its enforcement in the superior court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business. (1983, c. 522, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 1(3).)

**§ 41A-9: Repealed by Session Laws 1989, c. 721, s. 3.**

**§ 41A-10. Venue.**

All civil actions shall be commenced in the county where the alleged unlawful discriminatory housing practice occurred, or in the county where the real property is located. (1983, c. 522, s. 1.)

**§ 143-422.3. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. (1977, c. 726, s. 1; 1989 (Reg. Sess., 1990), c. 979, ss. 1(5), 2.)

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: DEPARTMENT OF ADMINISTRATION

RULE CITATION: 01 NCAC 19A .0103

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

There is no authority cited for the Department of Administration to repeal this rule. It appears from the cited authority that the Youth Advisory Council is the agency with rulemaking authority and nothing in the published notice implied that the Youth Advisory Council was repealing this rule.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

**§ 143B-386. State Youth Advisory Council – members; selection; quorum; compensation.**

The State Youth Advisory Council of the Department of Administration shall consist of 20 members. The composition and appointment of the Council shall be as follows:

Ten youths to be elected by the procedure adopted by the Youth Advisory Council, which shall include a requirement that four of the members represent youth organizations; and 10 adults to be appointed by the Governor at least four of whom shall be individuals working on youth programs through youth organizations. Provided that no person shall serve on the Board for more than two complete consecutive terms.

The initial members of the Council shall be the appointed members of the Youth Advisory Board who shall serve for a period equal to the remainder of their current terms on the Youth Advisory Board. The current terms of the youth members expire July 1, 1976, the current terms of four of the adult members expire April 7, 1976, and the remaining four adult members' terms expire May 1, 1978. At the end of the respective terms of office of the initial members of the Council, the appointment of their successors shall be as follows:

- (1) Eight youth members to serve for terms beginning on July 1, 1976, and expiring on June 30, 1977, and two additional youth members to serve for terms beginning on July 1, 1977, and expiring on June 30, 1978. At the end of the terms of office of these youth members of the Council, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify.
- (2) Four adult members to serve for terms beginning on April 8, 1976, and expiring on June 30, 1979; four adult members to serve for terms beginning on May 1, 1978, and expiring on June 30, 1980; one additional adult member to serve for a term beginning July 1, 1977, and expiring June 30, 1978; and one additional adult member to serve for a term beginning July 1, 1977, and expiring June 30, 1979. At the end of the respective terms of office of these adult members of the Council, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify. At least one adult member shall be an advisor of a local youth council at appointment and for the duration of the term. The total membership shall reasonably reflect the socioeconomic, ethnic, sexual and sectional composition of the State.

Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate an adult member of the Council to serve as chairman at the pleasure of the Governor. The Council shall elect a youth member to serve as vice-chairman for a one-year term.

A majority of the Council shall constitute a quorum for the transaction of business.

Members of the Council who are not officers or employees of the State shall receive per diem and necessary travel and subsistence expenses in accordance with provisions of G.S. 138-5.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1975, c. 879, s. 27; 1977, c. 510; 1979, c. 410; 1991, c. 128.)

## **RRC STAFF OPINION**

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AGENCY: DEPARTMENT OF ADMINISTRATION

RULE CITATION: 01 NCAC 22 – ALL REPEALS

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
  - X Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

COMMENT:

The authority for these rules, S.L. 1977-677, gives the Department the authority to adopt these rules but also authorizes joint adoption with the Commission for Health Services (now Commission for Public Health) and the Environmental Management Commission. Jointly adopted rules may only be revoked upon the concurrence of all three agencies. There is some evidence that these rules were originally jointly adopted. There is no authority cited for the Department to repeal these rules without the concurrence of the other agencies. Nothing in the published notice implied that the other agencies were concurring in the repeal of these rules.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL



applicant meets all eligibility criteria, and that notice and hearing requirements of this act have been met.

In the event that the grant payments are to be made in installments, no installment payment shall be disbursed by the Department of Administration until it has received from the appropriate receiving agency a written request for disbursement.

**Sec. 14. Payment of grants.** The receiving agency, in its sole discretion, may determine whether the payment of any grant made under this act shall be in a lump sum or in installments as progress payments and shall, by adoption of appropriate rules and regulations, provide for the manner of approval and payment of grants.

**Sec. 15. Inspection.** Inspection of a project for which a grant has been made under this act may be performed by qualified personnel of the Division of Health Services or the Environmental Management Commission or may be performed by qualified professional engineers, registered in this State, who have been approved by the Division of Health Services or the Environmental Management Commission; but no person shall be approved to perform inspections who is an officer or employee of the unit of government to which the grant was made or who is an owner, officer, employee or agent of a contractor or subcontractor engaged in the construction of the project for which the grant was made. For the purpose of payment of inspection fees, inspection services shall be included in the term "construction cost" as used in this act.

*INCA 22* **Sec. 16. Rules and regulations.** (a) Adoption. The Department of Administration, the Commission of Health Services and the Environmental Management Commission, in order to accomplish the efficient administration and uniform application of this act, are empowered to adopt, modify and revoke rules of procedure establishing and amplifying the procedures to be followed in the administration of this act and regulations interpreting and applying the provisions of this act. To the extent practicable and feasible, uniform rules and regulations may be jointly adopted, and no rule or regulation jointly adopted may be modified or revoked except upon concurrence of all three agencies.

(b) Approval; duplication. No rule or regulation adopted by the Department of Administration, the Commission of Health Services or the Environmental Management Commission, or each of them, pursuant to this act, shall become effective until approved by the Advisory Budget Commission and until printed or otherwise duplicated and a certified copy filed with the Secretary of State or other official of the State designated by law.

(c) Copies furnished. A copy of its rules and regulations adopted pursuant to this act shall be furnished free of charge by the receiving agency and the Department of Administration to any governmental unit. Any other person shall be entitled to receive a copy upon payment of a reasonable charge for printing or duplication if the receiving agency or Department of Administration shall so require.

**Sec. 17. Federal grants and loans.** In order to carry out the purpose of this act to secure the greatest benefits possible to the citizens of this State from the funds herein provided for, the Department of Administration, the Commission for Health Services and the Environmental Management Commission are authorized and directed to adopt such rules, regulations and criteria pursuant to and in accordance with this act as are necessary and appropriate to conform to federal requirements for federal grants and loans for

AMENDMENTS  
TO

RULES AND REGULATIONS  
GOVERNING  
STATE GRANTS FOR  
WASTEWATER TREATMENT WORKS,  
WASTEWATER COLLECTION  
SYSTEMS AND  
WATER SUPPLY SYSTEMS

ADOPTED PURSUANT TO  
THE NORTH CAROLINA CLEAN WATER BOND ACT  
OF 1977

BY

DEPARTMENT OF HUMAN RESOURCES  
COMMISSION FOR HEALTH SERVICES  
DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT  
COMMISSION OF ENVIRONMENTAL MANAGEMENT

AND

DEPARTMENT OF ADMINISTRATION



State of North Carolina  
Department of Justice

RUFUS L. EDMISTEN  
ATTORNEY GENERAL

RECEIVED

2/3/76

BY Don

REGULATION CERTIFICATION

ADMINISTRATIVE PROCEDURES SECTION  
ATTORNEY GENERAL'S OFFICE

(A) I do hereby certify that the attached regulation(s) 1 NCAC 22 are correct  
copies as adopted by Advisory Budget Commission pursuant to the authority vested in it  
by Chapter 909 <sup>Laws</sup> 1971 Session of the General Statutes of North Carolina and filed with the  
section(s) <sup>and</sup>  
Attorney General's Office on or before the 1st Day of February, 1976.

L. Kenneth Woodward  
Officer

State Budget Officer

Title

(B) The Attached Regulation(s) are received for filing on this day 2/3/76 and are in the form  
specified by this office.

Rufus L. Edmisten  
Attorney General

[Signature]  
by Deputy Attorney General



State of North Carolina

Department of Justice

RUFUS L. EDMISTEN  
ATTORNEY GENERAL

P. O. Box 629  
RALEIGH  
27602

FOR JUSTICE DEPARTMENT  
USE ONLY

RECEIVED

02/27/79  
(date)

*[Signature]*

Administrative Procedures Section  
Attorney General's Office

REGULATION CERTIFICATION

I do hereby certify that the attached regulation(s) 1 NCAC 22  
(cite)  
are correct copies as <sup>readopted</sup> ~~adopted~~ ~~(amended)~~ by Secretary, Department of Administration  
(agency)  
pursuant to the authority vested in it by G.S. 143B-366 through 370; 143B-10(j); S.L. 1977,  
[section (s)] Ch. 677;  
of the General Statutes of North Carolina.

☐ This regulation is to be effective thirty (30) days after filing with the Attorney General's Office, on  
(date)

☒ This regulation is to be effective -0- days after filing with the Attorney General's Office, on  
February 27, 1979 (date). An effective date of other than thirty (30) days after filing is  
necessary because of the following circumstances: These regulations have been readopted at  
public hearing to be effective immediately upon filing. The regulations have been  
readopted by the Department of Administration in compliance with the Administrative  
Procedures Act and amendments to this Act and a 30 day delay in their implementation  
would work a hardship on the Department.

*[Signature]*  
Jane Smith Patterson, Hearing Officer  
(Officer)

Assistant Secretary, Department of Administration  
(Title)

The attached regulation(s) are received for filing in the Office of the Attorney General on this day,  
02/27/79, and are in the form specified by this office.

RUFUS L. EDMISTEN  
ATTORNEY GENERAL

*[Signature]*  
(by Deputy/Assistant Attorney General)

**TEMPORARY RULE**  
**RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: DEPARTMENT OF CULTURAL RESOURCES

RULE CITATION: 07 NCAC 04N .0202

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Decline to approve, based on:
  - ☐ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
- ☒ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

The findings of need for this rule state that this temporary rule was required by the effective date of a recent act of the General Assembly. There is nothing in the cited Session Law, S.L. 2012-142, that requires an increase in fees. If anything, the inclusion of an additional appropriation would have been justification for reduced fees rather than increased fees.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: PRIVATE PROTECTIVE SERVICES BOARD

RULE CITATION: 12 NCAC 07D .0105

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

In (d), it is not clear what standards the Administrator will use in deciding to exempt a person from the requirements of the paragraph. There are no specific guidelines for the waiver as required by G.S. 150B-19(6).

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: PRIVATE PROTECTIVE SERVICES BOARD

RULE CITATION: 12 NCAC 07D .1403

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

In (4), it is not clear what is meant by "determine whether the applicant meets the requirements of this Paragraph." The fact that a psychiatrist has found an individual to be restored does not change the fact the individual has been declared incompetent or involuntarily committed. The prohibition on those are the requirements in this Item.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: PRIVATE PROTECTIVE SERVICES BOARD

RULE CITATION: 12 NCAC 07D .1501

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

G.S. 93B-9 prohibits occupational licensing boards from requiring individuals to be more than 18 years of age as a requirement for receiving a license with certain inapplicable exceptions. There is no authority cited for the provision in (a)(6) that an applicant be at least 21.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL



**§ 93B-9. Age requirements.**

Except certifications issued by the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission pursuant to Chapters 17C, 17E, 74E, and 74G of the General Statutes, no occupational licensing board may require that an individual be more than 18 years of age as a requirement for receiving a license with the following exceptions: the North Carolina Criminal Justice Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission may establish a higher age as a requirement for holding certification through either Commission. (1973, c. 1356; 2010-97, s. 8; 2010-122, s. 27.)

## **RRC STAFF OPINION**

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AGENCY: PRIVATE PROTECTIVE SERVICES BOARD

RULE CITATION: 12 NCAC 07D .1503

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☒ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

Assuming the reference in this rule to Rule .1407 should mean .1403, this rule is unclear because Rule .1403 is unclear. If .1407 is the current reference then it would appear that this rule is not necessary because it is adequately covered in .1507.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION

RULE CITATION: 12 NCAC 10B .2004

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

In (1)(d)(i), it is not clear what is meant by "possessing a law degree under [one of the Commissions]."

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION

RULE CITATION: 12 NCAC 10B .2102

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

In (1), it is not clear what is meant by "possessing a law degree under [one of the Commissions]."

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

## **RRC STAFF OPINION**

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 01C .0201

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority cited for the requirement that a contractor with a ["valid"] claim against the Department of Transportation (DOT) for any amount he claims is due to "exhaust whatever informal negotiation steps the Chief Engineer has established" before resorting to any other options allowed him by law. [I have asked the agency to delete or define "valid." It seems to me that whether the claim is "valid" is precisely the question to be answered about the claim. I do not believe there would be a serious issue about that technical change request.]*

*There are two problems with this provision:*

*The first is that there is no authority cited to require a claimant to "exhaust ... informal negotiations" before undertaking either of the two statutory options.*

*The first authority cited, G.S. 136-29, provides:*

### **§ 136-29. Adjustment and resolution of Department of Transportation contract claim.**

(a) A contractor who has completed a contract with the Department of Transportation let in accordance with Article 2 of this Chapter and who has not received the amount he claims is due under the contract may submit a verified written claim to the Secretary of Transportation for the amount the contractor claims is due. The claim shall be submitted within 60 days after the

contractor receives his final statement from the Department and shall state the factual basis for the claim.

The Secretary or the Secretary's designee shall investigate a submitted claim within 90 days of receiving the claim or within any longer time period agreed to by the Secretary or the Secretary's designee and the contractor. The contractor may appear before the Secretary or the Secretary's designee, either in person or through counsel, to present facts and arguments in support of the claim. The Secretary or the Secretary's designee may allow, deny, or compromise the claim, in whole or in part. The Secretary or the Secretary's designee shall give the contractor a written statement of the decision on the contractor's claim.

(b) A contractor who is dissatisfied with the Secretary or the Secretary's designee's decision on the contractor's claim may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the written statement of the decision.

(c) As to any portion of a claim that is denied by the Secretary or the Secretary's designee, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, within six months of receipt of the final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

(d) The provisions of this section shall be part of every contract let in accordance with Article 2 of this Chapter between the Department of Transportation and a contractor. A provision in a contract that conflicts with this section is invalid. (1939, c. 318; 1947, c. 530; 1957, c. 65, s. 11; 1963, c. 667; 1965, c. 55, s. 11; 1967, c. 873; 1973, c. 507, ss. 5, 17, 18; 1977, c. 464, s. 7.1; 1983, c. 761, s. 191; 1987, c. 847, s. 3; 2009-266, s. 16.)

*This is a statute that is designed to specifically address handling claims for money owed by the DOT to a claimant. In (a) and (b) it allows him – and one could argue after reading (b) and (c) that it requires him – to file a claim with the secretary of the DOT before pursuing either a contested case hearing in the Office of Administrative Hearings under (b) or an action in Superior Court as set out in (c). There is nothing in that statute that requires the claimant to engage in informal negotiations. It even adds in (d) that these provisions “shall be a part of every contract” the department lets and that any “provision in a contract that conflicts with this section is invalid.” If the department cannot put such a provision requiring “informal negotiation” before engaging in other legal pursuits in a contract, it certainly has no authority to put it in a rule.*

*There is a provision in the APA, G.S. 150B-22, addressing informal negotiations that the agency also cites as rulemaking authority:*

### Article 3.

#### Administrative Hearings.

#### **§ 150B-22. Settlement; contested case.**

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986), c. 1022, s. 1(11); 1991, c. 418, s. 16.)

*The above statute does not require a person to engage in any sort of informal proceedings. Nor does it allow an agency to require that. It is also important to note that this is a general statute addressing all state agencies and the policies and procedures that "should" be followed before a citizen is forced to engage in a contested case hearing. The first statute cited above is specifically addressed to the DOT and the settlement of claims against that agency.*

*There is another problem with this rule. Even if there were authority for the agency to require a claimant to engage in these "informal negotiations," there is no authority for the chief engineer to establish "whatever ... steps" he wanted someone to engage in, apparently whenever he wanted to, without going through rulemaking.*

*The other two statutes cited as authority for this rule do not seem as relevant to this particular issue. However they are set out for your easier reference:*

**§ 143B-10. Powers and duties of heads of principal departments.**

(a) Assignment of Functions. – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b) Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c) Department Staffs. – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d) Appointment of Committees or Councils. – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or

councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(e) Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f) Custody of Records. – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132-1.

(g) Budget Preparation. – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h) Plans and Reports. – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i) Reports to Governor; Public Hearings. – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j) Departmental Rules and Policies. – The head of each principal State department and the Director of the Office of State Personnel may adopt:

- (1) Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132-1, which pertain to department business;
- (2) Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;
- (3) Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006-203, s. 101.)

#### **§ 150B-1. Policy and scope.**

(a) Purpose. – This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making,



investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. – This Chapter confers procedural rights.

(c) Full Exemptions. – This Chapter applies to every agency except:

...

(d) Exemptions from Rule Making. – Article 2A of this Chapter does not apply to the following:

...

(e) Exemptions From Contested Case Provisions. – The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

...

(8) The Department of Transportation, except as provided in G.S. 136-29.

...

(f) Exemption for the University of North Carolina. – Except as provided in G.S. 143-135.3, no Article in this Chapter except Article 4 applies to The University of North Carolina.

(g) Exemption for the State Board of Community Colleges. – Except as provided in G.S. 143-135.3, no Article in this Chapter except Article 4 applies to the State Board of Community Colleges.

## **RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02A .0102

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority cited for the secretary of the DOT to delegate his rulemaking authority to the chief engineer, as found in item (22). The agency has rulemaking authority only because the legislature delegated that authority to the agency. Absent a specific authorization from the legislature to sub-delegate that authority, the agency cannot give it to anyone else.*

*Even though G.S. 143B-10(a) appears to be a broad grant of authority for an agency head to delegate a "function of the department" it was never intended to allow an agency head to pass down to any employee of the department the ability to make rules affecting everybody in the state. For this to occur there must be a quite specific delegation from the General Assembly.*

*In addition the last sentence of G.S. 143B-10(j) is a specific limitation on the delegation authority of a department head. It provides that "[t]his subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein." Another way of reading that is an agency cannot "make ... rules concerning ... policies and procedures" including delegating the agency's rulemaking policies and procedures without specific authority.*

**§ 143B-10. POWERS AND DUTIES OF HEADS OF PRINCIPAL DEPARTMENTS.**

(a) **Assignment of Functions.** – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b) **Reorganization by Department Heads.** – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c) **Department Staffs.** – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d) **Appointment of Committees or Councils.** – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(e) **Departmental Management Functions.** – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that

principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f) **Custody of Records.** – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132-1.

(g) **Budget Preparation.** – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h) **Plans and Reports.** – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i) **Reports to Governor; Public Hearings.** – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j) **Departmental Rules and Policies.** – The head of each principal State department and the Director of the Office of State Personnel may adopt:

(1) Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132-1, which pertain to department business;

(2) Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;

(3) Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006-203, s. 101.)

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02B .0164

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority for the provision in (e), page 3 lines 6 and 7, where the Manager of the Right of Way Branch determines the number of pre-qualified firms outside of rulemaking without setting the standards for the determination.*

## **RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02B .0165

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

X Unclear or ambiguous

X Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There is no authority for the provision in (s), page 5 lines 23 – 25, to require a claimant who believes he is entitled to additional time or compensation to notify the Department within 30 days of the "final payment." G.S. 136-29(a) gives a claimant 60 days to make such a claim.*

*It also fails to note that a claimant has a right to take its case into Wake County Superior Court if he so chooses. Paragraph (c) of that same statute gives him that right.*

*Finally the last sentence of paragraph (s) in the rule is a legal conclusion and as a legal conclusion is unnecessary. It also seems to contradict G.S. 136-29(c) which would make it lacking in authority. That statute gives a contractor the right to file a civil case in court without going through any other administrative remedies. And whether "[e]xhaustion of the administrative procedure described ... shall be a prerequisite to the firm's right of review" is a question of law for some legal tribunal to provide. Therefore it is unnecessary. If the agency is attempting to write the law that it desired to prevail – go through administrative procedures before going to any contested case or other remedy, - then that is outside their rulemaking authority.*

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02D .0414

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There are several places in this rule where the department is requiring things to be done based on standards "required by the District Engineer" or similar language. There is no authority cited to set these standards outside rulemaking.*

*The locations in this rule where these provisions are found are:*

*(4)(b), lines 17 and 18*

*(5), lines 21 and 22*

*(7), lines 26 and 27*

## **RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0702

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (b), lines 13 and 14, it is unclear what constitutes "a large portion of the work required."*

*Normally counsel would recommend a technical change and ask the agency to "delete or define 'large' or 'a large portion of' in this sentence. However because of the possibility that this might result in a major change in the rule not previously expected by the agency or public, counsel is recommending an objection.*

*On the other hand if the agency has a simple solution that is in line with their current practices and the expectations in this matter of the regulated public, then the RRC may be willing or desirous to accept any change as a technical change.*