

NORTH CAROLINA REGISTER

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JANUARY 16, 2007

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contact: Karen Cochrane-Brown, Staff Attorney karenc@ncleg.net
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NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603

contact: Jim Blackburn or Rebecca Troutman jim.blackburn@ncacc.org
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NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603

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NORTH CAROLINA REGISTER
 Publication Schedule for January 2007 – December 2007

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270 th day from publication in the Register
21:13	01/02/07	12/07/06	01/17/07	03/05/07	03/20/07	05/01/07	05/08	09/29/07
21:14	01/16/07	12/20/06	01/31/07	03/19/07	03/20/07	05/01/07	05/08	10/13/07
21:15	02/01/07	01/10/07	02/16/07	04/02/07	04/20/07	06/01/07	05/08	10/29/07
21:16	02/15/07	01/25/07	03/02/07	04/16/07	04/20/07	06/01/07	05/08	11/12/07
21:17	03/01/07	02/08/07	03/16/07	04/30/07	05/21/07	07/01/07	05/08	11/26/07
21:18	03/15/07	02/22/07	03/30/07	05/14/07	05/21/07	07/01/07	05/08	12/10/07
21:19	04/02/07	03/12/07	04/17/07	06/01/07	06/20/07	08/01/07	05/08	12/28/07
21:20	04/16/07	03/23/07	05/01/07	06/15/07	06/20/07	08/01/07	05/08	01/11/08
21:21	05/01/07	04/10/07	05/16/07	07/02/07	07/20/07	09/01/07	05/08	01/26/08
21:22	05/15/07	04/24/07	05/30/07	07/16/07	07/20/07	09/01/07	05/08	02/09/08
21:23	06/01/07	05/10/07	06/16/07	07/31/07	08/20/07	10/01/07	05/08	02/26/08
21:24	06/15/07	05/24/07	06/30/07	08/14/07	08/20/07	10/01/07	05/08	03/11/08
22:01	0702/07	06/11/07	07/17/07	08/31/07	09/20/07	11/01/07	05/08	03/28/08
22:02	07/16/07	06/22/07	07/31/07	09/14/07	09/20/07	11/01/07	05/08	04/11/08
22:03	08/01/07	07/11/07	08/16/07	10/01/07	10/22/07	12/01/07	05/08	04/27/08
22:04	08/15/07	07/25/07	08/30/07	10/15/07	10/22/07	12/01/07	05/08	05/11/08
22:05	09/04/07	08/13/07	09/19/07	11/05/07	11/20/07	01/01/08	05/08	05/31/08
22:06	09/17/07	08/24/07	10/02/07	11/16/07	11/20/07	01/01/08	05/08	06/13/08
22:07	10/01/07	09/10/07	10/16/07	11/30/07	12/20/07	02/01/08	05/08	06/27/08
22:08	10/15/07	09/24/07	10/30/07	12/14/07	12/20/07	02/01/08	05/08	07/11/08
22:09	11/01/07	10/11/07	11/16/07	12/31/07	01/21/08	03/01/08	05/08	07/28/08
22:10	11/15/07	10/25/07	11/30/07	01/14/08	01/21/08	03/01/08	05/08	08/11/08
22:11	12/03/07	11/08/07	12/18/07	02/01/08	02/20/08	04/01/08	05/08	08/29/08
22:12	12/17/07	11/26/07	01/01/08	02/15/08	02/20/08	04/01/08	05/08	09/12/08

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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

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

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt the rules cited as 01 NCAC 43A .0101 -.0102, .0301 -.0320 and repeal the rules cited as 01 NCAC 05C .0101 - .0102, .0201 - .0215, .0217 -.0223, .0301, .0305.

Proposed Effective Date: May 1, 2007

Public Hearing:

Date: February 21, 2007

Time: 10:00 a.m.

Location: N.C. Department of Administration, Administration Building, 5th Floor, Commission Conference Room 5034, 116 West Jones Street, Raleigh, North Carolina 27603.

Reason for Proposed Action:

The Secretary is moving the State Surplus Property Agency rules from 01 NCAC 05C to 01 NCAC 43A. The Secretary of Administration is updating the State Surplus Property Agency rules to reflect changes in technology and procedures.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to Mickey Sauls, Director, North Carolina Department of Administration, State Surplus Property Office. Objections may be received by mail, delivery service, hand delivery, or facsimile transmission. Objections may be directed to Mickey Sauls, Director, 1310 Mail Service Center, Raleigh, NC 27699-1310. Fax: (919) 854-2275.

Comments may be submitted to: Mickey Sauls, Director, N.C. Department of Administration, State Surplus Property Office, 1310 Mail Service Center, Raleigh, NC 27699-1310, phone (919) 854-2163, fax (919) 854-2275, email Mickey.Sauls@ncmail.net

Comment period ends: March 19, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive

those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

CHAPTER 05 - PURCHASE AND CONTRACT

SUBCHAPTER 05C - SURPLUS PROPERTY

SECTION .0100 - GENERAL PROVISIONS

01 NCAC 05C .0101 RESPONSIBILITY

~~The Department of Administration is responsible for administering the sale and disposal of surplus within state government. The administration of this program has been delegated by the Secretary to the SPO.~~

Authority G.S. 143-49; 143-64.1 to 143-64.5.

01 NCAC 05C .0102 ORGANIZATION

~~There are two agencies within the Division of Purchase and Contract which administer the state's surplus property program. The state agency for state surplus property is responsible only for state government surplus property. The state agency for federal surplus property is responsible for disposal of federal surplus property.~~

Authority G.S. 143-49; 143-64.1 to 143-64.5.

SECTION .0200 - STATE SURPLUS PROPERTY

01 NCAC 05C .0201 TRANSFER OR SALE

~~The State Surplus Property Office shall determine the means for disposal or transfer of all State-owned property.~~

Authority G.S. 143-49.

01 NCAC 05C .0202 NOTIFICATION OF SURPLUS

~~State agencies shall notify the State Surplus Property Office of the Division of Purchase and Contract of any personal property which is surplus to their needs by completing the equipment disposal form. In doing so, agencies may suggest a minimum dollar value which they desire to receive from any disposition made, but the suggestion shall not govern.~~

Authority G.S. 143-49.

01 NCAC 05C .0203 TRADE-IN

~~Under some conditions for some types of items it may be more advantageous to the state to seek to trade in used property against the purchase of a replacement. Before an agency makes any final decision to trade in an item, the State Surplus Property Office shall be contacted for guidance.~~

~~Where an agency solicits competition for the purchase of a new item and it appears that a trade in may be advantageous, the solicitation shall contain a provision requesting that a trade in allowance be offered and prior approval by the State Surplus Property Office is required.~~

Authority G.S. 143-49.

01 NCAC 05C .0204 ORDER OF PRIORITY IN DISPOSITION

~~In the disposition of state surplus property, the State Surplus Property Office gives first priority to transfer to other agencies of the state. Second priority is given to transfer to political subdivisions and qualified non profit organizations within the state. Property thus transferred must be for the use of the recipient agency, political subdivision or qualified non profit organization with title being in such agency, unit or organization. In making transfers over seventy five dollars (\$75.00), the price shall be one mutually agreeable to the owning agency and the recipient and approved by the State Surplus Property Office as being a fair market price based where possible on previous sales of similar products in the open market. State surplus property transferred to any political subdivision or non profit organization must be retained by the unit or organization not less than 12 months before disposal, unless the property becomes unusable for the purpose intended.~~

Authority G.S. 143-49.

01 NCAC 05C .0205 PUBLIC SALE

~~When not transferred, state surplus property is generally offered for public sale, usually by sealed competitive bids, with public advertisement of the sale at least seven days in advance of the opening of the bids.~~

Authority G.S. 143-49.

01 NCAC 05C .0206 FIRST-COME: FIRST-SERVED

~~State surplus property sold to the general public is, as in transfers to state agencies, political subdivisions or non profit organizations, available on a first come, first served basis.~~

Authority G.S. 143-49.

01 NCAC 05C .0207 REQUEST FOR BIDS ON STATE SURPLUS PROPERTY

~~A free copy of the bid invitation listing state surplus property to be sold by sealed bidding is available both at the Administration Building in downtown Raleigh and at the State Surplus Property warehouse, Raleigh, North Carolina. Annual subscriptions to the bid invitation are available through State Surplus Property~~

~~Agency at a price based on the recovery of postage and handling and a portion of the printing costs.~~

Authority G.S. 143-49.

01 NCAC 05C .0208 DISPOSAL BY OTHER MEANS

~~Where state surplus property can be sold more advantageously by means other than sealed competitive bidding, either because of the nature of the property or the existence of unusual circumstances, the State Surplus Property Office may utilize whatever means are considered in the state's interest.~~

Authority G.S. 143-49.

01 NCAC 05C .0209 REJECTION OF BIDS

~~Under the sealed bid procedure, any and all bids may be rejected. If the prices received are acceptable to the division, award is made to the state's best advantage. If bids are deemed not satisfactory, they may be rejected in whole or in part and the property either readvertised or sale negotiated without recourse to further bidding.~~

Authority G.S. 143-49.

01 NCAC 05C .0210 RECEIPT OF BIDS

~~It is the bidder's responsibility to have his bid in the Office of State Surplus Property by the specified time and date of bid opening. The sale bid number should be clearly shown on the face of the mailing envelope.~~

Authority G.S. 143-49.

01 NCAC 05C .0211 EXECUTION OF BIDS

~~The executor of a bid must sign his bid in pen or pencil in the space provided on the bid form and also print his name below the signature. Additionally, the executor must complete in the space provided, in pen, pencil, stamp, or gummed sticker, his full name or company name, social security no. or federal identification no., address, city, state, zip and phone number.~~

Authority G.S. 143-49.

01 NCAC 05C .0212 TELEFAX PROPOSALS (BIDS)

~~Telephone facsimile machine (FAX) proposals may be considered if received prior to the published time and date of the bid opening. Any proposal which is faxed to the Office of State Surplus Property must include both the front and back of the State Surplus Property proposal form with the proposer's signature on the second or back page of the proposal form. The proposer acknowledges an intent to contract by submission of his bid by fax and waives the right to raise any defenses to contract related to his electronic submission of the fax proposal. Any bid which is faxed must be received by no later than 1:00 p.m. Eastern Standard Time on the published bid opening date.~~

Authority G.S. 143-49.

01 NCAC 05C .0213 INSPECTION OF PROPERTY

~~Bidders are invited and urged to inspect property prior to submitting bids. Reasonable opportunity will be afforded for inspection up to the time for opening bids, but no labor will be furnished for such purpose. The purchaser is to assume all liability for the property after award is made. The state will exercise its usual care for protection up to the time for removal but will not be responsible for any loss or damage.~~

Authority G.S. 143-49.

01 NCAC 05C .0214 STATE DOES NOT GUARANTEE

~~The description of the property offered for sale is compiled from available information. All property is sold "as is" and "where is." In addition, the property offered for sale or a portion thereof is subject to withdrawal prior to the bid date. A refund or an adjustment will not be made on account of property not meeting expectations nor will the bidders' failure to inspect prior to the sale be grounds for claim. Any cost of weighing, packaging, crating, loading or hauling property is assumed by the bidder unless otherwise provided.~~

Authority G.S. 143-49.

01 NCAC 05C .0215 DEPOSITS

~~No deposit is required unless specifically requested. If deposit is requested, bids must be accompanied by cashier's or certified check or postal money order for at least 25 percent of the amount. If a bidder receives an award, the amount enclosed with his bid will be retained as a guaranty for the faithful performance of all the terms and conditions of the contract; otherwise, the deposit will be returned.~~

Authority G.S. 143-49.

01 NCAC 05C .0217 FAILURE TO PAY

~~If the purchaser fails to pay in full for the property within 15 calendar days from the date of award, the property purchased shall be promptly resold in such manner as the state may elect, and the defaulting purchaser charged with loss to the state, if any, together with all expense of the sale. If the purchaser does not remove the property purchased within 15 calendar days from the date of award, the State Surplus Property Office may retain the purchase price and resell the property a second time and retain all proceeds therefrom.~~

Authority G.S. 143-49.

01 NCAC 05C .0218 BOND

~~The State Surplus Property Office may require any bidder presently or previously in default to post a bond prior to bidding or prior to consideration of his bid.~~

Authority G.S. 143-49.

01 NCAC 05C .0219 DEMOLITION OF STATE BUILDINGS

~~The state surplus property agency handles bids and awards of contracts for the demolition of state buildings including those of~~

~~universities, hospitals and other state agencies. Requests for bid forms are sent to interested, responsible contractors and are further available upon request. Property contractor's insurance coverages are required for this work, and performance bonds may also be called for.~~

Authority G.S. 143-49.

01 NCAC 05C .0220 TIMBER SALES AND PINESTRAW SALES

~~(a) Timber and pinestraw owned by state agencies are disposed of by the state surplus property agency on a sealed competitive bid basis. A request for bid form shall be sent to any interested party upon request.~~

~~(b) Timber and pinestraw are sold on a lump sum basis with payment to be made in full at the time of execution of a contract; and a high bidder may, in the discretion of the State Surplus Property Office, be required to post bond prior to award.~~

Authority G.S. 143-49.

01 NCAC 05C .0221 SURPLUS WEAPONS

~~Surplus weapons possessed by the North Carolina State Highway Patrol, the North Carolina Department of Correction, and the North Carolina State Bureau of Investigation may be sold through the State Surplus Property Office upon notification in writing to the State Surplus Property Office that such weapons are surplus. The request should list each weapon by description and serial number and should state the times and locations at which the weapons will be available for inspection.~~

~~The State Surplus Property Office shall make available to federally licensed firearms dealers a list of weapons to be sold and a statement of the times and locations at which they may be inspected. Sales shall be made by sealed competitive bids in accordance with the normal procedures of the State Surplus Property Office. Upon notification by the State Surplus Property Office that payment has been received in full, the selling agency shall release the weapons to the successful bidder; provided, however, that no weapons shall be released to any person without the production of satisfactory proof of identification and a valid federal firearms license.~~

Authority G.S. 143-63.1(d).

01 NCAC 05C .0222 PAYMENT

~~All payments must be in the form of cashier's or certified check or postal money order. Payment in full for all property purchased must be made within 15 calendar days from date of award, and all property purchased must be removed within 15 calendar days from date of award. No property may be removed by the purchaser prior to full payment of the purchase price. The terms bid opening date and date of award shall be the same date.~~

Authority G.S. 143-49.

01 NCAC 05C .0223 SURPLUS PAPER

~~All state agencies processing recyclable paper through the Division of State Surplus Property for disposition as surplus paper must remove the following contaminant materials: plastic~~

~~materials (i.e. plastic folders, notebooks), metals (excluding paper clips and staples), photographs, microfiche, microfilm, tape, glue-based labels, and window or sticky-backed envelopes.~~

~~Authority G.S. 130A-309.14; 143-64.04.~~

SECTION .0300 - STATE SURPLUS PROPERTY FORMS

01 NCAC 05C .0301 REQUEST FOR BIDS ON SALE OF SURPLUS STATE PROPERTY

~~Form DA AS SP/3 is for use in soliciting sealed bids and proposals. The terms and conditions of sale are contained on Form DA AS SP/3 as well as instructions.~~

~~Authority G.S. 150B-11.~~

01 NCAC 05C .0305 INVOICE: STATE SURPLUS PROPERTY

~~Form PC 28, Invoice State Surplus Property, is for use in the sale of state surplus property to other state agencies.~~

~~Authority G.S. 150B-11.~~

CHAPTER 43 – STATE SURPLUS PROPERTY

SUBCHAPTER 43A – STATE SURPLUS PROPERTY AGENCY

SECTION .0100 – GENERAL PROVISIONS

01 NCAC 43A .0101 SCOPE

This Subchapter shall apply to entities engaging in the sale, purchase, or transfer of surplus property through the State Surplus Property Agency.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0102 DEFINITIONS

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

- (1) "Employee" includes full-time exempt and non-exempt, part-time, temporary, and permanent employees of a state agency as defined in G.S. 143-64.02.
- (2) "Fair Market Price" means the agreed price, that price on which the seller, the State Surplus Property Agency and the buyer agree.
- (3) "Immediate Family" includes spouse or children/stepchildren under the age of 18.
- (4) "State-Owned" means in the possession of the State of North Carolina, and purchased with State funds.
- (5) "Surplus Property" means property no longer needed by a State institution.
- (6) "Qualifying Tax Exempt Non Profit" is defined in G.S. 143-64.02.

Authority G.S. 143-64.01; 143-64.04.

SECTION .0200 – RESERVED FOR FUTURE CODIFICATION

SECTION .0300 - DISPOSAL OF SURPLUS PROPERTY

01 NCAC 43A .0301 TRANSFER OR SALE

The State Surplus Property Agency shall determine the method of transfer, sale, or disposal of all State owned property.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0302 NOTIFICATION OF SURPLUS

State agencies shall notify the State Surplus Property Agency of the Division of Surplus Property of any personal property which is surplus to their needs by entering the necessary information into the electronic State Surplus Property Disposal System. In doing so, agencies may suggest a minimum dollar value which they desire to receive from any disposition made, but the suggestion shall not govern.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0303 TRADE-IN

Agencies desiring to trade-in property for new or replacement property must gain State Surplus Property Agency approval prior to said trade-in. Where an agency solicits competition for the purchase of a new item and it appears that a trade-in may be advantageous, the solicitation shall contain a provision requesting that a trade-in allowance be offered and the agency's Purchasing Officer shall seek approval from the State Surplus Property Agency prior to the issuance of a purchase order. It is the responsibility of the agency to document the advantages to the State of a proposed trade-in. However, the State Surplus Property Agency shall be the final authority when concluding advantages to the State. Advantages other than for cost-effectiveness and ease of disposal shall be considered exceptions, and shall be clearly documented, and approved by the agency head prior to submission to the State Surplus Property Agency for final determination.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0304 ORDER OF PRIORITY IN DISPOSITION

(a) In the disposition of state surplus property, the State Surplus Property Agency gives first priority to sale to other agencies of the state. Second priority is given to sale to political subdivisions and qualified non-profit organizations within the state. Property thus sold must be for the use of the recipient agency, political subdivision or qualified non-profit organization with title being in such agency, unit or organization.

(b) In making transfers over one hundred fifty dollars (\$150.00) the price shall be set by the owning agency in consultation with the State Surplus Property Agency. The price shall be based upon previous sales of similar products on the open market, and mutually agreeable to the recipient agency. All transfers of property from or to a receipt-supported agency shall include an exchange of funds. All final dispositions must be approved by the State Surplus Property Agency.

(c) State surplus property transferred to any political subdivision or non-profit organization must be retained by the unit or organization not less than 12 months before disposal. Should the property become unusable for the purpose intended within 12 months from date of transfer, the State Surplus Property Agency reserves the right to recapture the property and dispose of said property under normal disposal guidelines. In all cases, the State Surplus Property Agency must approve disposal of transferred property held less than 12 months.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0305 DISPOSAL BY EXECUTIVE ORDER

Notwithstanding 01 NCAC 43A .0304, the Governor, through Executive Order, may direct the disposal of surplus State property by transfer or donation to any North Carolina State agency or political subdivision or to the State Government of any other State within the United States, in response to a declared Federal or North Carolina State Disaster.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0306 BIDDING AND PURCHASES PROHIBITED BY EMPLOYEES AND IMMEDIATE FAMILY MEMBERS

To avoid conflicts of interest, bidding on or purchase of state surplus property is prohibited by State Surplus Property Agency employees and their immediate family members. All State employees charged with custody of state property for a state agency, and their immediate family members, are prohibited from bidding on or purchasing the surplus property of the employing state agency.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0307 PUBLIC SALE

When not transferred or sold, state surplus property will be offered for public sale. Public sale of weapons is limited to licensed firearms dealers. Public sale is through sealed competitive bids, competitive bids, electronic bids, auction, and other methods.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0308 FIRST-COME FIRST-SERVED

State surplus property is available on a first-come, first-served basis. This applies to retail sales to the general public as well as transfers to state agencies, political subdivisions or qualifying non-profit organizations.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0309 REJECTION OF BIDS

Any and all bids may be rejected. Bids may be rejected in whole or in part if:

- (1) The bidder has failed to pay for or pick up surplus property awarded;

- (2) The bid is submitted by an ineligible bidder pursuant to Rule .0315 of this Section;
- (3) The bid does not fully comply with the terms and conditions of the request/solicitation for bid;
- (4) The bid is not legible or lacks completeness;
- (5) The bid does not comply with the bid policies of State Surplus Property Agency.
- (6) Bid rejection is recommended by the State Capitol Police, State Bureau of Investigation, Federal Bureau of Investigation, or other Homeland Security entity. In such cases, the security entity must provide a written statement requesting rejection and that the recommendation is based on homeland security concerns. In the event of receipt of a security based bid rejection recommendation, the State Surplus Property Agency will take most conservative position and reject the bid without further supporting documentation.

If a bid is rejected in whole or part, the subject property will be re-advertised, sold at the highest bidder's amount, the next higher bid accepted, or sale negotiated, at the sole discretion of the State Surplus Property Officer, without recourse to further bidding.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0310 RECEIPT OF BIDS

It is the responsibility of the bidder to have the bid properly received in the State Surplus Property Agency by the specified time and date of bid opening.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0311 INSPECTION OF PROPERTY

Bidders are urged to inspect property prior to submitting bids. All property is sold "as is" and "where is." Any property descriptions provided by the State are solely as an aid to identification. Verbal communications by custodians of property cannot be deemed reliable, and will not be considered by the State Surplus Property Agency. Reasonable opportunity will be afforded for inspection up to the time for opening bids, but no labor will be furnished for such purpose. The purchaser assumes all liability for the property after award is made.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0312 STATE DOES NOT GUARANTEE

The description of the property offered for sale is compiled from available information. All property is sold "as is" and "where is." In addition, all property offered for sale or a portion thereof is subject to withdrawal prior to the bid opening date. A refund or an adjustment will not be made on account of property not meeting expectations, a bidder's failure to inspect prior to sale, or change of condition of property from the time of award to the time of pickup. Any cost of weighing, packaging, crating,

loading or hauling property is assumed by the bidder unless otherwise provided.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0313 REFUNDS

Refunds or adjustments due to change in condition from time of inspection until time of award are limited to the change in value as determined by the State Surplus Property Officer. In such cases, the State Surplus Property Officer reserves the right to remove the property from bid, or reverse the award and re-bid the property.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0314 EXTENSION TO PAY OR REMOVE PROPERTY

Extensions to pay or remove property may be granted under the following conditions:

- (1) The purchaser's inability to pay or remove property was due to the actions or inactions of the State Surplus Property Agency or the custodian of the property, and
- (2) In the case of removal of property, the State Surplus Property Officer determines that space is available.

The purchaser waives all rights to recourse for change in the condition of the property as a condition of the extension.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0315 FAILURE TO PAY OR REMOVE PROPERTY

(a) If the successful bidder fails to pay in full for the property by the time and date indicated on the notice of award, the award shall be rescinded, the property resold, and the defaulting bidder shall be charged with loss to the State, if any, together with all expenses of the sale.

(b) If the successful bidder does not remove the property purchased by the time and date indicated on the notice of award, the State Surplus Property Agency will retain the purchase price and resell the property a second time and retain all proceeds there from.

(c) Successful bidders who fail to pay shall be ineligible for award of future bids.

Authority G.S. 143-64.01; 143-64.04; 143-64.05.

01 NCAC 43A .0316 BOND

(a) Performance bonds may be required for purchase of commodities, if requested, by the selling agency or the State Surplus Property Agency.

(b) The selling agency or the State Surplus Property Agency shall set the amount and terms of the bond.

(c) Selling agencies shall document the need for performance bonds.

(d) Selling agencies shall request a bond release from the State Surplus Property Agency once the requirements of the bond have been met by the successful bidder.

(e) Selling agencies shall submit a justification to the State Surplus Property Agency for any retention in whole or in part of the performance bond.

(f) The State Surplus Property Agency is the final authority on releasing the performance bond.

Authority G.S. 143-64.01; 143-64.04; 143-64.05.

01 NCAC 43A .0317 DEMOLITION OF STATE BUILDINGS

(a) The State Surplus Property Agency handles bids and awards of contracts for the demolition of state buildings including those of universities, hospitals, and other state agencies.

(b) Requests for bid forms are sent to interested, responsible contractors and are further available upon request.

(c) The owning agency shall submit the requirements for permits, insurances, performance bonds and any other applicable requirements from local, state or federal authorities regarding the demolition of a state building to the State Surplus Property Agency.

(d) The successful bidder is responsible for obtaining all necessary permits, insurances, licenses, performance bonds and other requirements to complete the demolition.

Authority G.S. 143-64.01; 143-64.04; 143-64.05.

01 NCAC 43A .0318 TIMBER SALES, PINESTRAW, AND FOREST COMMODITIES SALES

Timber, pine straw, and other forest commodities owned by state agencies are disposed of by the State Surplus Property Agency on a competitive bid basis. A request for bid form shall be sent to any interested party upon request as well as to entities on a list maintained by the State Surplus Property Office compiled from individuals who have previously expressed an interest in similar sales.

Authority G.S. 143-64.01; 143-64.04.

01 NCAC 43A .0319 SURPLUS WEAPONS AND FIREARMS

(a) Subject to G.S. 20-187.2, Surplus weapons and firearms possessed by the North Carolina State Highway Patrol, North Carolina Department of Correction, North Carolina State Bureau of Investigation, State Capitol Police, and other non-military armed state security agencies shall be sold through the State Surplus Property Agency upon notification in writing to the State Surplus Property Agency that such weapons or firearms are surplus.

(b) The notification shall list each weapon by description and serial number.

(c) Weapons and firearms are subject to transfer between non-military armed state security agencies.

(d) The selling agency is responsible for notifying the State Surplus Property Agency of any federal or state restrictions on sale of non-firearm weapons.

(e) The State Surplus Property Agency, if requested, shall make available to federally licensed firearms dealers a list of firearms to be sold and a statement of the times and locations at which they may be inspected.

(f) Surplus weapons and firearms sales shall be made by competitive bids.

(g) When payment has been received in full by the State Surplus Property Agency, the State Surplus Property Agency shall authorize the release of the weapons to the successful bidder; provided, however, that no weapons shall be released to any person without the production of satisfactory proof of identification and, in the case of firearms, a valid federal firearms license.

Authority G.S. 143-63.1; 143-64.01; 143-64.04.

01 NCAC 43A .0320 PAYMENT

All payments must be in the form of cash (retail sales only), cashier's or certified check, postal money order, or other methods as approved by the Department of Administration Fiscal Officer. Payment for retail sales items must be at the time of purchase. Payment in full for all other property purchases must be made by the time and date indicated on the notice of award. Extensions to pay or remove property must be in accordance with 01 NCAC 43A. 0314. No property may be removed by the successful bidder prior to full payment of the purchase price. Payments for retail sales can be made at the retail site where the property is located. All other payments must be made directly to the State Surplus Property Agency. Agencies are not authorized to accept payments on behalf of the State Surplus Property Agency. If an agency releases property prior to receiving documentation that payment in full has been made to the State Surplus Property Agency said agency shall assume all liability related to the release.

Authority G.S. 143-64.01; 143-64.04.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Child Care Commission intends to adopt the rule cited as 10A NCAC 09 .0512 and amend the rules cited as 10A NCAC 09 .0604 - .0605, .0805, .1003 and .2510.

Proposed Effective Date: September 1, 2007

Public Hearing:

Date: February 8, 2007

Time: 11 am – 12 pm

Location: NC Division of Child Development, 319 Chapanoke Road, Suite 120, Raleigh, NC

Reason for Proposed Action: *The NC Child Care Commission is initiating rule-making regarding the requirements for the safety of children in child care facilities. Amendments to the rules will ensure the safety and welfare of children who are participating in activities off premises from their child care facility, either by being transported by motor vehicle or by taking a walk. Other changes simply recodify language within the rules for clarity, consistency and ease of reading.*

Procedure by which a person can object to the agency on a proposed rule: *Anyone wishing to comment on this proposed rule or to request copies of the rule should contact Dedra Alston, Rule-making Coordinator, NC Division of Child Development, 2201 Mail Service Center, Raleigh, NC 27699-2201, at 919-662-4543 or Dedra.Alston@ncmail.net. Written comments will be accepted through March 19, 2007. Oral comments may be made during the public hearing. The Commission Chairperson may impose time limits for oral remarks.*

Comments may be submitted to: *Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, phone (919) 662-4543, fax (919) 662-4568, email Dedra.Alston@ncmail.net*

Comment period ends: *March 19, 2007*

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

CHAPTER 09 - CHILD CARE RULES

SECTION .0500 - AGE APPROPRIATE ACTIVITIES FOR CENTERS

10A NCAC 09 .0512 OFF PREMISE ACTIVITIES

(a) Off premise activities refer to any activity which takes place away from licensed space.

(b) When children participate in off premise activities the following shall apply:

- (1) Children under the age of three shall not participate in off premise activities that involve children being transported in a motor vehicle.
- (2) Before children are transported in a motor vehicle for off premise activities, written permission from a parent shall be obtained as specified in Rule .1003(i) of this Chapter.
- (3) Before staff members walk children off premises for play or outings, the parent of each

- child shall give written permission for the child to be included in such activities.
- ~~(4) Parents may provide a written statement giving standing permission which may be valid for up to 12 months for participation in off premise activities that occur on a regular basis.~~
- ~~(5) The center shall maintain documents providing permission for participation for children in off premise activities.~~
- ~~(6) The facility shall post a schedule of off premise activities in each participating classroom where it can be easily viewed by parents, and a copy shall be given to parents. The schedule shall be current and shall include: the location of the activity, purpose of the activity, time the activity will take place, date of the activity, the name of the person(s) to be contacted in the event of an emergency.~~
- ~~(7) Each time that children are taken off the premises, staff shall take a list of the children participating in the activity with them. Staff members shall use this list to check attendance when leaving the facility, periodically when the children are involved in the activity, before leaving the activity to return to the child care facility, and upon return to the facility.~~

(h) Fuel burning heaters, fireplaces and floor furnaces shall be provided with a protective screen attached securely to substantial supports to prevent access by children and to prevent objects from being thrown into them.

(i) Plants that are toxic shall not be in indoor or outdoor space that is used by or is accessible to children.

~~(j) The outdoor play area shall be protected by a fence or other protection. The height shall be a minimum of four feet and the top of the fence shall be free of protrusions by January 1, 1999. The requirement disallowing protrusions on the tops of fences shall not apply to fences six feet high or above. The fencing shall exclude fixed bodies of water such as ditches, quarries, canals, excavations, and fish ponds. Gates to the fenced outdoor play area shall remain securely closed while children occupy the area. When the center uses areas outside the fenced outdoor play area for children's activities or takes children off the premises for play or outings, the parent of each child shall give written permission for the child to be included in such activities. The permission may be:~~

- ~~(1) a one time, blanket permission for all activities;~~
- ~~(2) a one time, blanket permission for a specific activity at any time; or~~
- ~~(3) a one time permission for a specific activity at a designated time. The center shall maintain the signed permission in the child's record. When children are taken off the premises, staff accompanying the children shall have a list of the names of all children participating in the outing. When the center provides transportation for children, the center shall furnish parents the names of all regularly scheduled drivers.~~

~~(k)(j)~~ Air conditioning units shall be located so that they are not accessible to children or shall be fitted with a mesh guard to prevent objects from being thrown into them.

~~(l)(k)~~ Gas tanks shall be located so they are not accessible to the children or shall be in a protective enclosure or surrounded by a protective guard.

~~(m)(l)~~ Cribs and playpens shall be placed so that the children occupying them shall not have access to cords or ropes, such as venetian blind cords.

~~(n) Children shall not be allowed to play on outdoor equipment that is too hot to touch.~~

~~(o)(m)~~ The indoor and outdoor premises shall be checked daily for debris, vandalism and broken equipment. Debris shall be removed and disposed of appropriately.

~~(p) The playground surface area shall be checked at least weekly to assure that surface material is maintained to assure continued resiliency.~~

~~(q) Following completion of safety training by the administrator or other staff person as required by Rule .0705(e) of this Subchapter, a monthly playground inspection shall be conducted and a record of each inspection shall be completed. This staff person shall use a playground inspection checklist provided by the Division. The checklist shall be signed by the person who conducts the inspection and shall be maintained in the center's files for review by a representative of the Division.~~

Authority G.S. 110-85; 110-91(9),(12); 143B-168.3.

SECTION .0600 - SAFETY REQUIREMENTS FOR CHILD CARE CENTERS

10A NCAC 09 .0604 GENERAL SAFETY REQUIREMENTS

- (a) Potentially hazardous items, such as firearms and ammunition, hand and power tools, nails, chemicals, lawn mowers, gasoline or kerosene, archery equipment, propane stoves, whether or not intended for use by children, shall be stored in locked areas or with other appropriate safeguards, or shall be removed from the premises.
- (b) Electrical outlets not in use which are located in space used by the children shall be covered with safety plugs unless located behind furniture or equipment that cannot be moved by a child.
- (c) Electric fans shall be mounted out of the reach of children or shall be fitted with an appropriate mesh guard to prevent access by children.
- (d) All small electrical appliances shall be used only in accordance with the manufacturer's instructions.
- (e) Electrical cords shall not be accessible to infants and toddlers. Extension cords, except as approved by the local fire inspector, shall not be used. Frayed or cracked electrical cords shall be replaced.
- (f) All materials used for starting fires, such as matches and lighters, shall be kept in locked storage or shall be stored out of the reach of children.
- (g) Smoking shall not be permitted in space used by children when children are present. All smoking materials shall be kept in locked storage or out of the reach of children.

~~(n)~~ Plastic bags, toys and toy parts small enough to be swallowed, and materials that can be easily torn apart such as foam rubber and styrofoam, shall not be accessible to children under three years of age, except that styrofoam plates and larger pieces of foam rubber may be used for supervised art activities and styrofoam plates may be used for food service. Latex and rubber balloons shall not be accessible to children under five years of age.

~~(o)~~ When non-mobile children are in care, a crib or other approved device shall be available for evacuation in case of fire or other emergency. The crib or other approved device shall be fitted with wheels in order to be easily moveable, have a reinforced bottom, and shall be able to fit through the designated fire exit. For centers that do not meet institutional building code, and the exit is more than eight inches above grade, the center shall develop a plan to ensure a safe and timely evacuation of the crib or other approved device. This plan shall be demonstrated to a Division representative for review and approval. During the monthly fire drills required by Rule 10A NCAC 09 .0302d(4), .0302(d)(4), the evacuation crib or other approved device shall be used in the manner described in the evacuation plan.

Authority G.S. 110-85; 110-91(3),(6); 143B-168.3.

10A NCAC 09 .0605 CONDITION OF OUTDOOR LEARNING ENVIRONMENT

(a) All equipment shall be in good repair and shall be maintained in useable condition. All commercially manufactured equipment shall be assembled and installed according to procedures specified by the manufacturer.

(b) Equipment shall be sturdy, stable, and free of hazards that are accessible to children during normal supervised play including sharp edges, lead based paint, loose nails, splinters, protrusions (excluding nuts and bolts on sides of fences), pinch and crush points.

(c) All broken equipment shall be removed from the premises immediately or made inaccessible to the children.

(d) Children shall not be allowed to play on outdoor equipment that is too hot to touch.

~~(e)~~ Any openings in equipment, steps, decks and handrails shall be smaller than 3 ½ " or greater than 9" to prevent entrapment.

~~(f)~~ All upright angles shall be greater than 55 degrees to prevent entrapment and entanglement.

(g) The outdoor play area shall be protected by a fence or other protection. The height shall be a minimum of four feet and the top of the fence shall be free of protrusions. The requirement disallowing protrusions on the tops of fences shall not apply to fences six feet high or above. The fencing shall exclude fixed bodies of water such as ditches, quarries, canals, excavations, and fish ponds. Gates to the fenced outdoor play area shall remain securely closed while children occupy the area.

~~(h)~~ All stationary outdoor equipment more than 18 inches high shall be installed over a resilient surface. Footings which anchor equipment shall not be exposed. Loose surfacing material shall not be installed over concrete. Acceptable materials to be used for surfacing include the following: wood mulch, double shredded bark mulch, uniform wood chips, fine sand, coarse sand, and pea gravel. Other materials that have

been certified by the manufacturer to be shock-absorbing resilient material in accordance with the American Society for Testing and Materials (ASTM) Standard 1292, may be used only if installed, maintained and replaced according to the manufacturer's instructions. Pea gravel shall not be used if the area will be used by children under three years of age. The depth of the surfacing that is required shall be based on the critical height of the equipment. The critical height is defined as the maximum height a child may climb, sit or stand.

- (1) Equipment with a critical height of five feet or less shall have six inches of any of the surfacing materials listed.
- (2) Equipment with a critical height of more than five feet but less than seven feet shall have six inches of any of the surfacing materials listed, except for sand.
- (3) Equipment with a critical height of seven feet to 10 feet shall have nine inches of any of the surfacing materials listed, except for sand.
- (4) When sand is used as a surfacing material for equipment with a critical height of more than five feet, 12 inches is required.

~~(i) The resilient surfacing shall extend beyond the external limits of the equipment for a minimum of six feet. The area which is required to have the resilient surfacing is the area under and around the equipment where the child is likely to fall and it is called the fall zone. Fall zones may overlap in three situations: between two swing structures, around spring rockers, or around equipment that is less than 30 inches in height.~~

- (1) For stationary outdoor equipment used by children under two years of age, the resilient surfacing shall extend beyond the external limits of the equipment for a minimum of three feet.
- (2) For stationary outdoor equipment used by children two years of age or older, the resilient surfacing shall extend beyond the external limits of the equipment for a minimum of six feet.

(j) Exceptions to Paragraph (i) of this Rule are as follows:

- (1) Fall zones may overlap in two situations: around spring rockers, and around equipment that is more than 18 but less than 30 inches in height. If there are two adjacent structures and one is more than 18 but less than 30 inches in height, the resilient surfacing shall extend a minimum of nine feet between the two structures.
- (2) Swings shall have resilient surfacing that extends two times the length of the pivot point to the surface below. The surfacing shall be to the front and rear of the swing.
- (3) Tot swings shall have resilient surfacing that extends two times the length of the pivot point to the bottom of the swing seat. The surfacing shall be to the front and rear of the swing. Tot swings are defined as swings with enclosed seats.

(4) Tire swings shall have resilient surfacing that extends a distance of six feet plus the measurement from the pivot point to the swing seat and six feet to the side of the support structure.

~~(h) Swings shall have resilient surfacing that extends two times the length of the pivot point to the surface below. The surfacing shall be to the front and rear of the swing. Enclosed tot swings shall have resilient surfacing that extends two times the length of the pivot point to the bottom of the swing seat. The surfacing shall be to the front and rear of the swing. Tot swings are defined as swings with enclosed seats. Tire swings shall have resilient surfacing that extends a distance of six feet plus the measurement from the pivot point to the swing seat and six feet to the side of the support structure.~~

~~(k) Swing seats shall be made of plastic or soft or flexible material.~~

~~(l) Elevated platforms shall have a guardrail or protective barrier, depending upon the height of the platform and the age of children that will have access to the piece of equipment. All sides of platforms shall be protected except for the area which allows entry or exit. Guardrails shall prevent inadvertent or unintentional falls off the platform. The critical height for a platform with a guardrail is the top of the guardrail. Protective barriers shall prevent children from climbing over or through the barrier. The critical height for a platform with a protective barrier is the platform surface. surface; the critical height for a platform with a guardrail is the top of the guardrail. All sides of platforms shall be protected except for the area which allows entry or exit. Measurements for the guardrails and protective barriers are stated below:~~

(1) Equipment used by preschool and school-age children:

(A) Guardrails - an elevated surface that is more than 20 inches and no more than 30 inches above the underlying surface shall have a guardrail. The minimum height of the top surface of the guardrail shall be at least 38 inches high and the lower edge shall be no more than 23 inches above the platform.

(B) Protective Barriers - an elevated surface that is more than 30 inches above the underlying surface shall have a protective barrier. The minimum height of the top surface of the protective barrier shall be at least 38 inches high.

(2) Equipment used exclusively by preschool children:

(A) Guardrails - an elevated surface that is more than 20 inches and no more than 30 inches above the underlying surface shall have a guardrail. The minimum height of the top surface of the guardrail shall be at least 29 inches high and the lower edge shall

be no more than 23 inches above the platform.

(B) Protective Barriers - an elevated surface that is more than 30 inches above the underlying surface shall have a protective barrier. The minimum height of the top surface of the protective barrier shall be at least 29 inches high.

(3) Equipment used exclusively by school-age children:

(A) Guardrails - an elevated surface that is more than 30 inches and no more than 48 inches above the underlying surface shall have a guardrail. The minimum height of the top surface of the guardrail shall be at least 38 inches high and the lower edge shall be no more than 26 inches above the platform.

(B) Protective Barriers - an elevated surface that is more than 48 inches above the underlying surface shall have a protective barrier. The minimum height of the top surface of the protective barrier shall be at least 38 inches high.

~~(k) All equipment and surfacing ordered, constructed or installed on or after October 1, 1997 shall conform to all the requirements in this Rule. All equipment and surfacing ordered, constructed, or installed prior to October 1, 1997 shall conform to Paragraphs (a) through (e) of this Rule.~~

~~(l) All equipment and surfacing ordered, constructed, or installed prior to October 1, 1997 shall conform with Paragraphs (d) through (j) of this Rule by January 1, 2000.~~

~~(1) Any operator who is unable to comply by this date due to hardship may contact the Division by July 1, 1999 to apply for an extension until January 1, 2001.~~

~~(m) In cases where a large Large composite structure structures that werewas installed after-between January 1, 1989 until-and January 1, 1996 according to manufacturer's instructions and-that met existing safety standards for playground equipment at the time of installation, and received approval from the Division may continue to be used, an operator may contact the Division to apply for approval for continued use of the structure. Approval shall be based upon:~~

~~(A) Documentation submitted that verifies the structure was installed according to manufacturer's instructions; and~~

~~(B) Documentation submitted that verifies the structure met existing safety standards at the time of installation; and~~

~~(C) An inspection from a representative of the Division to determine the structure remains in good repair and in a useable condition.~~

(n) Following completion of safety training by the administrator or other staff person as required by Rule .0705(e) of this Chapter, a monthly playground inspection shall be conducted. A trained administrator or staff person shall make a record of each inspection using a playground inspection checklist provided by the Division. The checklist shall be signed by the person who conducts the inspection and shall be maintained in the center's files for review by a representative of the Division.

Authority G.S. 110-85; 110-91(6); 143B-168.3.

SECTION .0800 - HEALTH STANDARDS FOR CHILDREN

10A NCAC 09 .0805 SANITARY FOOD SERVICE

(a) All food shall be served in a manner to minimize the possibility of contamination. In no instance shall any food be served directly on a table top, countertop, ~~etc.~~ or other surface except on a sanitized high chair tray and must be cleaned and sanitized pursuant to 15A NCAC 18A .2812.

(b) No more than one child shall be fed with the same utensil, drink from the same cup or glass, or be fed from the same individual portion of food.

- (1) Each child shall be served individual portions of food on a plate or in another appropriate container.
- (2) Beverages shall be served to children in individual cups or glasses. Any child who is bottle-fed must be fed from the child's own bottle only.
- (3) Each child shall be fed with an individual spoon or other safe utensil.
- (4) Snack foods may be placed on an individual napkin or paper towel to be served to a child.

Authority G.S. 110-85; 110-91(1); 143B-168.3.

SECTION .1000 - TRANSPORTATION BY MOTOR VEHICLE

10A NCAC 09 .1003 SAFE PROCEDURES

(a) The driver or other adult in the vehicle shall assure that all children are received by a responsible ~~person.~~ adult.

(b) Each center shall establish safe procedures for pick-up and delivery of children. These procedures shall be communicated to parents, and a copy shall be posted in the center where they can easily be seen. Centers licensed for three to 12 children located in a residence are not required to post these procedures.

(c) A first-aid kit shall be located in each vehicle used on a regular basis to transport children. The first-aid kit shall be firmly mounted or otherwise secured if kept in the passenger compartment.

(d) Emergency and identification information about each child must be in the vehicle in which the child is riding whenever children are being transported.

(e) The driver shall ~~be~~ be:

- (1) ~~18-21~~ 18-21 years old; ~~or~~
- (2) a duly licensed ~~school~~ school-bus driver and have a valid driver's license of the type required under

North Carolina Motor Vehicle Law for the vehicle being driven or comparable license from the state in which the driver ~~resides~~ resides; and

(3) no convictions of Driving While Impaired (DWI) or any other impaired driving offense within the ~~last~~ previous three years.

(f) Each person in the vehicle must be seated in the manufacturer's designated areas. No child shall ride in the load carrying area or floor of a vehicle.

(g) Children shall never be left in a vehicle unattended by an adult.

(h) Children shall be loaded and unloaded from curbside, or in a safe, off-street area, out of the flow of traffic, so that they are protected from all traffic hazards.

(i) Before children are transported, written permission from a parent shall be obtained which shall include when and where the child is to be transported, expected time of departure and arrival, and the transportation provider.

(j) A written statement from parents giving standing permission for routine pick-up and delivery of children from home or school may be given for up to 12 months.

(k) The center shall maintain documents providing permission for participation for children in off premise activities.

(l) When children are transported, an adult in each vehicle shall have a working cellular phone with them for use in an emergency.

Authority G.S. 110-85; 110-91; 110-91(13); 143B-168.3.

SECTION .2500 - CARE FOR SCHOOL-AGE CHILDREN

10A NCAC 09 .2510 STAFF QUALIFICATIONS

(a) The individual who is responsible for ensuring the administration of the program, whether on-site or off-site, shall:

- (1) Prior to employment, be at least 21 years old and have at least 400 hours of verifiable experience working with school-aged children in a licensed child care program or 600 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or have an undergraduate, graduate, or associate degree, with at least 12 semester hours in school-age care related coursework; and
- (2) Meet the requirements for a child care administrator in G.S. 110-91(8).

(b) At least one individual who is responsible for planning and ensuring the implementation of daily activities for a school-age program (who may be called a program coordinator) shall:

- (1) Be at least 18 years old and have a high school diploma or its equivalent prior to employment; and
- (2) Have completed two semester credit hours in child and youth development and two semester credit hours in school-age programming. Each individual who does not meet this requirement shall enroll in coursework within six months after becoming employed and shall complete

this coursework within 18 months of enrollment. An individual who meets the staff requirements for administrator or lead teacher shall be considered as meeting the requirements for program coordinator, provided the individual completes Basic School-Age Care (BSAC) training.

- (3) In a part day program be on site when children are in care. For a full day program be on site for two thirds of the hours of operation. This may include times when the individual may be off site due to illness or vacation.

(c) Staff who are responsible for supervising groups of school-aged children (who may be called group leaders) shall be at least 18 years of age and have a high school diploma or its equivalent prior to employment, and shall complete the BSAC Training.

(d) Staff who assist group leaders (who may be called assistant group leaders) shall be at least 16 years of age and shall complete the BSAC training.

(e) The individual who is on-site and responsible for the administration of the school-age component of a center which also provides care to preschool-age children shall meet the requirements for child care administrator in G.S. 110-91(8) and Section .0700 of this ~~Subchapter~~ Chapter.

(f) When an individual has responsibility for both administering the program and planning and ensuring the implementation of the daily activities of a school-age program, the individual shall meet the staff requirements for an administrator and shall complete the BSAC Training.

(g) Completion of the BSAC Training may count toward meeting one year's annual on-going training requirements in Section .0700 of this ~~Subchapter~~ Chapter.

(h) Individuals who have completed seven hours of school-age program training as approved by the Division prior to July 1, 2000 shall not be required to complete the BSAC Training.

(i) As used in this Rule, the term "experience working with school-aged children" shall mean experience working with school-aged children as an administrator, program coordinator, group leader, assistant group leader, lead teacher, teacher, or aide.

(j) The special training requirements in Rule .0705 of this Chapter shall apply to all programs for school-aged children.

(k) Whenever children participate in swimming or other aquatic activities, the following provisions shall apply:

- (1) The children shall be supervised by persons having current life guard training certificates issued by the Red Cross or having other training determined by the Division to be equivalent to the Red Cross training, appropriate for the type of body of water and type of aquatic activities:
 - (A) One lifeguard is required for groups of 25 or fewer children.
 - (B) Two lifeguards are required for groups of 26 or more children.
- (2) A person with lifeguard certification is not required when there are no more than 12 children present and the body of water has no portion deeper than 30 inches and the total

surface area is not more than 400 square feet. The children shall be supervised by at least one adult who is certified to perform cardiopulmonary resuscitation appropriate for the ages of children in care.

- (1) All staff shall ~~participate in at least three hours of documented orientation related to the program's policies, activities and child safety within six weeks of assuming responsibility for supervising a group of children.~~ receive on-site training and orientation as follows:

- (1) Within the first two weeks of assuming responsibility for supervising a group of children, each employee shall complete at least six clock hours of training on:

- (A) the recognition of the signs and symptoms of child abuse or neglect and in the employee's duty to report suspected abuse and neglect;

- (B) review of the center's operational policies;

- (C) adequate supervision of children, taking into account their age, emotional, physical and cognitive development.

- (2) Within the first six weeks of assuming responsibility for supervising a group of children, each employee shall complete at least three additional clock hours of training on maintaining a safe and healthy environment and developmentally appropriate activities for school-age children.

(m) The health requirements for staff and volunteers in Rule .0701 - .0702 of this Chapter shall apply.

(n) All staff under age 18 counted toward meeting the required staff/child ratio shall work under the direction of another staff person at least 21 years of age.

(o) Staff in part-time or full day school-age care programs required to complete BSAC Training shall do so within three months of becoming employed ~~employed or by December 31, 2000, whichever is later.~~ Staff in seasonal school-age care programs required to complete BSAC Training shall do so within six weeks of becoming employed ~~employed or by December 31, 2000, whichever is later.~~

Authority G.S. 110-85; 110-91(8),(11); 143B-168.3.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09A .0206; 09B .0202, .0303, and .0305.

Proposed Effective Date: *May 1, 2007*

Public Hearing:
Date: *February 18, 2007*
Time: *1:00 p.m.*

Location: Department of Correction Office of Staff Development and Training, 211 Schieffelin Road, Apex, NC

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

Reason for Proposed Action:

12 NCAC 09A .0206 – Grants the Probable Cause Committee authority to issue a summary suspension of certification to a criminal justice officer who tests positive on a urinalysis test. Clarifies that the Criminal Justice Standards Division Director is responsible for notifying members of the Probable Cause Committee 48 hours in advance of meetings where summary suspensions are to be considered.

12 NCAC 09B .0202 – Changes the requirements for school directors to evaluate instructors from once during each course delivery to once during each three year certification period in each topic taught by the instructor.

12 NCAC 09B .0303 – Changes the number of hours probationary instructors are required to teach from 8 to 12. Eliminates the requirement to submit an Instructor Evaluation Form for instructor certification renewal. Adds the requirement to submit a Renewal of Instructor and Professional Lecturer Certification Form for instructor certification renewal.

12 NCAC 09B .0305 – Eliminates the requirement to submit an Instructor Evaluation Form for instructor certification renewal. Adds the requirement to submit a Renewal of Instructor and Professional Lecturer Certification Form for instructor certification renewal.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection, and the clearly identified portion of the rule to which the objection pertains, must be submitted in writing to Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 West Edenton Street, Raleigh, NC 27602.

Comments may be submitted to: Teresa Marrella, Department of Justice, 114 West Edenton Street, Raleigh, NC 27602, phone (919) 716-6470, fax (919) 716-6752, email tmarrella@ncdoj.com

Comment period ends: March 19, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact: A copy of the fiscal note can be obtained from the agency.

CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0200 - ENFORCEMENT OF RULES

12 NCAC 09A .0206 SUMMARY SUSPENSIONS

(a) The Commission, by and through the Probable Cause Committee, may summarily suspend the certification of a criminal justice officer or instructor before the commencement of proceedings for suspension or revocation of the certification when, in the opinion of the Probable Cause Committee, the public health, safety, or welfare requires this emergency action of summary suspension. The Commission has determined that the following conditions specifically affect the public health, safety, or welfare and therefore it, by and through the Probable Cause Committee, may utilize summary suspension when:

- (1) the person has ~~committed or~~ been convicted of a violation of the criminal code that would require a permanent revocation or denial of certification; or
- (2) the certified officer fails to satisfactorily complete the in-service training requirements as prescribed in 12 NCAC 09E.
- (3) The certified officer has produced a positive result on a urinalysis test.

(b) For the purpose of considering a summary suspension of certification, the Probable Cause Committee may meet upon notice given by mail, telephone, or other means not less than 48 hours in advance of the meeting.

(c) A summary suspension shall be effective on the date specified in the order of summary suspension or on service of the certified copy of the order at the last known address of the person, whichever is later. The summary suspension shall remain effective during the proceedings.

(d) The director, upon receipt of information showing the condition of a basis provided for in Subparagraph (a)(1), (a)(2), or (a)(3) of this Rule, shall coordinate the meeting noticed in Paragraph (b) of this Rule. Any affected person shall be notified, if feasible, that the person may submit any matters to the Probable Cause Committee for its consideration before acting on the summary suspension issue. Under no circumstance will this allowance be allowed to exceed 48 hours.

~~(d)~~(e) Upon verbal notification by the Director that the certification of an officer or instructor is being summarily suspended by written order, the Department head of the criminal justice agency or the executive officer of the institution shall take such steps as are necessary to ensure that the officer or instructor does not perform duties requiring certification by the Commission.

Authority G.S. 17C-6; 17C-10; 150B-3.

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT; EDUCATION; AND TRAINING

SECTION .0200 – MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION

12 NCAC 09B .0202 RESPONSIBILITIES OF THE SCHOOL DIRECTOR

(a) In planning, developing, coordinating, and delivering each Commission-certified criminal justice training course, the School Director shall:

- (1) Formalize and schedule the course curriculum in accordance with the curriculum standards established in this Subchapter. The "Criminal Justice Instructor Training Course" shall be presented with 40 hours of instruction each week during consecutive calendar weeks until course requirements are completed;
- (2) Select and schedule instructors who are certified by the Commission;
- (3) Provide each instructor with a current Commission course outline and all necessary additional information concerning the instructor's duties and responsibilities;
- (4) Review each instructor's lesson plans and other instructional materials for conformance to Commission standards and to minimize repetition and duplication of subject matter;
- (5) Arrange for the timely availability of appropriate audiovisual aids and materials, publications, facilities, and equipment for training in all topic areas;
- (6) Develop, adopt, reproduce, and distribute any supplemental rules, regulations, and requirements determined by the school to be necessary or appropriate for:
 - (A) effective course delivery;
 - (B) establishing responsibilities and obligations of agencies or departments employing or sponsoring course trainees; and
 - (C) regulating trainee participation and demeanor and ensuring trainee attendance and maintaining performance records.
- (7) If appropriate, recommend housing and dining facilities for trainees;
- (8) Administer the course delivery in accordance with Commission procedures and standards, give consideration to advisory guidelines issued by the Commission, and ensure that the training offered is safe and effective;
- (9) Maintain direct supervision, direction, and control over the performance of all persons to whom any portion of the planning,

development, presentation, or administration of a course has been delegated; and

- (10) Report the completion of each presentation of a Commission-certified criminal justice training course to the Commission.

(b) In addition to Paragraph (a) of this Rule, in planning developing, coordinating and delivering each Commission-certified Basic Law Enforcement Training Course, the School Director shall:

- (1) Schedule course presentation to include 12 hours of instruction each week during consecutive calendar weeks except that there may be as many as three one-week breaks until course requirements are completed; and
- (2) Schedule only those instructors certified by the Commission to teach those high liability areas as specified in 12 NCAC 09B .0304(a) as either the lead instructor or in any other capacity; and
- (3) With the exception of the First Responder, Physical Fitness, Electrical and Hazardous Materials, and topical areas as outlined in 12 NCAC 09B .0304(a) of this Subchapter, schedule one specialized certified instructor for each six trainees while actively engaged in a practical performance exercise; and
- (4) Schedule one specialized certified instructor for each eight trainees while actively engaged in a practical performance exercise in the topical area "Subject Control Arrest Techniques;" and
- (5) Not schedule any single individual to instruct more than 35 percent of the total hours of the curriculum during any one delivery of the Basic Law Enforcement Training Course presentation; and
- (6) Not less than 15 days before commencing delivery of the Basic Law Enforcement Training Course, submit to the Commission a Pre-Delivery Report of Training Course Presentation as set out in 12 NCAC 09C .0211 along with the following attachments:
 - (A) a course schedule showing arrangement of topical presentations and proposed instructional assignments.
 - (B) a copy of any rules, regulations, and requirements for the school. A copy of such rules shall also be given to each trainee and to the executive officer of each trainee's employing or sponsoring agency or department at the time the trainee enrolls in the course.

The Director of the Standards Division shall review the submitted Pre-Delivery Report together with all attachments and notify the School Director of any apparent deficiency.

- (7) Monitor, or designate a certified instructor to monitor, the presentations of all instructors once during each three year certification period in each topic taught by the instructor during each course delivery and prepare written evaluations on their performance and suitability for subsequent instructional assignments. The observations shall be of sufficient duration to ensure the instructor is using the Instructional System Design model, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the School Director's evaluation shall be based upon the course delivery observations, the instructor's use of the approved lesson plan, and the results of the student evaluation of the instructor. For probationary instructors, these evaluations shall be prepared on Commission forms and forwarded to the Commission. Based on this evaluation, the School Director shall recommend approval or denial of requests for General Instructor Certification. For all other instructors, these evaluations shall be prepared on Commission forms in accordance with Commission standards as set out in this Chapter. These evaluations shall be kept on file by the school for a period of three years and shall be made available for inspection by a representative of the Commission upon request. In the event the evaluation of an instructor indicates that his or her performance was less than acceptable, the School Director shall forward a copy of the evaluation to the Commission. Any designated certified instructor who is evaluating the instructional presentation of another instructor shall hold certification in the same instructional topic area as that for which the instructor is being evaluated.
- (8) Administer or designate a staff person to administer appropriate tests as determined necessary at various intervals during course delivery:
- (A) to determine and record the level of trainee comprehension and retention of instructional subject- matter;
 - (B) to provide a basis for a final determination or recommendation regarding the minimum degree of knowledge and skill of each trainee to function as an inexperienced law enforcement officer; and
 - (C) to determine subject or topic areas of deficiency for the application of 12 NCAC 09B .0405(a)(3); and
- (9) During a delivery of Basic Law Enforcement Training, make available to the Commission
- four hours of scheduled class time and classroom facilities for the administration of a written examination to those trainees who have satisfactorily completed all course work.
- (10) Not more than 10 days after receiving from the Commission's representative the Report of Examination Scores, submit to the Commission a Post-Delivery Report of Training Course Presentation (Form F-10B) which shall include:
- (A) a "Student Course Completion" form for each individual enrolled on the day of orientation.
 - (B) a "Certification and Test Score Release" form.
- (c) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating and delivering each Commission-certified "Criminal Justice Instructor Training Course" the School Director shall:
- (1) Schedule course presentation to include 40 hours of instruction each week during consecutive calendar weeks until course requirements are completed;
 - (2) Schedule at least one evaluator for each six trainees:
 - (A) no evaluator shall be assigned more than six trainees during a course delivery.
 - (B) each evaluator, as well as the instructors, must have successfully completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and
 - (C) each instructor and evaluator must document successful participation in a program presented by the Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation.
 - (3) Not less than 30 days before commencing delivery of the course, submit to the Commission a Pre-Delivery Report of Training Course Presentation [Form F-10A(ITC)] with the following attachments:
 - (A) a course schedule showing arrangement of topical presentations and proposed instructional assignments;
 - (B) the names and social security numbers of all instructors and evaluators; and
 - (C) a copy of any rules, regulations, and requirements for the school.

The Director of the Standards Division shall review the submitted Pre-Delivery Report together with all attachments and notify the School Director of any apparent deficiency.

- (4) Not more than 10 days after course completion the School Director shall submit to the Commission a Post-Delivery Report [Form F-10B(ITC)] containing the following:
 - (A) class enrollment roster;
 - (B) a course schedule with designation of instructors and evaluators utilized in delivery;
 - (C) scores recorded for each trainee on both the 80 minute skill presentation and the final written examination; and
 - (D) designation of trainees who successfully completed the course in its entirety and whom the School Director finds to be competent to instruct.

(d) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating and delivering each Commission-certified radar, radar and time-distance, time-distance, or lidar speed measurement operator training course or re-certification course, the School Director shall:

- (1) select and schedule radar, time-distance, or lidar speed measurement instrument instructors who are certified by the Commission as instructors for the specific speed measurement instruments in which the trainees are to receive instruction. The following requirements apply to operator certification training:
 - (A) provide to the instructor the Commission form(s) for motor-skill examination on each trainee;
 - (B) require the instructor to complete the motor-skill examination form on each trainee indicating the level of proficiency obtained on each specific instrument; and
 - (C) require each instructor to sign each individual form and submit the original to the School Director.
- (2) not less than 30 days before the scheduled starting date submit to the Director of the Standards Division a Request for Training Course Presentation:
 - (A) the request shall contain a period of course delivery including the proposed starting date, course location and the number of trainees to be trained in each type of approved speed-measurement-instrument; and
 - (B) the Director of the Standards Division shall review the request and notify the School Director of the accepted delivery period unless a conflict

exists with previously scheduled programs.

- (3) during the delivery of the training course, make available to the Commission two hours of scheduled class time and classroom facilities for the administration of a written examination to the trainee; and
- (4) upon completing delivery of the Commission-certified course, and not more than 10 days after receiving from the Commission's representative the Report of Examination Scores, the School Director shall notify the Commission regarding the progress and achievements of each trainee by submitting a Post-Delivery Report of Training Course Presentation. This report shall include the original motor-skill examination form(s) completed and signed by the certified instructor responsible for administering the motor-skill examination to the respective trainee.

Authority G.S. 17C-6.

SECTION .0300 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS

12 NCAC 09B .0303 TERMS AND CONDITIONS OF GENERAL INSTRUCTOR CERTIFICATION

(a) An applicant meeting the requirements for certification as a general instructor shall, for the first 12 months of certification, be in a probationary status. The General Instructor Certification, Probationary Status, shall automatically expire 12 months from the date of issuance.

(b) The probationary instructor shall be eligible for full general instructor status, if the instructor through application at the end of the probationary period, submits to the Commission:

- (1) a favorable recommendation from a school director or in-service training coordinator accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of ~~eight~~ 12 hours in a Commission-certified course or a Commission-recognized in-service training course during the probationary year. The results of the student evaluation of the instructor must be considered by the school director or in-service training coordinator when determining recommendation; or
- (2) a favorable written evaluation by a Commission or staff member, based on an on-site classroom evaluation of the probationary instructor in a Commission-certified course or a Commission-recognized in-service training course. Such evaluation shall be certified on a Commission Instructor Evaluation Form. In addition, instructors evaluated by a Commission or staff member must also teach a minimum of ~~eight~~ 12 hours

in a Commission-certified training course or a Commission-recognized in-service training course.

(c) The term of certification as a general instructor is three years from the date the Commission issues the certification. The certification may subsequently be renewed by the Commission for three year periods. The application for renewal shall contain, in addition to the requirements listed in Rule .0302 of this Section, documentary evidence indicating that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include proof that the applicant has, within the three year period preceding application for renewal, instructed a minimum of 12 hours in a Commission-certified training course or a Commission-recognized in-service training course; and either

(1) a favorable written recommendation from a school director or in-service training coordinator ~~accompanied by certification on a Commission Instructor Evaluation Form completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form~~ that the instructor successfully taught a minimum of 12 hours in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of general certification; or

(2) a favorable evaluation by a Commission or staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three year period of General Instructor Certification. In addition, instructors evaluated by a Commission or staff member must also teach a minimum of 12 hours in a Commission-certified training course or a Commission-recognized in-service training course.

(d) For Speed Measuring Instrument Instructors, the General Instructor Certification shall run concurrent with the Speed Measuring Instrument Instructor's certification. For the initial issuance of Speed Measuring Instrument Instructor certifications, the terms for the instructor's General Instructor certification shall automatically be reissued for a three year period determined by the certification period of the Speed Measuring Instrument Instructor certification. The general instructors shall not be required to submit documentation of having taught the minimum 12 hours during the period preceding the initial certification as specified in Paragraph (c) of this Rule. For the first renewal of Speed Measuring Instrument instructor certifications occurring after January 2006, the terms for the instructor's General Instructor certification shall automatically be reissued for a three year period determined by the certification period of the Speed Measuring Instrument Instructor certification. The general instructors shall not be required to submit documentation of having taught the minimum 12 hours during the period preceding the initial certification as specified in Paragraph (c) of this Rule. Once the General

Instructor's certification becomes concurrent with the Speed Measuring Instrument certification, all instructors must meet the requirements in Subparagraph (c)(1) or (c)(2) of this Rule to be eligible for re-certification.

(e) All instructors shall remain active during their period of certification. If an instructor does not teach a minimum of 12 hours during the period of certification, the certification shall not be renewed, and the instructor shall file application for General Instructor Certification, Probationary Status. Such applicants shall meet the minimum requirements of Rule .0302 of this Section.

(f) The use of guest participants in a delivery of the Basic Law Enforcement Training Course is permissible. However, such guest participants are subject to the direct on-site supervision of a Commission-certified instructor and must be authorized by the school director. A guest participant shall only be used to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

(g) For purposes of this Section, "Commission-recognized in-service training" shall mean any training for which the instructor is evaluated by a certified school director or in-service training coordinator on a Commission Instructor Evaluation Form. Such training shall be objective based and documented by lesson plans designed consistent with the Basic Law Enforcement Training format and documented by departmental training records to include required post-test and testing methodology. The signature of the school director on the Commission Instructor Evaluation Form shall verify compliance with this Rule.

Authority G.S. 17C-6.

12 NCAC 09B .0305 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION

(a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to run concurrently with the existing General Instructor Certification, except as set out in (d). The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.

(b) The terms of certification as a specialized instructor shall be determined by the expiration date of the existing General Instructor Certification. The following requirements shall apply during the initial period of certification:

(1) where certification for both general probationary instructor and Specialized Instructor Certification is issued on the same date, the instructor shall be required to satisfy the teaching requirement for only the general probationary instructor certification. The instructor may satisfy the teaching requirement for the general probationary instructor certification by teaching any specialized topic for which certification has been issued;

(2) when Specialized Instructor Certification is issued during an existing period of General Instructor Certification, either probationary status or full general status, the specialized instructor may satisfy the teaching requirement

for the general certification by teaching the specialized subject for which certification has been issued;

- (3) where Specialized Instructor Certification becomes concurrent with an existing 36 month period of General Instructor Certification, the instructor must teach 12 hours for each specialized topic for which certification has been issued.

(c) The term of certification as a specialized instructor shall not exceed the 36 month period of full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in Rule .0304 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three-year period. Such documentary evidence shall include the following:

- (1) proof that the applicant has, within the three year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and such instruction must be in a Commission-accredited training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission records submitted by School Directors or in-service training coordinators and written certification from a School Director or in-service training coordinator; and
- (2) proof that the applicant has, within the three year period preceding application for renewal, attended and successfully completed any instructor updates that have been issued by the Commission. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators, or copies of certificates of completion issued by the institution which provided the instructor updates; and
- (3) either:

(A) a favorable written recommendation from a School Director or In-Service Training Coordinator ~~accompanied by certification on a Commission Instructor Evaluation Form completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form~~ that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching must have occurred in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of Specialized Instructor Certification; or

(B) a favorable evaluation by a Commission or staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three-year period of Specialized Instructor Certification. Such evaluation shall be certified on a Commission Instructor Evaluation Form. In addition, instructors evaluated by a Commission or staff member must also teach at least 12 hours in each of the topics for which Specialized Instructor Certification was granted.

- (4) Upon submission of the required documentation for renewal the Commission staff shall renew the certification as a Specialized Instructor. Such renewal shall occur at the time of renewal of the General Instructor certification.

(d) Certification as a specialized instructor in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas as outlined in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) of this Section, specifically those certifications not based upon General Instructor Certification, shall remain in effect for 36 months from the date of issuance. During the 36 month term all non-Commission certificates required in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) for specialized instructor certification in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas must be maintained.

(e) All instructors shall remain active during their period of certification. If an instructor does not teach at least 12 hours in each of the topic areas for which certification is granted, the certification shall not be renewed for those topics in which the instructor failed to teach. Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted. Upon application for re-certification, such applicants shall be required to meet the requirements of Rule .0304 of this Section.

(f) The use of guest participants in a delivery of the "Basic Law Enforcement Training Course" is permissible. However, such guest participants are subject to the direct on-site supervision of a Commission-certified instructor and must be authorized by the School Director. A guest participant shall only be used to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

Authority G.S. 17C-6.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to adopt the rule cited as 15A NCAC 11 .1106 and amend the rules cited as 15A NCAC 11 .1102, .1104 - .1105, and .1123.

Proposed Effective Date: June 1, 2007

Public Hearing:

Date: February 7, 2007

Time: 2:00 p.m. and 7:00 p.m.

Location: Radiation Protection Section, 3825 Barrett Drive, Room 101, Raleigh, NC 27607

Reason for Proposed Action: The proposed changes are designed to restructure the annual fees assessed radioactive material and accelerator licensees to cover the anticipated costs of inspection, education and training activities associated with possession of such licenses in the current post 9/11 risk-based environment, and current sensitivity of all radioactive material and high radiation producing accelerators. These changes will allow a proactive/preventative position against malicious use of radioactive material through pre-licensing and increased security inspections. To ensure the inspection program is effective will require verification through expansion of a statewide monitoring program and a vigilant enforcement program. Waste coordination is another important component supporting inspections, which will have to be expanded to help licensees through increased visits and resources in identifying proper alternatives for the disposition of unwanted radioactive material. Most importantly, these changes will help build a strong foundation of Agency/Licensee expectations through education and training in the mission of keeping NC citizens and the environment safe from the hazardous effects of radiation.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted, in writing to the individual listed below. Objections may also be submitted during the public hearings conducted on these rules. Objections must include the specific rule citation for the objectionable rule and the nature of the objection. Objections must include the complete name and contact information for the individual submitting the objection. Objections will be accepted until March 19, 2007.

Comments may be submitted to: Beverly O. Hall, Section Chief, 1645 Mail Service Center, Raleigh, NC 27699-1645, phone (919) 571-4141, fax (919) 571-4148, email beverly.hall@ncmail.net

Comment period ends: March 19, 2007

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

approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

CHAPTER 11 – RADIATION PROTECTION

SECTION .1100 - FEES

15A NCAC 11 .1102 PAYMENT DUE

- (a) All fees established in this Section shall be due on the effective date of this Rule and on the first day of July of each subsequent year.
(b) Notwithstanding Paragraph (a) of this Rule, when a new license or registration is issued by the agency after the first day of July of any year, the initial fee shall be due on the date of issuance of the license or registration.
(c) The initial fee in Paragraph (b) of this Rule shall be computed as follows:
(1) When any new license or registration is issued before the first day of January of any year, the initial fee shall be the full amount specified in Rule .1105 or .1106 of this Section; and
(2) When any new license or registration is issued on or after the first day of January of any year, the initial fee shall be one-half of the amount specified in Rule .1105 or .1106 of this Section.
(d) All fees received by the agency pursuant to provisions of this Section shall be nonrefundable.
(e) Each licensee or registrant shall pay all fees by check or money order made payable to "Division of Radiation Protection" "Radiation Protection Section" and mail such payment to: Division of Radiation Protection, North Carolina Department of Environment, Health and Natural Resources, P.O. Box 27687, Raleigh, North Carolina 27611 7687-Radiation Protection Section, Division of Environmental Health, Department of Environment and Natural Resources, 1645 Mail Service Center, Raleigh, North Carolina 27699-1645. Such payment may be delivered to the agency at its office located at 3825 Barrett Drive, Raleigh, North Carolina 27609-7221.

Authority G.S. 104E-9(a)(8); 104E-19(a).

15A NCAC 11 .1104 DELINQUENT AND UNCOLLECTIBLE FEES

- (a) Payment of fees established in this Section shall be delinquent, if not received by the agency within 60 days after the

PROPOSED RULES

due date specified in Paragraphs (a) and (b) of Rule .1102 of this Section.

(b) If a licensee or registrant remits a fee in the form of a check or other instrument which is uncollectible from the paying institution, the agency shall notify the licensee or registrant by certified mail and allow the licensee or registrant 15 days to

correct the ~~matter~~ matter, which includes payment of any fee charged to the agency by a banking institution.

(c) If payment of fees is uncollectible from the paying institution or not submitted to the agency by the delinquent date, the agency may institute appropriate legal action to collect.

Authority G.S. 104E-9(8); 104E-19(a).

15A NCAC 11 .1105 X-RAY FEE AMOUNTS

(a) Annual fees for persons registered pursuant to provisions of Section .0200 of this Chapter are as listed in the following table:

Type of registered facility	Letters appearing in registration number	Facility plus first X-ray tube	Each additional X-ray Tube to a maximum of 40 additional X-ray tubes
Clinics	A	\$ 90.00	\$ 16.25
Chiropractors	C	\$ 90.00	\$ 16.25
Dentists	D	\$ 90.00	\$ 16.25
Educational	E	\$ 65.00	\$ 13.00
Government	G	\$ 65.00	\$ 13.00
Podiatrists	H	\$ 90.00	\$ 16.25
Industrial	I	\$ 90.00	\$ 16.25
Industrial Medical	IM	\$130.00	\$ 22.75
Health Departments	L	\$130.00	\$ 22.75
Hospitals	M	\$195.00	\$ 29.25
Physicians	P	\$ 90.00	\$ 16.25
Industrial Radiography	R	\$195.00	\$ 29.25
Services	S	\$130.00	\$ 0.00
Veterinarians	V	\$ 65.00	\$ 13.00
Other	Z	\$ 90.00	\$ 16.25

~~(b) Annual fees for persons licensed pursuant to provisions of Section .0300 of this Chapter are as listed in the following table:~~

Type of Radioactive Material License	Annual Fee
Specific license of broad scope	
-medical or academic	\$1,200.00
-other	\$ 425.00
Specific license	
-industrial radiography (with temporary subsites)	\$1,525.00
-industrial radiography (in plant only)	\$ 780.00
-manufacture or distribution	\$ 425.00
-medical institution other than teletherapy	\$ 360.00
-medical private practice	\$ 260.00
-medical teletherapy with one teletherapy unit	\$ 300.00
-and	
-each additional teletherapy unit	\$ 65.00
-industrial gauges	\$ 225.00
-moisture density gauges	\$ 100.00
-gas chromatographs	\$ 100.00
-educational institutions	\$ 360.00
-services/consultants	\$ 100.00
-other	\$ 160.00
General licenses	
-industrial gauges	\$ 100.00
-IN VITRO testing and others	\$ 100.00

~~(c) Annual fees for persons licensed pursuant to provisions of Section .0900 of this Chapter are as listed in the following table:~~

PROPOSED RULES

Description of Fee	Annual Fee
Facility with one accelerator	\$ 300.00
each additional accelerator	\$ 65.00

~~(d)(b)~~ Annual fees for out-of-state persons granted permission to use sources of radiation in this state pursuant to provisions of Rules .0211 and .0345 of this Chapter are the same as that provided for in the applicable category specified in Paragraphs (a), (b), and (c) Paragraph (a) of this Rule. ~~Only those out of state persons granted reciprocal recognition for the purpose of industrial radiography, portable gauge use and use~~

~~that involves intentional exposures to individuals for medical purposes are subject to the payment of the prescribed fees contained in this Rule.~~ Such fees are due when application for reciprocal recognition of out-of-state license or registration is made in the same manner as for a new license or registration as specified in Rule .1102.

Authority G.S. 104E-9(a)(8); 104E-19(a).

15A NCAC 11 .1106 RADIOACTIVE MATERIALS AND ACCELERATOR FEE AMOUNTS

(a) Annual fees for persons licensed pursuant to provisions of Section .0300 of this Chapter are as listed in the following table:

Type of Radioactive Material License	Annual Fee
<u>Specific license of broad scope</u>	
-Medical Broad	\$ 3,600.00
-Academic Broad	\$ 2,500.00
-Research and Development Broad	\$ 2,000.00
<u>Specific license</u>	
-industrial radiography (with temporary subsites)	\$ 2,500.00
-industrial radiography (in plant only)	\$ 2,000.00
-medical institution other than teletherapy	\$ 2,000.00
-medical private practice	\$ 650.00
-mobile medical practice (home office)	\$ 1,200.00
-mobile medical practice (per additional client location)	\$ 250.00
-medical teletherapy	\$ 750.00
-fixed industrial gauges	\$ 350.00
-portable gauges	\$ 250.00
-gas chromatographs	\$ 250.00
-manufacture or distribute	\$ 1,500.00
-wet shielded irradiator >10,000kCi	\$ 3,600.00
-educational institutions	\$ 1,750.00
-water remediation activities (home office)	\$ 1,200.00
-water remediation activities (per additional client location)	\$ 250.00
-services/consultants	\$ 250.00
-other	\$ 250.00
<u>General licenses</u>	
-licenses subject to annual registration requirements	\$ 250.00
-licenses not subject to annual registration requirements	\$ 150.00

(b) Annual fees for persons licensed pursuant to provisions of Section .0900 of this Chapter are as listed in the following table:

-Description of Fee	Annual Fee
-Facility with accelerator unit(s)	\$ 1,500.00

(c) Annual fees for out-of-state persons granted permission to use sources of radiation in this state pursuant to provisions of Rule .0345 of this Chapter are the same as that provided for in the applicable category specified in Paragraphs (a) and (b) of this Rule. Such fees are due when application for reciprocal recognition of out-of-state license or registration is made in the same manner as for a new license or registration as specified in Rule .1102 of this Chapter.

Authority G.S. 104E-9(a)(8); 104E-19(a).

SECTION .1400 - TANNING FACILITIES

to cover the anticipated costs of tanning equipment inspection and enforcement activities of the agency.

15A NCAC 11 .1423 FEES AND PAYMENT

(a) This Rule establishes initial, annual and reinstatement fees for persons registered pursuant to the provisions of this Section

(b) Annual fees established in this Rule shall be due on the effective date of this Rule and on the first day of July of each

PROPOSED RULES

subsequent year; reinstatement fees shall be paid prior to reinstatement.

(c) Notwithstanding Paragraph (b) of this Rule, when a new registration is issued by the agency after the first day of July of any year, the initial fee shall be due on the date of issuance of the registration.

(d) The initial fee in Paragraph (c) of this Rule shall be computed as follows:

- (1) When any new registration is issued before the first day of January of any year, the initial fee shall be the full amount specified in this Rule; and
- (2) When any new registration is issued on or after the first day of January of any year, the initial fee shall be one-half of the amount specified in this Rule.

(e) All fees received by the agency pursuant to provisions of this Rule shall be nonrefundable.

(f) Each registrant may pay all fees by cash, check or money order provided:

- (1) Checks or money orders shall be made payable to "~~Division of Radiation Protection~~", "Radiation Protection Section", and mailed to 1645 Mail Service Center, Raleigh, NC 27699-1645 or delivered to the agency office

at 3825 Barrett Drive, Raleigh, NC 27609-7221; and

- (2) Cash payments shall be made only by appointment by calling the agency at 919/571-4141 and delivered to the agency office at 3825 Barrett Drive, Raleigh, NC 27609-7221.

(g) Within five days after the due dates established in Paragraphs (b) and (c) of this Rule, the agency shall mail to each registrant, who has not already submitted payment, a notice which indicates the due date, the amount of fees due, the delinquent date and the amount of the reinstatement fee if not paid by the delinquent date.

(h) Payment of fees established in this Rule shall be delinquent, if not received by the agency within 60 days after the due date specified in Paragraphs (b) and (c) of this Rule.

(i) If a registrant remits a fee in the form of a check or other instrument which is uncollectible from the paying institution, the agency shall notify the registrant by certified mail and allow the registrant 15 days to correct the ~~matter.~~ matter, which includes payment of any fee charged to the agency by a banking institution.

(j) If payment of fees is uncollectible from the paying institution or not submitted to the agency by the delinquent date, the agency may institute legal action to collect.

(k) Annual fees for persons registered pursuant to provisions of this Section are as listed in the following table:

Type of registered facility	Letters appearing in registration number	Facility plus first Piece of Tanning Equipment	Each additional Piece of Tanning Equipment
Tanning Facility	B	\$100.00	\$16.00
Tanning Equipment Services	F	\$100.00	NA

(l) When fees become delinquent as specified in this Rule, in addition to any delinquent fee owed to the agency, the registrant shall pay to the agency a reinstatement fee of one hundred fifty dollars (\$150.00).

Authority G.S. 104E-9(a)(8); 104E-19(a).

Public Hearing:

Date: January 31, 2007

Time: 8:00 a.m.

Location: 1201 Front Street, Suite 110, Raleigh, NC 27609

Reason for Proposed Action:

21 NCAC 14H .0105 - To make sure a written record of pedi-spa is maintained in the salon for review.

21 NCAC 14H .0120 - To maintain a record of pedi-spa sanitation in salons for review by clients or inspectors.

21 NCAC 14H .0121 - To prohibit permanent makeup application in salons.

21 NCAC 14J .0106, .0206, .0302, .0303 - To update school equipment requirements and eliminate outdated equipment.

21 NCAC 14N .0102 - To allow students with at least 1000 hours the opportunity to take the written examination in preparation for graduation as well as to require graduation prior to taking the practical examination.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 14 – COSMETIC ART EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Cosmetic Art Examiners intends to adopt the rule cited as 21 NCAC 14N .0115 and amend the rules cited as 21 NCAC 14H .0105, .0120 - .0121; 14J .0106, .0206, .0302 - .0303; 14N .0102, .0113; 14R .0102.

Proposed Effective Date: May 1, 2007

21 NCAC 14N .0113 – To require additional training for exam candidates after three failures.

21 NCAC 14N .0115 – Specification of hours required for full time or part time work status.

21 NCAC 14R .0102 – To require re-approval for courses that have not been offered in three years to ensure that the information is still relevant and continuing education.

Procedure by which a person can object to the agency on a proposed rule: Letter or written objection directed to Stefanie Kuzdrall, Rule-making coordinator at 1201 Front Street, Suite 110, Raleigh, NC 27609 or skuzdrall@ncccosmeticarts.com

Comments may be submitted to: Stefanie Kuzdrall, 1201 Front Street, Suite 110, Raleigh, NC 27609, phone (919) 715-0018

Comment period ends: March 19, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

SUBCHAPTER 14H - SANITATION

SECTION .0100 - SANITATION

21 NCAC 14H .0105 SANITARY RATINGS AND POSTING OF RATINGS

(a) The sanitary rating of a beauty establishment shall be based on a system of grading outlined in this Subchapter. Based on the grading, all establishments will be rated in the following manner:

- (1) all establishments receiving a rating of at least 90 percent or more, shall be awarded a grade A;
(2) all establishments receiving a rating of at least 80 percent, and less than 90 percent, shall be awarded grade B.

(b) Every beauty establishment shall be given a sanitary rating. A cosmetic art school may be graded four times a year, and a cosmetic art salon may be graded once a year.

(c) The sanitary rating given to a beauty establishment shall be posted in a conspicuous place at all times.

(d) No beauty establishment shall be permitted to operate without first having obtained a sanitary rating card with a grade of not less than 80 percent.

(e) Cosmetic art inspectors shall give each beauty establishment a new sanitary rating card each year.

(f) Violation of any sanitary rules, or the operation of a beauty establishment which fails to receive a sanitary rating of at least 80 percent (grade B) shall be sufficient cause for revoking or suspending the letter of approval or permit.

(g) A re-inspection for the purpose of raising the sanitary rating of a beauty establishment shall not be given within 30 days of the last inspection, unless the rating at the last inspection was less than 80 percent.

(h) A pedi-spa unit sanitation record must be kept for inspection on a form provided by the Board.

Authority G.S. 88-23; 88-30.

21 NCAC 14H .0120 FOOTSPA SANITATION

Manicurists and Cosmetologists shall use the following disinfection procedures to ensure proper cleaning and maintenance of the footspa equipment and to prevent bacterial infection:

- (1) Between each customer a manicurist or cosmetologist shall:
(a) drain all water and remove all debris from the footspa;
(b) clean and scrub the surfaces and walls of the footspas with a scrub brush soap or detergent and rinse with clean, clear water; and
(c) disinfect with an EPA registered disinfectant with bactericidal, fungicidal, and virucidal activity used according to the manufacturer's instructions.
(2) At the end of the day a manicurist or cosmetologist shall:
(a) remove the screen. All debris trapped behind the screen of each footspa shall be removed, and the screen and the inlet shall be washed with soap or detergent and water;
(b) before replacing the screen wash the screen with a chlorine bleach solution of one part bleach to 10 parts water, or totally immerse the screen in an EPA registered disinfectant;
(c) fill the footspa tub with five gallons of water and four cups of five per cent bleach solution;
(d) circulate the solution through the footspa system for no less than 10 minutes;

- (e) let the solution sit overnight (at least six - ten hours);
- (f) drain and flush the system the following morning; and
- (g) make a record of the date/time of this cleaning and ~~disinfecting~~ disinfecting, on a form provided by the Board. The record for the last 90 days shall be readily accessible upon client or Board inspector request.

Authority G.S. 88B-4.

21 NCAC 14H .0121 PROHIBITED PRACTICES

Licensed cosmetologists, estheticians, and manicurists shall not use or possess in a shop any of the following products:

- (1) Methyl Methacrylate Liquid Monomer a.k.a. ~~MMA; and MMA;~~
- (2) Razor-type callus shavers designed and intended to cut growths of skin such as corns and ~~calluses; and~~
- (3) Permanent makeup, defined as beautifying the face by inserting or implanting facial cosmetic pigment under the surface of the skin or mucosa.

Authority G.S. 88B-4.

SUBCHAPTER 14J - COSMETOLOGY CURRICULUM

SECTION .0100 - BEGINNERS' DEPARTMENT

21 NCAC 14J .0106 EQUIPMENT FOR BEGINNER DEPARTMENT

The beginner department shall be equipped with the following minimum equipment for every 20 students in the department:

- (1) one manicure table and stool,
- (2) two shampoo bowls and chairs,
- (3) ~~two heating caps,~~
- (4)(3) one mannequin with hair per student,
- (5) ~~three marcel heaters, three electrical marcel curling irons,~~
- (4) thermal styling equipment for the purpose of curling or straightening the hair,
- (6) ~~one slide projector and slides or video equipment;~~
- (5) visual aids,
- (7)(6) one mannequin practice table to accommodate at least ten students,
- (8)(7) sufficient cold wave rods for each student in the department.

Authority G.S. 88-23.

SECTION .0200 - ADVANCED DEPARTMENT

21 NCAC 14J .0206 EQUIPMENT IN ADVANCED DEPARTMENT

The advanced department must be equipped with the following equipment:

- (1) for departments with 20 to 29 stations, two manicure tables and stools;
- (2) for departments with 30 or more stations, four manicure tables and stools;
- (3) for departments with 20 to 29 stations, eight dryers and chairs;
- (4) for departments with 30 or more stations, 12 dryers and chairs;
- (5) eight shampoo bowls and chairs;
- (6) 20 dressing tables and styling chairs;
- (7) for departments with 20 to 29 stations, one facial chairs;
- (8) for departments with 30 or more stations, two facial chairs;
- (9) three marcel heaters; and thermal styling equipment for the purpose of curling or straightening the hair.
- (10) ~~three marcel irons.~~

Authority G.S. 88B-4.

SECTION .0300 - COMBINED STUDIES

21 NCAC 14J .0302 EQUIPMENT

Each cosmetology school shall provide training in the decontamination methods used to prevent the growth of germs and bacteria. Each cosmetology school shall provide the following equipment or supplies for use in the training and teaching of all students:

- (1) two therapeutic lamps, containers of sufficient size for the purpose of disinfecting implements by the immersion of implements in an EPA disinfectant solution,
- (2) one vibrator, covered containers for storage of sanitized implements until they are needed to prevent contamination.
- (3) ~~one set standard measuring spoons,~~
- (4) ~~wet and dry sterilizers of sufficient size to sterilize properly all tools and supplies used by students.~~

Authority G.S. 88-23.

21 NCAC 14J .0303 STUDENTS' PERSONAL SUPPLIES

Each student shall have the following minimum supplies:

- (1) manicure supplies and implements for a complete manicure;
- (2) six combs;
- (3) six brushes;
- (4) sufficient pin curl clips;
- (5) sufficient smooth rollers;
- (6) ~~one marcel comb,~~ hard rubber; or nonflammable comb for heat protection used in thermal styling;
- (7) one electric curling iron, marcel;
- (8) one razor;

- (9) two scissors, one tapered and one straight;
- (10) one eyebrow tweezer;
- (11) one tint comb;
- (12) one blow dryer; and
- (13) one copy of "An Act to Regulate the Practice of Cosmetic Art in the State of North Carolina", and a copy of the course curriculum requirements, both of which shall be at no charge to the student for the first copy.

~~(b)(c)~~ The school in which the student has enrolled pursuant to G.S. 88B-18(d) shall design a course of study for that student in order to correct the student's deficiencies.

~~(e)(d)~~ A candidate for licensure as an apprentice cosmetologist who passes the examination with a score of 75 percent or more on both sections; and

- (1) passes the examination with a score of 75 percent or more on both sections; and
- (2) subsequently completes an additional 300 hours of cosmetology curriculum within one year of the examination date may be licensed as a cosmetologist under G.S. 88B-7 without retaking the examination.

Authority G.S. 88-23.

SUBCHAPTER 14N - EXAMINATIONS

SECTION .0100 – GENERAL PROVISIONS

21 NCAC 14N .0102 INITIAL APPLICATIONS AND FEES

(a) All applications for examination must be on a form provided by the Board.

~~(b) If special arrangements are required, the initial application or request for re-examination must include an application for special arrangements pursuant to 21 NCAC 14N .0107. Cosmetologist candidates having completed a minimum of 1000 hours in a cosmetology curriculum from an approved cosmetic art school are authorized to receive the written examination. All cosmetic art licensee candidates must have successfully completed the appropriate cosmetic art curriculum in an approved cosmetic art school before receiving the practical examination.~~

Authority G.S. 88B-4; 88B-7(1); 88B-8(1); 88B-18; 88B-20(a).

21 NCAC 14N .0113 RE-EXAMINATION

~~(a) Notwithstanding any other provision of the rules in this Subchapter, pursuant to G.S. 88B-18(d) a cosmetology candidate who has failed either section of the examination three times, shall complete an additional 200 hours of study at an approved cosmetic art school before another application for re-examination shall be accepted by the Board. a cosmetologist, esthetician, manicurist, or teacher candidate who has failed either section of the examination three times, shall complete the following amounts of study at an approved cosmetic art school before reapplication for examination will be accepted by the Board:~~

- (1) Cosmetologist 200 hours
- (2) Esthetician 80 hours
- (3) Manicurist 40 hours
- (4) Teacher cosmetology 100 hours, esthetician 80 hours manicurist 40 hours

(b) Teacher candidates with no prior cosmetic art teacher training program experience will be required to complete at least 800 hours of a cosmetology teacher curriculum, 650 hours of an esthetician teacher curriculum, or 320 hours of a manicurist teacher curriculum.

21 NCAC 14N .0115 FULL TIME AND PART TIME EQUIVALENCY

Candidates for teacher licensure must work a full-time minimum of 2,080 hours per year or 1,040 hours per year in a part-time capacity or any equivalent thereof, in the cosmetic arts industry, to be eligible for Board equivalency consideration.

Authority G.S. 88B-11.

SUBCHAPTER 14R – CONTINUING EDUCATION

SECTION .0100 – CONTINUING EDUCATION

21 NCAC 14R .0102 APPLICATION CRITERIA AND CONTINUING EDUCATION COURSE APPROVAL

(a) Application for course approval shall be completed on forms provided by the Board and shall demonstrate that the applicant is:

- (1) A provider as defined in 21 NCAC 14A .0101;
- (2) Submitting the form to the Board's office at least 30 days prior to the proposed initial date of the course offering.
- (3) Proposing a course offering that must include at least 50% of subject matter in the cosmetic arts or cosmetic art teacher training techniques;
- (4) Providing a short resume of all course instructors.

(b) The following offerings shall not be approved by the Board for continuing education credit:

- (1) That portion of any offering devoted to any breaks including: breakfast, lunch and dinner or other refreshments;
- (2) Any application, that fails to meet the standards of this Rule.

(c) A continuing education number shall be assigned to each approved course.

(d) Applications for course approval must be in the Board's office at least 10 days prior to a Board meeting to allow time for review and Board approval.

(e) Approved courses may be conducted as often as desired during the calendar year.

PROPOSED RULES

(f) Approved courses not conducted for three consecutive years must be re-approved before they may again be offered. *Authority G.S. 88-B 4; 88B-21(e).*

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services

Rule Citation: 10A NCAC 26E .0601 - .0603

Effective Date: January 1, 2007

Date Approved by the Rules Review Commission: December 14, 2006

Reason for Action:

10A NCAC 26E .0601 - .0603 - Section 10.36(a) of S.L. 2005-276 directs the Commission for MH/DD/SAS to adopt rules necessary to implement the N.C. Controlled Substances Reporting System Act. The Commission for MH/DD/SAS adopted permanent rules on 8/17/2006. The permanent rules were approved by the Rules Review Commission on 9/21/2006. The agency was notified that the rules are subject to the next Legislative Session. The Commission is requesting approval of temporary rules pursuant to G.S. 150B-21.3(b2).

CHAPTER 26 – MENTAL HEALTH: GENERAL

SUBCHAPTER 26E - MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND RESEARCHERS OF CONTROLLED SUBSTANCES

SECTION .0600 CONTROLLED SUBSTANCES REPORTING SYSTEM

10A NCAC 26E .0601 SCOPE

The rules of this Section as well as the provisions of Chapter 90, Article 5E shall govern requirements for the controlled substances reporting system as set forth in G.S. 90-113.70.

History Note: Authority G.S. 90-113.70; 90-113.76; Temporary Adoption Eff. January 1, 2007.

10A NCAC 26E .0602 DEFINITIONS

(a) As used in this Section, the following terms shall have the meanings as specified:

- (1) "Controlled substance reporting system" means the reporting system as set forth in Article 5E of Chapter 90.
- (2) "ASAP" means the American Society for Automation in Pharmacy.

(b) Any term not defined in this Section shall have the same definitions as set forth in G.S. 90-87 and 90-113.72.

History Note: Authority G.S. 90-113.70; 90-113.76; Temporary Adoption Eff. January 1, 2007.

10A NCAC 26E .0603 REQUIREMENTS FOR TRANSMISSION OF DATA

(a) Each dispenser shall transmit to the Department the data as set forth in GS 90-113.73. The data shall be transmitted in the ASAP Telecommunication Format for Controlled Substances, published by the American Society for Automation in Pharmacy that is in use in the majority of states operating a controlled substance reporting system.

(b) The dispenser shall transmit the data electronically unless the Department approves a request for submission on paper as set forth in Paragraphs (e) and (f) of this Rule.

(c) The dispenser's electronic transfer data equipment including hardware, software and internet connections shall be in compliance with the Health Insurance Portability and Accountability Act as set forth in 45 CFR, Part 164.

(d) Each electronic transmission shall meet data protection requirements as follows:

- (1) Data shall be at least 128B encryption in transmission and at rest; or
- (2) Data shall be transmitted via secure file transfer protocol. Once received, data at rest shall be encrypted.

(e) The data may be submitted on paper, if the dispenser submits a written request to the Department and receives prior approval.

(f) The Department shall consider the following in granting approval of the request:

- (1) The dispenser does not have a computerized record keeping system.
- (2) The dispenser is unable to conform to the submission format required by the database administrator without incurring undue financial hardship.

(g) The dispenser shall report the data on the 30th day of each month for the first 12 months of the system's operation, and on the 15th day and 30th day of each month thereafter. If the 15th or the 30th day does not fall on a business day the dispenser shall report the data on the next following business day.

(h) The Department shall provide reports to the Commission concerning the outcomes of the implementation of the controlled substances reporting system. The reports shall be made to the Commission six and 12 months after the reporting system is implemented.

History Note: Authority G.S. 90-113.70; 90-113.73; 90-113.76; Temporary Adoption Eff. January 1, 2007.

TITLE 11 – DEPARTMENT OF INSURANCE

Rule-making Agency: *North Carolina Department of Insurance*

Rule Citation: *11 NCAC 11B .0222*

Effective Date: *December 31, 2006*

Date Approved by the Rules Review Commission: *December 14, 2006*

Reason for Action: *Effective December 31, 2006, S.L. 2006-105 (SB 615) amends G.S. 58-19-25(d) by requiring each domestic insurer to report to the Commissioner all dividends and other distributions to shareholders within 5 business days following the declaration thereof, and at least 30 days before the payment thereof. This amended rule complies with the legislation. Presently, this rule only applies to extraordinary dividends that are declared or paid by insurance companies to the stockholders. G.S. 58-7-130(b), 58-19-25(d) and 58-19-30(c) were amended by S.L. 2006-105 to apply to all dividends and other distributions that are declared or paid by insurance companies to their stockholders. These amendments become effective December 31, 2006. The changes to this rule are in the public interest because without them becoming effective at the same time as the change in the law, distributions and other dividends declared paid by insurance companies would not be adequately regulated. Adherence to the notice and hearing requirements would be contrary to the public interest because the changes in this rule could not become effective on December 31, 2006.*

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11B - SPECIAL PROGRAMS

SECTION .0200 - INSURANCE HOLDING COMPANY SYSTEMS

11 NCAC 11B .0222 TRANSACTIONS SUBJECT TO PRIOR NOTICE - NOTICE FILING

(a) An insurer required to give prior notice of a proposed transaction under G.S. 58-19-30(b) shall furnish the required information on Form D.

(b) ~~Requests~~ An insurer required to give prior notice of an ordinary dividend or any other ordinary distribution to shareholders under G.S. 58-19-25(d) or an insurer that requests, under G.S. 58-19-30(c), for approval of extraordinary dividends or any other extraordinary distribution to shareholders shall include the following:

- (1) The amount of the proposed ~~dividend;~~ dividend or distribution;
- (2) The date established for payment of the ~~dividend;~~ dividend or distribution;
- (3) A statement as to whether the dividend or distribution is to be in cash or other property and, if in property, a description thereof, its

cost, and its fair market value together with an explanation of the basis for valuation;

(4) A statement identifying the dividend or distribution as an ordinary dividend or other ordinary distribution subject to G.S. 58-19-25(d) or as an extraordinary dividend or other extraordinary distribution as defined in G.S. 58-19-30(c);

~~(4)(5)~~ A copy of the calculations determining that the proposed dividend is an ordinary dividend or other ordinary distribution subject to G.S. 58-19-25(d), or an extraordinary dividend or other extraordinary distribution as defined in G.S. 58-19-30(c). ~~extraordinary.~~ The work paper shall include the following information:

(A) The amounts, dates and form of payment of all dividends or distributions ~~(including regular dividends but~~ excluding distributions of the ~~insurers~~ insurer's own securities) paid within the period of 12 consecutive months ending on the date fixed for payment of the proposed dividend for which notification is being given or approval is sought ~~sought,~~ and commencing on the day after the same day of the same month in the last preceding year;

(B) ~~Surplus as regards policyholders~~ Policyholder surplus (total capital and surplus) as of the preceding December 31;

(C) If the insurer is a life insurer, the net gain from operations for the 12-month period ending the preceding December 31; and

(D) If the insurer is not a life insurer, the net income less realized capital gains for the 12-month period ending the preceding ~~December 31 and the two preceding 12-month periods; and December 31.~~

~~(E) If the insurer is not a life insurer, the dividends paid to stockholders excluding distributions of the insurer's own securities in the preceding two calendar years;~~

~~(5)(6)~~ A balance sheet and statement of income for the period ~~intervening from between~~ the last annual statement filed with the Commissioner and the end of the month preceding the month in which the request for ~~dividend approval is submitted;~~ or the prior notification of a dividend or distribution is submitted. The insurer shall indicate the amount of all unrealized capital gains included in unassigned funds;

- (6)(7) A brief statement as to the effect of the proposed dividend or distribution upon the insurer's surplus and the reasonableness of surplus in relation to the insurer's outstanding liabilities and the adequacy of surplus relative to the insurer's financial needs; and
- (7)(8) A brief statement as to the intended use(s) of the proposed dividend or distribution by the parent, and, if applicable, any upstream parent, of the insurer.

(c) A prior notification of an ordinary dividend or any other ordinary distribution required under G.S. 58-19-25(d) shall be deemed to be incomplete unless all of the information required by Paragraph (b) of this Rule has been included.

(d) A request for approval of an extraordinary dividend or any other extraordinary distribution required under G.S. 58-19-30(c) shall be deemed to be incomplete unless all of the information required by Paragraph (b) of this Rule has been included.

(e) For the purposes of the Commissioner's review of all proposed dividend payments or other distributions to shareholders, the factors set forth in G.S. 58-19-30(d) shall be considered.

History Note: Authority G.S. 58-2-40; 58-19-25; 58-19-30; Eff. April 1, 1993; Temporary Amendment Eff. December 31, 2006.

TITLE 12 – DEPARTMENT OF JUSTICE

Rule-making Agency: *Criminal Justice Education and Training Standards Commission*

Rule Citation: *12 NCAC 09C .0401*

Effective Date: *January 1, 2007*

Date Approved by the Rules Review Commission: *December 14, 2006*

Reason for Action: *This rule concerns certification of schools at law enforcement agencies and community colleges. Each school is certified for a five year period. A school must have current certification in order to offer criminal justice courses. There are approximately 50 schools whose certification will expire this year. Due to staff vacancies and lack of funds, the current staff is unable to complete site visits and audits of all 50 schools by the end of the year. These courses include Basic Law Enforcement Training, General Instructor, Radar, etc. If these schools are prohibited from offering courses for any period of time, it will have a significant impact on the ability of law enforcement agencies to hire qualified police officers. It will also result in a decrease in the number of officers certified to operate speed measurement instruments and certified to teach. The Commission wants to grant the remaining schools an extension on the certification period until such time as the Standards Division staff can catch up. This additional time would not exceed two years. If the extended period of certification is not granted, the majority of these 50 schools will*

experience a lapse in certification and will be unable to offer criminal justice courses next year.

CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09C - ADMINISTRATION OF CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SECTION .0400 - ACCREDITATION OF CRIMINAL JUSTICE SCHOOLS AND TRAINING COURSES

12 NCAC 09C .0401 CERTIFICATION OF CRIMINAL JUSTICE SCHOOLS

(a) The Commission shall establish a standing subcommittee, called the ~~Accreditation~~–Certification Committee, of the Education and Training Committee for the purposes of evaluating Request for School ~~Accreditation~~–Certification applications and making recommendations to the Education and Training committee on the granting of ~~accreditation~~–certification to institutions and agencies. The ~~Accreditation~~–Certification Committee shall be comprised of two members appointed by the School Directors' Advisory Committee and two members who shall be ~~commission~~–Commission members to include the North Carolina Department of Community Colleges' representative to the Commission. The Chairman of the Commission shall appoint the Chairman of the ~~Accreditation~~–Certification Committee.

(b) Any school requesting ~~accreditation~~–certification meeting the minimum requirements contained in 12 NCAC 09B .0200 must submit a completed Request for School ~~Accreditation~~–Certification application. Upon receipt of a completed Request for School ~~Accreditation~~–Certification application:

- (1) The Standards Division staff shall review the application for any omissions and clarifications and conduct a site visit to tour facilities, confirm information on the application, and determine if and where deficiencies exist;
- (2) The Standards Division Staff shall contact the applying institution or agency concerning deficiencies and shall provide assistance on correcting problem areas;
- (3) The Standards Division staff shall make a recommendation to the ~~Accreditation~~–Certification Committee when the accredited institution has satisfied the requirements outlined in 12 NCAC 09B .0200;
- (4) The Standards Division staff shall submit the application and staff reports to the ~~Accreditation~~–Certification Committee for review;
- (5) The ~~Accreditation~~–Certification Committee shall then submit a recommendation to the Education and Training Committee on the approval or denial of the application; and
- (6) The Education and Training Committee shall recommend to the full Commission at its next regularly scheduled meeting the approval or

denial of ~~accreditation~~-certification for the applicant institution or agency.

(c) ~~Accreditation-Certification~~ of a school shall remain effective for five years from issuance unless earlier suspended or revoked for failure to maintain compliance with the requirements outlined in 12 NCAC 09B .0200, Minimum Standards for Criminal Justice Schools and Criminal Justice Training Programs or Courses of Instruction.

(d) The identity of those schools ~~accredited~~-certified under this Rule shall be published and distributed annually by the Standards Division together with the name and business address of the school director and the schedule of criminal justice training courses planned for delivery during the succeeding year.

(e) A school may apply for ~~reaccreditation~~-recertification to the Commission by submitting a completed Request for School ~~Accreditation-Certification~~ application. The application for ~~reaccreditation~~-recertification shall contain information on changes in facilities, equipment, and staffing. Upon receipt of a completed application:

- (1) The Standards Division staff shall review the application for any omissions and clarification;
- (2) The Standards Division staff shall attach copies of the reports of site visits conducted during the last period of certification to the application;
- (3) The Standards Division staff shall submit the application and staff reports to the ~~Accreditation-Certification~~ Committee for Review;
- (4) The ~~Accreditation-Certification~~ Committee shall submit a recommendation to the Education and Training Committee on the approval or denial of the application; and
- (5) The Education and Training Committee shall recommend to the full Commission at its next regularly scheduled meeting the approval or denial of ~~accreditation~~-certification of the applicant institution or agency.

(f) In instances where ~~accredited~~-certified schools have been found to be in compliance with 12 NCAC 09B .0200 through favorable site visit reports, Standards Division staff shall ~~reaccredit~~-recertify on behalf of the Commission. Such action shall be reported to the Commission through the ~~Accreditation-Certification~~ Committee and the Education and Training Committee at its next scheduled meeting.

(g) The Commission may suspend or revoke a school's ~~accreditation~~-certification when it finds that the school has failed to meet or continuously maintain any requirement, standard, or procedure for school or course ~~accreditation~~-certification.

(h) The certification of a school whose certification is scheduled to expire in calendar year 2006 and who has submitted a request for recertification is extended for a maximum of two years under the following conditions:

- (1) certification has not expired;
- (2) the school has submitted a request for recertification along with the required documentation by December 31, 2006;

(3) the Standards Division staff is unable to complete the recertification process by December 31, 2006; and

(4) the school is not denied recertification prior to the expiration of the current certification. Certification or certification extension according to this paragraph expires when recertification is denied or revoked or the Standards Division staff is able to complete the recertification process and it is determined that the school is in compliance with the Rules for recertification. If the school recertification is denied or revoked, the school must not deliver Commission certified criminal justice courses until such recertification has been granted or reinstated by the Commission.

History Note: Authority G.S. 17C-6; Eff. January 1, 1981; Amended Eff. August 1, 2004, January 1, 1996; Temporary Amendment Eff. January 1, 2007.

TITLE 18 – SECRETARY OF STATE

Rule-making Agency: *Department of Secretary of State*

Rule Citation: *18 NCAC 12 .0101-.0103; .0201-.0217; .0301-.0307; .0401-.0407; .0501; .0601-.0604; .0701-.0704; .0801-.0802; .1101; .1501-.1504; .1601.*

Effective Date: *January 1, 2007*

Date Approved by the Rules Review Commission: *December 14, 2006*

Reason for Action: *Session Law 2006-201 and Session Law 2006-259, Section 43.5, signed by the Governor on August 4 and 23, 2006, respectively, amend the General Statutes by adding a new Chapter 120C, entitle "Lobbying". Temporary rulemaking and immediate adoption of the rules is required in order to ensure that rules are in effect on January 1, 2007 and lobbyists and principals can begin registering on January 2, 2007. A person who lobbies a designated individual in either the executive or legislative branch is required by the Act to register within one day of lobbying. Failure to do so is a crime. Therefore, the Department must adopt temporary rules effective on January 1, 2007 in order for those individuals to register and comply with both civil and criminal law. The public has had the opportunity to comment and participate in a public hearing pursuant to APA temporary rulemaking requirements and has, in fact, vigorously participated.*

CHAPTER 12 – LOBBYING

SECTION .0100 – GENERAL

18 NCAC 12 .0101 SCOPE

The rules in this Chapter implement Chapter 120C of the North Carolina General Statutes.

History Note: Authority G.S. 120C-101(a),(b); 120C-200; 120C-201; 120C-206; 120C-207; 120C-401; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0102 DEFINITIONS

(a) The terms and definitions applicable to the rules in this Chapter are those:

- (1) Set out in Article 1 of Chapter 120C of the North Carolina General Statutes; and
- (2) Set out in Article 1 of Chapter 138A of the North Carolina General Statutes; and
- (3) Set out in Paragraphs (b) and (c) of this Rule.

(b) As used in G.S. 120C-100(a) of the North Carolina General Statutes, the following terms and definitions shall apply:

- (1) "Adoption" means formal acceptance;
- (2) "Amendment" means proposed or actual alteration, change or modification;
- (3) "Approval" means confirmation, sanction, ratification, authorization or endorsement;
- (4) "Consideration" means a designated individual's deliberative process and may include deliberation with others;
- (5) "Defeat" means a designated individual's abolition, cancellation, reduction, limitation, or voiding of an action or course of action from present or future consideration;
- (6) "Development" means bringing into existence, creation, or evolution of any action;
- (7) "Drafting" means composition or writing of a document whether in single or multiple versions;
- (8) "Guideline" means a code, protocol, scheme, plan, instruction or criterion;
- (9) "Ministerial" means execution of a specific non-discretionary duty arising from fixed and designated facts. NOTE: For example, calculation of prejudgment interest is a ministerial action;
- (10) "Modification" means an alteration or adjustment or a change in form, qualities or content;
- (11) "Postponement" means putting off to a later time, deferral, delay, extension of a time period, or suspension of consideration;
- (12) "Preparation" means development, creation or composition, getting ready, laying groundwork for, setting up, scheduling or preliminary actions;
- (13) "Procedure" means a regular or established method or way of taking an action or reaching a result;
- (14) "Purporting to act in an official capacity" means to convey expressly or by implication that the individual is communicating or acting because of, due to, or as authorized by law or rule with regard to the individual's position as

a designated individual and in conformity with the responsibilities or duties accompanying the position as a designated individual;

- (15) "Reject" means a designated individual's refusal, denial, disallowance, ending, or elimination of an action or course of action from present or future consideration;
- (16) "Request for proposal" means a formal procedure such as an Invitation for Bids, Request for Proposals, Negotiation, or Request for Quotations;
- (17) "Research" means gathering or acquisition of data, facts, statistics, opinions or other information, including inquiry into a subject, for use by a designated individual; and
- (18) "Tabling" means to suspend consideration at that time, to reserve for future discussion, to postpone or shelve indefinitely.

(c) As used in this Chapter and Chapter 120C of the North Carolina General Statutes, the following terms and definitions shall apply:

- (1) "Act" means Chapter 120C of the North Carolina General Statutes entitled "Lobbying";
- (2) "Communication" means the action of imparting or exchanging thoughts, facts, opinions, or other information whether in person, through paper, electronic or other means;
- (3) "Department" means the Department of the Secretary of State;
- (4) "Disclose" means to affirmatively communicate or confirm information to a designated individual. An oral declarative statement spoken in a manner heard and understood by the designated individual; in a document in bold or large typeface or other method clearly stating; or, by a visible display such as a name tag constitutes disclosure;
- (5) "Disclose the identity of the principal":
 - (A) For a lobbyist representing a single principal, means an affirmative communication of the identity of the principal. An oral and affirmative statement identifying the principal; or the act of supplying a business card with the name of the principal; or stating in correspondence the identity of the principal; or the act of placing the words "lobbyist for" and the identity of the principal in correspondence; or the visible displaying of a name tag containing the identity of the principal; or words that affirmatively convey that the person is representing a principal and the identity of the principal constitutes disclosure of the identity of the principal;

- (B) For a lobbyist representing multiple principals, an affirmative communication of the identity of the specific principal or principals on whose behalf the lobbyist is currently communicating with the designated individual. An oral and affirmative declaration stating the identity of the specific principal or principals on whose behalf the lobbyist is currently communicating; or stating in correspondence the identity of the specific principal or principals on whose behalf the lobbyist is currently communicating; or placing the words "lobbyist for" and the identity of the specific principal or principals on whose behalf the lobbyist is currently communicating in correspondence constitutes disclosure of the identity of the principal;
- (6) "Economic development activity" means any project, initiative or business or industrial recruitment activity which satisfies the statutory requirements to withhold a public record under G.S. 132-6(d);
- (7) "Economic development designation" means a written request completed and submitted for the purpose of withholding economic development activity information;
- (8) "Filer" means a person making a filing;
- (9) "Filing," "document" and "record" mean those completed forms, attachments and information submitted in paper or electronic form;
- (10) "Form" means a form or report required or permitted to be filed;
- (11) "Identify himself or herself as a lobbyist" means to affirmatively communicate that the person is a lobbyist. Note: Examples of such identification include: orally and affirmatively stating that the person is a lobbyist; or supplying a business card with the word "lobbyist"; or stating in correspondence that the person is a "lobbyist"; or visibly displaying a name tag containing the word "lobbyist" or words that affirmatively convey that the individual is a lobbyist and represents a disclosed, specific principal or principals;
- (12) "Invitation" means either an oral or written request seeking a person's presence, participation or attendance. Note: Examples include requests to attend events, meetings, or conferences;
- (13) "Leaving office" means the date on which an individual no longer holds office for any reason including those reasons set forth in Chapter 128 of the North Carolina General Statutes;

- (14) "Recruitment filer" means a person who files an economic development designation form;
- (15) "Registration" means submission of a complete registration form to the Department;
- (16) "Result or outcome" means conclusion or point in a process or activity at which either a decision is made to proceed or not to proceed; and
- (17) RESERVED
- (18) "Withhold" and "withheld" mean to remove or be removed from the public record pursuant to law and Rule.

History Note: Authority G.S. 120C-100; 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0103 TIME

(a) Calculation of time periods. Time periods are calculated according to the requirements of G.S. 1A-1, Rule 6.

(b) Quarters. When calculating a deadline for any filing required on a quarterly basis or for a quarterly reporting period:

- (1) The reporting period for the first quarter ends on March 31;
- (2) The reporting period for the second quarter ends on June 30;
- (3) The reporting period for the third quarter ends on September 30; and
- (4) The reporting period for the fourth quarter ends on December 31.

(c) Months. When calculating a deadline for any filing required on a monthly basis for a monthly reporting period, the reporting period ends on the last calendar day of the month.

History Note: Authority G.S. 1A-1, Rule 6; 120C-101(a); 120C-401, 120C-402, 120C-403, 120C-404; Temporary Adoption Eff. January 1, 2007.

SECTION .0200 – FILING

18 NCAC 12 .0201 FILING SUBMISSION LOCATIONS AND METHODS

Each required filing shall be submitted to the Department by one of the following methods:

- (1) By United States mail at the following address: Secretary of State, P. O. Box 29622, Raleigh, N. C. 27626-0622;
- (2) In person or by a designated delivery service authorized pursuant to G.S. 1A-1, Rule 4 at the following street address: Department of the Secretary of State, 2 South Salisbury Street, Raleigh, N. C. 27601-2903;
- (3) Electronically by electronic mail via the Internet site at the following address: lobbyistfiling@sosnc.com. Any document(s) attached to the filing other than the form or report shall be compatible with or convertible to the most recently issued version of Microsoft Word®. NOTE: Until such time as the Department is authorized to accept credit

card payments, payment of fees must be submitted within two business days of an electronic filing or the filing shall be rejected; or

- (4) By facsimile for filings not requiring a fee, provided the original signed document is received by the Department within five business days following the Department's receipt of the faxed transmission. A filing for which the original is not received within five business days following the Department's receipt of the faxed transmission is void.

History Note: Authority G.S. 1A-1, Rule 4; 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0202 FILERS MUST USE DEPARTMENT'S FORMS

Filers shall use Departmental forms.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0203 FORM COMPLETION REQUIREMENTS

- (a) All information requested on a form shall be completed by the filer whether requested by means of a block to be marked or a line to be completed.
(b) If a question or item is not applicable to the filer, the filer shall not leave the question or item blank but shall enter "not applicable" or check the "not applicable" box.
(c) Forms may be submitted in paper or electronic format.
(d) A form is not complete unless it complies with all applicable filing requirements in this Chapter.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0204 FORM SIGNATURE REQUIRED

A form shall be legibly signed by the person required or authorized to file the form or, in the case of an entity, by an officer authorized to do so, and shall include the officer's title or indication of the officer's authority to sign the form.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0205 FORM PREPARATION OR COMPLETION BY ANOTHER

Any person who prepares or completes all or part of a form on behalf of a filer shall sign the form in the space provided for a preparer's signature. This Rule does not apply if information is entered on a filer's form without the exercise of independent judgment or discretion by the person entering the information. For example, an administrative assistant who enters information supplied by and at the direction of a filer would not have to sign the form in the space provided for a preparer's signature.

History Note: Authority G.S. 120C-101(a);

Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0206 SIGNING PURSUANT TO POWER OF ATTORNEY

A person signing a filing on behalf of another under a power of attorney granted pursuant to Chapter 32A of the General Statutes shall provide:

- (1) A legible copy of the power of attorney with each filing; and
(2) For an entity, a legible copy with each filing of a resolution or evidence of other formal action granting the power of attorney.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0207 SIGNING AND EXECUTING A FORM UNDER OATH

When the Act or this Chapter requires a report filed with the Department to be signed under oath, that report shall be signed by the filer or authorized person before a Notary Public or a person authorized to administer oaths by the state in which the report is being signed.

History Note: Authority G.S. 120C-101(a); 120C-402(a); 120C-403(a); 120C-404(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0208 SIGNATURE VERIFIES INFORMATION IS TRUE

An individual's signature on a filing submitted to the Department constitutes that person's verification that all information entered on the report is true and complete.

History Note: Authority G.S. 120C-101(a); 120C-402; 120C-403; 120C-404; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0209 SIGNATURE AND EXECUTION UNDER OATH OF AN ELECTRONIC FILING

If a form is filed electronically and is not electronically notarized pursuant to Article 2 of Chapter 10B of the General Statutes, an independent affidavit shall be delivered to the Department within seven days after the form is electronically filed. Failure to deliver the affidavit renders the filing void. The affidavit shall include the following information:

- (1) A statement that the person signing did electronically file a form required by the Act;
(2) The date and time at which the electronic filing was transmitted;
(3) The email address from which the electronic filing was transmitted; and
(4) A signature under oath pursuant to Rule .0207 of this Chapter.

History Note: Authority G.S. 10B-115; 120C-101(a); 120C-402(a); 120C-403(a); 120C-404(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0210 FILING SUBMISSION DATE AND TIME

A filing is submitted:

- (1) By hand-delivery, when it is received by the Department before 5:00 p.m. of that day; or
- (2) By mail, when the mailing is postmarked by the United States Postal Service or an equivalent marking used by a delivery service authorized pursuant to G.S. 1A-1, Rule 4; or
- (3) By facsimile (fax), when it is received by the Department before 5:00 p.m. of that day; or
- (4) Electronically, when it is transmitted to the Department by 11:59 p.m. of that day.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0211 PROOF OF SUBMISSION

A person may obtain proof of submission of a filing to the Department by:

- (1) Any means acceptable pursuant to G.S. 1A-1, Rules of Civil Procedure;
- (2) Requesting that the Department return a file stamped copy and supplying to the Department both a copy of the form and a self-addressed, stamped envelope or other prepaid delivery service envelope; or
- (3) Requesting that the Department file stamp a copy at the time of in person delivery.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0212 DEPARTMENT REVIEW OF SUBMITTED FILING

- (a) The Department shall examine each filing to determine whether the filing is complete.
- (b) The Department shall reject any filing which:
 - (1) Contains any illegible information; or
 - (2) Lacks any required information; or
 - (3) Contains any blank, unfilled, or unanswered questions or data entry areas.
- (c) The Department shall reject any filing which is not signed as required by the Act or the rules in this Chapter unless corrected in compliance with Rule .0213 or .0214 of this Chapter.
- (d) The Department shall reject any filing which is not submitted together with any required fee unless corrected in compliance with Rule .0201, .0213 or .0214 of this Chapter.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0213 OMISSIONS REQUIRING CORRECTION WITHIN ONE BUSINESS DAY

- (a) Principal's authorization statement. The absence of the signature of the principal on the principal's authorization statement shall be corrected within one business day after notification by the Department or the filing shall be rejected as incomplete.

- (b) Filing under oath. The absence of notarization of quarterly principal, lobbyist and solicitor reports shall be corrected within one business day after notification by the Department or the filing shall be rejected as incomplete.

History Note: Authority G.S. 120C-101(a); 120C-206; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0214 OMISSIONS REQUIRING CORRECTION WITHIN SEVEN DAYS

- (a) Omissions other than those set forth in Rule .0213 of this Chapter shall be corrected within seven days after notification by the Department or the filing shall be rejected.
- (b) A filing that contained an omission corrected pursuant to Paragraph (a) of this Rule shall be deemed filed pursuant to the provisions of Rule .0210 of this Chapter.

History Note: Authority G.S. 120C-101(a); 120C-401; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0215 EFFECTIVE DATE OF COMPLETE FILING

After the Department reviews a filing and determines that the filing is complete, the filing shall be deemed accepted and filed on the date on which it was submitted.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0216 REJECTED FILINGS

A filing which is reviewed by the Department and rejected as incomplete is not filed and the filer is subject to sanctions pursuant to G.S. 120C-401.

History Note: Authority G.S. 120C-101(a); 120C-401; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0217 EFFECTIVE DATE OF LATE FILING

For a late filing, there shall be no relation back of the filing to the date on which it was due.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

SECTION .0300 – FEES

18 NCAC 12 .0301 GENERAL

- (a) A required fee shall be submitted together with the filing to which the fee applies.
 - (b) A fee shall be paid by cash, warrant, uncertified check, certified check, money order, credit card or another instrument freely negotiable at par through the Federal Reserve System. Checks, money orders, credit cards or other instruments must be drawn on U.S. financial institutions in U.S. dollars and cents.
- NOTE: The Department will post a notice on its website as soon as it is authorized to accept payment by credit card.

(c) A filing is void if a check or other instrument for a required fee is returned by the institution upon which it was issued as "insufficient funds" or for other similar reason.

(d) A fee reduction or fee waiver applies only to the specific filing for which the request was submitted.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); 26 U.S.C. Sec. 501(c)(3); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0302 NONPROFITS TO WHICH NO FEE REDUCTION OR WAIVER SHALL BE GRANTED

The Department shall not grant a fee reduction or waiver if a nonprofit principal had annual revenues in its most recent fiscal year of more than three hundred thousand dollars (\$300,000) or is represented by more than two lobbyists.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); 26 U.S.C. Sec. 501(c)(3); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0303 NONPROFIT FEE REDUCTION PROCEDURE

(a) The Department shall reduce the fee to fifty dollars (\$50.00) if a nonprofit principal:

- (1) Had annual revenues in its most recent fiscal year of three hundred thousand dollars (\$300,000) or less; and
- (2) Is represented by no more than two lobbyists.

(b) The fifty dollar (\$50.00) fee shall be submitted together with the filing to which it applies.

(c) Documentation required in Rules .0305 and .0306 of this Chapter must be submitted together with the filing to which the fee reduction applies.

(d) The reduced fee shall apply to filing fees for both lobbyist and lobbyist's principal.

(e) If the Department finds that the non-profit principal does not qualify for fee reduction, the remaining fifty dollars (\$50.00) shall be paid by the filer within 10 business days of the date on the Department's denial letter. If the full fee is not paid, the registration is void and the filer shall not lobby after the 10th business day following the date on the Department's denial letter.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); 26 U.S.C. Sec. 501(c)(3); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0304 NONPROFIT FEE WAIVER PROCEDURE

(a) The Department shall waive the fee if the nonprofit principal:

- (1) Was formed within 12 months of filing;
- (2) Does not possess fund balance information or net assets for the immediately preceding fiscal year; and
- (3) Is represented by no more than two lobbyists.

(b) A non-profit principal shall submit a fee of fifty dollars (\$50.00) together with the filing for which it is requesting fee

waiver. If fee waiver is granted, the Department shall refund the fee of fifty dollars (\$50.00).

(c) Documentation required in Rules .0305 and .0307 of this Chapter must be submitted together with the filing to which the fee waiver applies.

(d) The waiver shall apply to filing fees for both lobbyist and lobbyist's principal.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); 26 U.S.C. Sec. 501(c)(3); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0305 PROOF OF NONPROFIT STATUS

(a) "Nonprofit" means an entity to which tax exempt status has been granted pursuant to 26 U.S.C. Sec. 501(c)(3), including those entities granted tax-exempt status which are permitted but not required to obtain a tax-exempt determination letter from the United States Internal Revenue Service.

(b) For purposes of the provisions of this Chapter relating to fee reduction or waiver, an "authorized officer":

- (1) For a nonprofit corporation, is any person authorized to act on behalf of the corporation pursuant to Chapter 55A of the General Statutes of North Carolina;
- (2) For a nonprofit trust, is any person authorized pursuant to law to act on behalf of the trust;
- (3) For an unincorporated association, is any person to whom the association has delegated authority to act on behalf of the association.

(c) Federal tax-exempt determination letter. A nonprofit principal which is required to obtain a federal tax-exempt determination letter shall submit a copy of that letter together with a filing for which fee reduction or waiver is requested.

(d) No federal tax-exempt determination letter. A nonprofit principal which is not required to obtain a tax exempt determination letter under 26 U.S.C. Sec. 501(c)(3) shall submit the following information together with the filing for which fee reduction or waiver is requested:

- (1) A statement signed by an authorized officer verifying the nonprofit's federal tax exempt status under 26 U.S.C. Sec. 501(c)(3); and
- (2) A statement signed by an authorized officer setting forth the reason(s) a tax-exempt determination letter is not required under 26 U.S.C. Sec. 501(c)(3).

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); 26 U.S.C. Sec. 501(c)(3); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0306 ADDITIONAL INFORMATION FOR FEE REDUCTION

(a) If the nonprofit principal has nonprofit status pursuant to a tax-exempt determination letter under 26 U.S.C. Sec. 501(c)(3), the fee reduction request shall include:

- (1) A statement signed by an authorized officer verifying that the nonprofit has no more than two lobbyists; and

(2) A copy of the nonprofit's most recent federal Form 990, Form 990-EZ or Form 990-PF.

(b) If the nonprofit has nonprofit status pursuant to a tax-exempt determination letter under 26 U.S.C. Sec. 501(c)(3) and is not required to file a federal Form 990, Form 990-EZ or Form 990-PF, then the fee reduction request shall include:

(1) A statement signed by an authorized officer verifying that the nonprofit has no more than two lobbyists;

(2) A statement signed by an authorized officer containing a copy of the nonprofit's annual financial statement for the preceding tax year; and

(3) A copy of the notice filed pursuant to Section 1223 of the United States Pension Protection Act of 2006 (PL 109-280) for notices and returns associated with annual periods beginning on or after January 1, 2007.

(c) If the nonprofit principal has non-profit status and a tax-exempt determination letter is not required under 26 U.S.C. Sec. 501(c)(3), the fee reduction request shall include:

(1) A statement signed by an authorized officer verifying that the nonprofit has no more than two lobbyists;

(2) A statement signed by an authorized officer containing a copy of the nonprofit's annual financial statement for the preceding tax year.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0307 ADDITIONAL INFORMATION FOR FEE WAIVER

If the nonprofit was formed within 12 months of filing and has no net assets or fund balance information, the fee waiver request shall include the following information:

(1) A statement signed by an authorized officer verifying that the nonprofit has no more than two lobbyists;

(2) A statement signed by an authorized officer verifying the nonprofit's formation date; and

(3) A statement signed by an authorized officer verifying that the nonprofit has no fund balance information or net assets.

History Note: Authority G.S. 120C-101(a); 120C-201(b); 120C-207(b); Temporary Adoption Eff. January 1, 2007.

SECTION .0400 – ECONOMIC DEVELOPMENT DESIGNATION

18 NCAC 12 .0401 WITHHOLDING PUBLIC RECORD PURSUANT TO ECONOMIC DEVELOPMENT DESIGNATION

(a) If Economic Development Designation is requested, a lobbyist and lobbyist's principal shall attach to and incorporate in their registration an Economic Development Designation form.

(b) Both the lobbyist and the lobbyist's principal shall file an Economic Development Designation request for an economic development activity.

(c) A lobbyist and lobbyist principal shall file an Economic Development Designation confirmation form with each quarterly or monthly report.

(d) All lobbying activity and expenses related to the Economic Development Designation are confidential until disclosure is required by law. Lobbying activity and expense filings unrelated to the Economic Development Designation shall be disclosed as if the Economic Development Designation did not exist.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0402 EFFECT OF FAILURE TO REQUEST DESIGNATION

Failure to request Economic Development Designation shall result in the disclosure of information as a public record.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0403 ONE DESIGNATION FORM PER ACTIVITY

An Economic Development Designation form shall cover only one economic development activity. A recruitment filer shall file a separate Economic Development Designation form for each economic development activity as if for a separate principal.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0404 DESCRIPTION OF ECONOMIC DEVELOPMENT ACTIVITY

A recruitment filer shall provide on or submit with the Economic Development Designation form a description of the economic development activity sufficient to enable the Department to determine whether and to what extent a public records request is applicable.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0405 IDENTIFICATION OF AUTHORIZED INDIVIDUAL

A recruitment filer shall designate and authorize at least one other individual to file a release authorizing disclosure of the economic development designation information. The recruitment filer shall provide the name, title, address, telephone number and email address of the authorized individual(s).

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0406 IDENTIFICATION OF AUTHORIZED GOVERNMENT EMPLOYEE, OFFICIAL OR PUBLIC SERVANT

(a) A recruitment filer shall identify at least one government employee or official or public servant who:

- (1) Is involved in or aware of the economic development activity;
(2) Is knowledgeable about the circumstances that give rise to the need for confidentiality and the economic development designation for the activity;
(3) Has the authority to make a determination as to whether and when a release of records or an announcement of the activity would be appropriate and proper; and
(4) Has authority to file a request for release of economic development activity information or to make an announcement regarding the activity.

(b) The recruitment filer shall ensure that any government employee or official or public servant who is identified pursuant to this Rule signs the Economic Development Designation form:

- (1) Agreeing to identification as a person who meets the criteria set out in Paragraph (a) of this Rule;
(2) Confirming that the economic development activity qualifies for Economic Development Designation pursuant to G.S. 120C-101(b) and G.S. 132-6(d); and
(3) Confirming that he or she has authority to file a request for release or make an announcement pursuant to G.S. 120C-101(b) and G.S. 132-6(d).

(c) The identification of government employees or officials or public servants pursuant to this Rule shall include the following information for each identified person: name, title, address, email address, telephone number.

(d) If the recruitment filer is himself or herself a government employee or official or public servant, an additional government employee(s) or official(s) or public servant(s) shall be identified pursuant to this Rule.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0407 DISCLOSURE AT REQUEST OF RECRUITMENT FILER

(a) For purposes of this Rule, "recruitment filer" includes the authorized person(s), government employee(s) or official(s) or public servant(s) designated pursuant to Rules .0405 and .0406 of this Chapter.

(b) The Department shall disclose economic development activity information filed with the Department one year from the date of filing unless:

- (1) Specified Date. The recruitment filer specifies an earlier date on the Economic Development Designation form; or
(2) Early Request for Release. The recruitment filer files a request for release of Economic Development Designation information before a year has elapsed; or
(3) Request for Extension. A recruitment filer may extend an Economic Development Designation for one year by filing an Economic Development Designation confirmation form together with the recruitment filer's annual registration form; or
(4) Change in Information. For purposes of Economic Development Designation, a change in information occurs because the circumstances no longer exist which qualified the information for Economic Development Designation. Filing of a request for release of the information within 10 days shall constitute compliance with the notice of change of information requirements in the Act. Note: For example, the circumstances which qualified the information for Economic Development Designation would cease to exist if: an economic development activity is publicly announced, and communicated to the appropriate governmental entity as having been located in another State and that North Carolina is no longer under consideration for that economic development activity. The circumstances which qualified the information for Economic Development Designation would cease to exist. The recruitment filer would be required to file the request for release of information within 10 business days after the public announcement.

(c) A request for release of Economic Development Designation information shall bear the signature of at least one of the government representatives identified pursuant to Rule .0406 of this Chapter and shall include a statement that the business has communicated to the State or local government agency involved with the project either:

- (1) A commitment to expand or locate the economic development project in this State; or
(2) A decision not to expand or locate the economic development project in this State.

History Note: Authority G.S. 120C-101(a); 120C-101(b); 132-6(d); 132-9; Temporary Adoption Eff. January 1, 2007.

SECTION .0500 -GENERAL REGISTRATION REQUIREMENTS

18 NCAC 12 .0501 MATTERS ON WHICH THE REGISTRANT EXPECTS TO ACT AS LOBBYIST

(a) An individual registering as a lobbyist shall specify on the registration form one or more categories in which the registrant expects to act as lobbyist.

(b) Any changes in the matters on which the individual expects to act as a lobbyist shall be reported pursuant to G.S. 120C-200(c).

History Note: Authority G.S. 120C-101(a); 120C-200; Temporary Adoption Eff. January 1, 2007.

SECTION .0600 – LOBBYISTS

18 NCAC 12 .0601 CALCULATION OF TIME TO DETERMINE REGISTRATION REQUIREMENTS

(a) For purposes of determining whether an employee has engaged in lobbying within the meaning of G.S. 120C-100(a)(10), d, the employee's actual duties shall include:

- (1) Actual time communicating with designated individuals; and
- (2) Actual time spent in goodwill lobbying as defined in 120C-100(a)(9).b, including time traveling with designated individuals.

(b) The 30-day period within which an employee's actual duty time is calculated shall be calculated in consecutive days and not by month. NOTE: For example, based on a 40-hour work week, an employee who lobbies eight hours on January 31 and then eight hours on February 1 will not be exempt from classification as a lobbyist by virtue of the exception in G.S. 120C-100(a)(10).d.

History Note: Authority G.S. 120C-101(a); 120C-200; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0602 QUARTERLY REPORT MAY INCLUDE LAST MONTH OF QUARTER REPORT

Instead of filing the monthly report for the last month of the quarter, a lobbyist may incorporate by reference that monthly report within the quarterly report.

History Note: Authority G.S. 120C-101(a); 120C-402; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0603 QUARTERLY REPORT MAY INCORPORATE SEPARATELY FILED MONTHLY REPORTS BY REFERENCE

Instead of entering separately filed monthly report information on the quarterly report form, a lobbyist may incorporate the separately filed monthly reports by reference in the applicable quarterly report form.

History Note: Authority G.S. 120C-101(a); 120C-402; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0604 QUARTERLY REPORT VERIFICATION OF MONTHLY REPORT INFORMATION

By signing the quarterly report, a lobbyist verifies the information contained in the incorporated monthly reports for that quarter and any amendments to the monthly reports,

including those previously filed and those specified in the quarterly report.

History Note: Authority G.S. 120C-101(a); 120C-402, 120C-403, 120C-404; Temporary Adoption Eff. January 1, 2007.

SECTION .0700 – PRINCIPALS

18 NCAC 12 .0701 SEPARATE REPORTS

A principal shall report the compensation paid to each lobbyist separately on the quarterly report.

History Note: Authority G.S. 120C-101(a); 120C-403; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0702 QUARTERLY REPORT MAY INCLUDE LAST MONTH OF QUARTER REPORT

Instead of filing the monthly report for the last month of the quarter, a principal may incorporate that monthly report within the quarterly report.

History Note: Authority G.S. 120C-101(a); 120C-403; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0703 QUARTERLY REPORT MAY INCORPORATE SEPARATELY FILED MONTHLY REPORTS BY REFERENCE

Instead of entering separately filed monthly report information on the quarterly report form, a principal may incorporate the separately filed monthly reports by reference in the applicable quarterly report form.

History Note: Authority G.S. 120C-101(a); 120C-403; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0704 QUARTERLY REPORT VERIFICATION OF MONTHLY REPORT INFORMATION

By signing the quarterly report, a principal verifies the information contained in the incorporated monthly reports for that quarter and any amendments to the monthly reports, including those previously filed and those specified in the quarterly report.

History Note: Authority G.S. 120C-101(a); 120C-403; Temporary Adoption Eff. January 1, 2007.

SECTION .0800 – SOLICITORS

18 NCAC 12 .0801 SOLICITOR REGISTRATION

When registering, solicitors shall provide the following:

- (1) The full legal name of the solicitor;
- (2) The full legal name of any firm or organization, if applicable;
- (3) If applicable, the name and title of the solicitor's representative authorized to sign a report;

- (4) The complete mailing and physical address of the solicitor;
- (5) The telephone number at which the solicitor can be reached between 8:00 a.m. and 5:00 p.m. on weekdays; and
- (6) The electronic mail address of the solicitor.

History Note: Authority G.S. 120C-100; 120C-101(a); 120C-215; 120C-404; Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .0802 REGISTRATION

- (a) A solicitor must register within 10 days after the total expense for solicitation of others exceeds three thousand dollars (\$3,000) during any 90-day period.
- (b) The 90-day period within which the triggering expenditure is calculated shall be calculated in consecutive days and not by quarter. NOTE: For example, an individual who solicits others and spends two thousand nine hundred dollars (\$2,900) on March 31 and two hundred dollars (\$200.00) on April 2 shall be required to register as a solicitor.

History Note: Authority G.S. 120C-100; 120C-101(a); 120C-215; 120C-404; Temporary Adoption Eff. January 1, 2007.

SECTION .0900 – RESERVED FOR FUTURE CODIFICATION

SECTION .1000 – RESERVED FOR FUTURE CODIFICATION

SECTION .1100 – PROVISION OF LISTS TO DESIGNATED INDIVIDUALS

18 NCAC 12 .1101 METHOD OF FURNISHING LOBBYIST LISTS

The Department shall furnish lobbyist lists to designated individuals for whom it has no current e-mail address by electronically mailing a copy to the head of the employing entity and requesting that it be forwarded to the designated individual.

History Note: Authority G.S. 120C-101(a); Temporary Adoption Eff. January 1, 2007.

SECTION .1200 – RESERVED FOR FUTURE CODIFICATION

SECTION .1300 – RESERVED FOR FUTURE CODIFICATION

SECTION .1400 – RESERVED FOR FUTURE CODIFICATION

SECTION .1500 – CONFIDENTIALITY AND RECORDS

18 NCAC 12 .1501 GENERAL REQUIREMENTS

- (a) A person who requests that information be held confidential ("confidentiality request") pursuant to G.S. 120C-401 shall make the request prior to or at the time of filing.
- (b) A person who makes a "confidentiality request" pursuant to G.S. 120C-401 shall include a cover sheet marked: "Confidentiality Requested" with any documents submitted.

History Note: Authority G.S. 120C-101(a); 120C-401(h); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .1502 CONFIDENTIALITY REQUEST CONTENTS

The following information shall be included with a confidentiality request pursuant to G.S. 120C-401:

- (1) Identification of all filings which contain information to which the confidentiality request applies;
- (2) Identification of any attachments to filings which contain information to which a confidentiality request applies; and
- (3) A copy of either:
 - (a) The protective order pursuant to Chapter 50B of the General Statutes which orders that a payee's actual address be kept confidential; or
 - (b) The Address Confidentiality Program authorization card issued to the payee by the Attorney General under G.S. 15C-8.

History Note: Authority G.S. 120C-101(a); 120C-401(h); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .1503 DISCLOSURE OF CONFIDENTIAL INFORMATION

(a) Unless the provisions of Paragraph (b) of this Rule apply, the Department shall disclose information for which there is not a confidentiality request presented to the Department pursuant to G.S. 120C-401 before or at the time of filing.

(b) If the Department has not already made a filing(s) public and a confidentiality request pursuant to G.S. 120C-401 is submitted, the Department shall hold the covered information confidential as requested.

(c) A payee address designated as confidential pursuant to a 50B order and pursuant to G.S. 120C- 401(h) remains confidential until the Department receives:

- (1) A signed, notarized request from the payee to remove the confidentiality designation, or
- (2) A copy of a court order directing removal of confidential address status.

(d) A payee address designated as confidential pursuant to the Address Confidentiality Program under Chapter 15C of the General Statutes and pursuant to G.S. 120C-401(h) remains confidential until the Department receives:

- (1) A signed, notarized request from the payee to remove the confidentiality designation, or
- (2) A written notification from the Attorney General issued pursuant to Chapter 15C modifying the payee's address under the

program or canceling the payee's participation in the program.

History Note: Authority G.S. 120C-101(a); 120C-401(h); Temporary Adoption Eff. January 1, 2007.

18 NCAC 12 .1504 CONFIDENTIALITY OF INVESTIGATIVE RECORDS

Public access to investigative records shall be governed by Chapter 132 of the General Statutes and G.S. 120C-600(c).

History Note: Authority G.S. 120C-101(a); 120C-600; Temporary Adoption Eff. January 1, 2007.

SECTION .1600 – PRESERVATION OF RECORDS

18 NCAC 12 .1601 GENERAL REQUIREMENTS

(a) A filer shall retain copies of all filings, forms, information and supporting documentation related to filings generated in response to the requirements of the Act and this Chapter for a period of three years after the date on which the record was made or the report submitted.

(b) If a filer knows or has reason to believe that an official investigation or inquiry related to a filing has been initiated for any reason, the filer shall preserve and maintain all filings and associated documents until three years from the later of:

- (1) Receipt of notice that the investigation has been closed and that no further action will be taken by the investigating authority and no other related investigation or inquiry is open, or
- (2) Termination or closure of any judicial or quasi-judicial proceeding related to the investigation or inquiry.

(c) A filer retaining information pursuant to this Rule must retain the information in the original form in which the information was created, or in any other form that accurately captures and retains information contained in the original form in which the information was created.

History Note: Authority G.S. 120C-101(a); 120C-603; Temporary Adoption Eff. January 1, 2007.

Rule-making Agency: *North Carolina Department of the Secretary of State*

Rule Citation: *18 NCAC 13 .0101-.0103; .0301; .0401; .0501; .0701-.0702; .0801-.0802; .0804; .0901.*

Effective Date: *January 1, 2007*

Date Approved by the Rules Review Commission: *December 14, 2006*

Reason for Action: *Session Law 2006-151, signed by the Governor on July 20, 2006, amends the General Statutes by adding a new Article 42 to Chapter 66, entitled "State Franchise*

for Cable Television Service." The new law changes cable TV franchising from a local government based system to a state franchising system for the purpose of promoting competition. Temporary rulemaking and immediate adoption of the rules is required in order to ensure that rules are in effect on January 1, 2007 and notices of franchise can be filed on January 2, 2007. The public has had the opportunity to comment and participate in a public hearing pursuant to APA temporary rulemaking requirements and has, in fact, vigorously participated.

CHAPTER 13 – STATE FRANCHISE FOR CABLE TELEVISION SERVICE

SECTION .0100 – GENERAL REQUIREMENTS

18 NCAC 13 .0101 SCOPE

The rules in this Chapter implement Article 42 of Chapter 66 of the General Statutes.

History Note: Authority G.S. 55D-5; 55D-10; 66-354(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0102 DEFINITIONS

The following terms and definitions shall apply to the rules in this Chapter:

- (1) "Act" means Article 42 of Chapter 66 of the North Carolina General Statutes entitled "State Franchise for Cable Television Service";
- (2) "Department" means the Department of the Secretary of State;
- (3) "Filed" means received by the Department and filed pursuant to G.S. 55D-15 and this Chapter;
- (4) "Filer" means a person submitting a filing pursuant to the Act and this Chapter;
- (5) "Filing" and "record" mean those completed forms, reports, attachments and information submitted in paper or electronic form; and
- (6) "Form" means a form or report promulgated by the Department and required or permitted to be filed pursuant to the Act.

History Note: Authority G.S. 55D-5; 55D-10; 66-354(a); Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0103 TIME

Time periods are calculated according to the provisions of G.S. 1A-1, Rule 6.

History Note: Authority G.S. 1A-1, Rule 6; 55D-5; 55D-10(b)(7); 66-354(a); Temporary Adoption Eff. January 1, 2007.

SECTION .0200 – FILING

18 NCAC 13 .0201 FILING LOCATIONS AND METHODS

Each required filing must be submitted to and received by the Department using one of the following methods:

- (1) By United States mail at the following address: Department of the Secretary of State, P.O. Box 29622, Raleigh, N.C. 27626-0622.
- (2) In person or by a designated delivery service authorized pursuant to G.S. 1A-1, Rule 4 at the following street address: Secretary of State's Office, 2 South Salisbury Street, Raleigh, N.C. 27601-2903.

History Note: Authority G.S. 1A-1, Rule 4; 55D-5; 55D-10; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0202 FILING USING DEPARTMENT'S FORMS

- (a) Filers shall use forms promulgated by the Department.
- (b) For each filing, a filer shall submit an original consisting of:
 - (1) A completed and signed form;
 - (2) A map which complies with Rule .0401 of this Chapter;
 - (3) Any attachments.
- (c) For each filing for which a map is required an electronic copy of the map shall be submitted which:
 - (1) Is prepared:
 - (A) In PDF format; or
 - (B) In a GIS "shapefile".
 - (2) Is prepared:
 - (A) In compliance with 04 NCAC 11 R09-04; or
 - (B) At a scale of 1:24,000; or
 - (C) At a scale legibly depicting one or more entire counties, cities or the entire State.
- (d) For each filing, a filer shall also submit three copies of the documents submitted to Paragraph (b) of this Rule.

History Note: Authority G.S. 55D-5; 55D-10; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0203 FORM COMPLETION REQUIREMENTS

- (a) All information requested on a form shall be completed by the filer whether requested by means of a block to be marked or a line to be completed.
- (b) If a question or item is not applicable to the filer, the filer shall not leave the question or item blank but shall enter "not applicable" or check the "not applicable" box.
- (c) A form is not complete unless it complies with all other applicable filing requirements in this Chapter and Article 2 of Chapter 55D of the General Statutes.

History Note: Authority G.S. 55D-5; 55D-10; 55D-15; 66-354(a).
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0204 FILING SUBMISSION DATE AND TIME

A filing is submitted on the day it is received in paper form by the Department before 5:00 p.m. of that day.

History Note: Authority G.S. 55D-5; 55D-10; 55D-15; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0205 REJECTION OF INCOMPLETE FILING

The Department shall reject any filing which is incomplete because the filing:

- (1) Contains any illegible information; or
- (2) Lacks any required information; or
- (3) Contains any blank, unfilled, or unanswered questions or data entry areas; or
- (4) Is not signed as required by the Act; or
- (5) Is not submitted together with any required fee; or
- (6) Does not comply with the requirements of G.S. 55D-10.

History Note: Authority G.S. 55D-5; 55D-10; 55D-15; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0206 DEPARTMENTAL REFUSAL TO FILE

The Department shall refuse to file a filing which is subject to rejection for any of the reasons stated in this Chapter or in Article 2 of Chapter 55D of the General Statutes.

History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0207 EXPEDITED REVIEW OF FILING

A filer may request expedited review of a filing pursuant to G.S. 55D-11 upon payment of the applicable expedited review fee.

History Note: Authority G.S. 55D-5; 55D-10; 55D-11; 55D-15; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0208 EFFECTIVE DATE OF FILING

When the Department accepts and files a filing pursuant to G.S. 55D-15, the document shall be deemed filed on the date on which it was received by the Department.

History Note: Authority G.S. 55D-5; 55D-10; 55D-13; 55D-15; 66-354(a);
Temporary Adoption Eff. January 1, 2007.

18 NCAC 13 .0209 DEPARTMENT'S DELIVERY OF COPY TO FILER

At the time of submission of a filing, a filer may request that the Department make the copy delivery required by G.S. 55D-15 by a delivery service authorized pursuant to G.S. 1A-1, Rule 4 if the filer has:

- (1) Made provision for the delivery service to visit the Department and pick up the copy; or

- (2) Provided a completed delivery envelope and made arrangements with the delivery service for payment of costs associated with the pickup and delivery of the copy.

History Note: Authority G.S. 1A-1, Rule 4; 55D-5; 55D-10; 55D-15; 66-354(a); 26 U.S.C. 7502(f)(2); Temporary Adoption Eff. January 1, 2007.

SECTION .0300 – FEES

18 NCAC 13 .0301 GENERAL REQUIREMENTS

- (a) A required fee shall be submitted together with the filing to which the fee applies.
- (b) A fee must be paid by cash, warrant, uncertified check, certified check, money order, or another instrument freely negotiable at par through the Federal Reserve System. Checks, money orders, or other instruments shall be drawn on U.S. financial institutions in U.S. dollars and cents.
- (c) A filing is void if a financial instrument listed in Paragraph (b) of this Rule and tendered for a required fee is returned by the institution upon which it was issued as "insufficient funds" or for other similar reason.

History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a); Temporary Adoption Eff. January 1, 2007.

SECTION .0400 – MAPS AND DESCRIPTIONS OF SERVICE AREAS

18 NCAC 13 .0401 MAPS

- (a) Maps of service area boundaries submitted to the Department shall delineate the service area as one or more polygons. The polygonal service area and subareas shall be closed on all sides.
- (b) Both the paper and electronic copy of a map of service area boundaries shall be sufficiently detailed so that one can determine whether a location is in the service area. Both the paper and electronic copy of a map shall identify each county or city included in the service area in whole or in part.
- (c) A map of service area boundaries which meets the standards set forth in this Paragraph is sufficient to comply with the Act and this Chapter:
- (1) A map which is obtained either from a certified property mapper or a county mapping office for the county in which the service area is located and which meets minimum State standards for indexing land records established by G.S. 147-54.3 and in 18 NCAC 08 .1100, including any subsequent amendments to those Rules. Copies of those Rules and the standards incorporated therein may be viewed online using the Department's Internet site at the following address: <http://www.secretary.state.nc.us/land/> or may be obtained by contacting the Land Records Management Section, NC Department of the Secretary of State, PO Box 29626, Raleigh,

North Carolina 27626-0626, telephone number 919-807-2206, facsimile number 919-807-2210. The cost for receiving a paper copy of these materials is twenty cents (\$.20) per page;
or

- (2) A map which is obtained from the website established by the NC Geographic Information Coordinating Council at: www.nconemap.com at no cost to the user and which contains at least the following geo-referenced representation of the service area boundaries:
- (A) County boundaries;
(B) City boundaries;
(C) Township boundaries;
(D) Roads and streets; or
- (3) A map which meets the requirements of the Utilities Commission as set forth in 04 NCAC 11 R09-04 , including any subsequent amendments to those Rules. Copies of those Rules and the standards incorporated therein may be viewed online at: <http://reports.oah.state.nc.us/ncac.asp> or may be obtained by contacting the Corporations Division, NC Department of the Secretary of State; PO Box 29626, Raleigh, North Carolina 27626-0626, telephone number 919-807-2225;
or
- (4) A map which uses for the service area boundaries of a service area consisting of one or more entire counties, the official State delineated boundaries of the county or counties in the service area;
- (5) A map which uses for the service area boundaries of a service area consisting of one or more entire cities or townships, the official boundaries of the cities or townships in the service areas, exclusive of extra-territorial jurisdictional boundaries;
- (6) A map which uses for the service area boundaries of a service area consisting of portions of cities or counties, public road and street boundaries; or
- (7) A map of the entire State for a service area which encompasses the entire State.

(d) A map may contain additional geo-referenced information which will be useful to the customers of the franchise holder, the North Carolina Department of Revenue, local governments and others. For example, a service area map may include such geographical features as waterways.

History Note: Authority G.S. 55D-5; 55D-10; 55D-15; 66-352; 66-354(a); Temporary Adoption Eff. January 1, 2007.

SECTION .0500 – NOTICE OF FRANCHISE

18 NCAC 13 .0501 SCHEDULES

(a) A schedule shall set forth the proposed sequence and timing of the provision of service to the service area. Deviations from the proposed schedule shall be noted and explained in the annual service report as required in G.S. 66-353(8).

(b) If a franchise service area contains noncontiguous geographic areas, then the schedule in the notice of franchise shall specifically address each area.

*History Note: Authority G.S. 55D-5; 55D-10; 66-352; 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

SECTION .0700 – NOTICE OF WITHDRAWAL

18 NCAC 13 .0701 MINIMUM REQUIREMENTS

A notice of withdrawal must include:

- (1) The name of the franchisee as stated on the notice of franchise;
- (2) The date of the notice of franchise;
- (3) The cities and counties identified in the original notice of franchise; and
- (4) The date upon which the franchisee will cease providing service.

*History Note: Authority G.S. 55D-5; 55D-10; 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

**18 NCAC 13 .0702 WITHDRAWAL NOTICE
COVERS ENTIRE SERVICE AREA**

A withdrawal of a notice of franchise applies to the entire franchise service area.

*History Note: Authority G.S. 55D-5; 55D-10; 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

SECTION .0800 – ANNUAL SERVICE REPORT

**18 NCAC 13 .0801 ONE ANNUAL SERVICE
REPORT PER FRANCHISE**

A separate annual service report shall be filed for each franchise.

*History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

**18 NCAC 13 .0802 ANNUAL SERVICE REPORT
DESCRIPTION AND MAP INFORMATION**

Description and map information filed in an annual service report must match or be congruent with description and map information in the notice of franchise to which the annual service report applies.

*History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

**18 NCAC 13 .0803 RESERVED FOR FUTURE
CODIFICATION**

**18 NCAC 13 .0804 REQUIRED CUSTOMER
SERVICE INFORMATION**

An annual service report shall specify the extent to which the following requirements contained in 47 C.F.R. Part 76 have been met:

- (1) 47 C.F.R. 76.309 Customer service obligations;
- (2) 47 C.F.R. 76.1602 Customer service--general information;
- (3) 47 C.F.R. 76.1603 Customer service--rate and service changes; and
- (4) 47 C.F.R. 76.1604 Charges for customer service changes.

A cable service franchise holder may include additional information regarding compliance with customer service requirements in Part 76 of Title 47 of the Code of Federal Regulations in the annual report.

*History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a); 66-356(b); 47 C.F.R. Part 76;
Temporary Adoption Eff. January 1, 2007.*

SECTION .0900 – RECORDS

18 NCAC 13 .0901 ACCESSING PUBLIC RECORDS

Records may be physically viewed at the Department by the public on weekdays between the hours of 8:30 a.m. and 4:30 p.m. except on State holidays. A list of State holidays may be viewed at: <http://www.osp.state.nc.us/holsched.htm>.

*History Note: Authority G.S. 55D-5; 55D-10(b)(7); 66-354(a);
Temporary Adoption Eff. January 1, 2007.*

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday January 18, 2006, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

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

Appointed by House

Jennie J. Hayman - Chairman
John B. Lewis
Mary Beach Shuping
Judson A. Welborn
John Tart

RULES REVIEW COMMISSION MEETING DATES

January 18, 2007 February 15, 2007
March 15, 2007 April 19, 2007

Note: The following minutes have not yet been approved as final by the RRC and are subject to change until they are approved. They will be reviewed, corrected if necessary, and approved at the next monthly meeting of the RRC. If you have any questions or corrections concerning the minutes or action taken by the RRC please contact: Lisa Johnson at 919-733-3962, Joe DeLuca at 919-715-8655, or Bobby Bryan at 919-733-0928.

**RULES REVIEW COMMISSION
DECEMBER 14, 2006
MINUTES**

The Rules Review Commission met on Thursday, December 14, 2006, in the Cabinet Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jim Funderburk, Jeff Gray, Jennie Hayman, Thomas Hilliard, Robert Saunders, Mary Shuping, John Tart, David Twiddy and Judson Welborn.

Staff members present were: Joseph DeLuca, Staff Counsel; Bobby Bryan, Rules Review Specialist; Barbara Townsend, Administrative Assistant.

The following people attended:

John Suttles	Southern Environmental Law Center
Jim Gulick	NC Department of Justice
Frank Crawley	NC Department of Justice
Andy Ellen	NC Retail Merchants Association
Peggy Oliver	Office State Personnel
Deborah Carroll	Division of Public Health
Ellie Sprenkel	Department of Insurance
Dana Sholes	Office of Administrative Hearings
Julie Edwards	Office of Administrative Hearings
Lauren Thompson	Department of Insurance
Gene Crow	NCDA & CS
Kelly Randell	Department of Insurance
Glenda Artis	DHHS/DAAS
Shannon Crane	DHHS/DAAS
Barry Gupton	Building Code Council
Becky Garrett	NC Board of Recreational Therapy
Nadine Pfeiffer	Division Facility Services
Bob Brooks	NC State Board of CPA Examiners
Mike Barham	NC State Board of CPA Examiners

Elizabeth Kontis	DENR/DWQ
Elliot Rushing	Secretary of State
Cheri Myers	Secretary of State
John Womble	DHHS
Ann Wall	Secretary of State
Jane Carter	NC Respiratory Care Board
Ozie Stallworth	Secretary of State
Gayle Holder	Secretary of State
Mark Prak	Brooks Pierce
Marcus Trathen	Brooks Pierce
Erin Gould	Department of Labor
Etta Maynard	Community Colleges
Mike Lopazanski	NC DCM
Julia Lohman	Sheriff's Education & Training Standards
Kim Colson	DENR/DWQ
Susan Dail	DHHS/DSS
Thom Allen	DENR/DAQ
Paul Grable	DENR/DAQ
Jean Stanley	NC Board of Nursing
Keith Overcash	DENR/DAQ
Sherry Samuels	NCRCB
Tom Miller	Attorney General's Office/ Board of Agriculture
Nancy Pate	DENR
Lee Hoffman	Division of Facility Services/CON
Karen Cochrane Brown	Legislative Research Staff
David McLeod	Board of Agriculture
Jack Nichols	Allen & Pinnix/Board of Nursing

APPROVAL OF MINUTES

The meeting was called to order at 10:09 a.m. with Chairman Hayman presiding. Chairman Hayman reminded the Commission that all members have a duty to avoid conflicts of interest and appearances of conflict pursuant to Governor Easley's Executive Order No. 1. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the November 16, 2006 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

21 NCAC 46 .2506: Pharmacy Board – The Commission received the rule from the trial court on remand from the Court of Appeals and Supreme Court. The Commission approved the rule. The Commission did receive 12 letters requesting that the rule be subject to legislative review if it is not already subject to it. The Commission believes that this is an “old process” rule and thus automatically subject to a delayed effective date pending legislative review. Commissioner Saunders did not participate in any discussion or vote concerning the Pharmacy Board rule.

04 NCAC 06C .1202: Credit Union Division - The Commission approved the rewritten rule submitted by the agency.

10A NCAC 06R .0305: Social Services Commission - The Commission approved the rewritten rule submitted by the agency.

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

21 NCAC 32M .0104: Medical Board – The Commission approved the rewritten rule submitted by the agency. Commissioner Shuping did not participate in any discussion or vote concerning the Medical Board rule.

21 NCAC 36 .0217; .0804: Nursing Board - The Commission approved the rewritten rules submitted by the agency. Commissioner Shuping did not participate in any discussion or vote concerning the Nursing Board rules.

21 NCAC 61 .0103: Respiratory Care Board – The Commission approved the rewritten rule submitted by the agency.

21 NCAC 65 .0205; .0401; .0601; .1001: Recreational Therapy Licensure Board - The Commission approved the rewritten rules submitted by the agency.

23 NCAC 3A .0113: Board of Community Colleges – David Sullivan appeared before the Commission and asked the Commission to rescind its objection and approve the rule. He cited additional authority for the rule along with a recent opinion from the Attorney General’s office. After his presentation Commissioner Saunders made a motion to rescind the objection to formally put Mr. Sullivan’s request before the Commission. There was no second and the motion died. The agency will be given another chance to respond to the objection.

LOG OF FILINGS

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

R 322.1: 2006 Residential Code: Building Code Council – The Commission objected to the rule due to ambiguity. It is not clear what is meant by an “accessible dwelling unit.” The term is not defined in this Code, and in the Accessibility Code, “accessible dwelling unit” is defined as a dwelling unit that complies with 30.4 only. It is therefore not clear what this rule requires.

4502: 2006 Residential Code: Building Code Council – The Commission objected to the rule due to ambiguity. In the definition of “Coastal High Hazard Area,” it is not clear what standards the Building Code Council will use in approving a Coastal Resources Commission identification of a coastal high hazard area.

15A NCAC 7H .0312: Coastal Resources Commission – The Commission objected to the rule due to ambiguity. In (1) (a), it is not clear what would constitute a “regularly maintained navigation channel”. There is the same issue in (2)(d) and (e), (3)(a), and (4)(a). In (1)(b), it is not clear what is meant by “acceptable geological and engineering standards”. There is the same issue in (2)(a). In (2)(b), it is not clear what is meant by “previously acquired data”. In (4)(c), it is not clear what standards the Division will use in determining whether to grant prior approval.

21 NCAC 8G: Board of Certified Public Accountant Examiners – The rules were unanimously approved. Commissioner Shuping did not participate in any discussion or vote concerning these rules.

21 NCAC 36: Nursing Board – The rules were unanimously approved. Commissioner Shuping did not participate in any discussion or vote concerning these rules.

21 NCAC 57A .0201: Appraisal Board – The Commission objected to this rule based on ambiguity. Paragraph (a)(3) of this rule appears to be inconsistent with (b) in Rules 57B .0102 and .0103. In 57A .0201(a)(3) an applicant for certification as a certified residential real estate appraiser has to complete the courses that a trainee registrant or licensed appraiser must have completed. However, this rule does not appear to have any requirement that the applicant complete those courses within any period of time before certification as a certified residential real estate appraiser. However, in rules 57B .0102(b) and .0103(b) an applicant who is not presently registered or licensed must have completed those courses “within the five-year period immediately preceding the date application is made to the Board.”

21 NCAC 57B .0102; .0103: Appraisal Board – The Commission objected to these rules based on ambiguity. Paragraph (a)(3) of the first rule appears to be inconsistent with (b) in these two rules. In 57A .0201(a)(3) an applicant for certification as a certified residential real estate appraiser has to complete the courses that a trainee registrant or licensed appraiser must have completed. However, that rule does not appear to have any requirement that the applicant complete those courses within any period of time before certification as a certified residential real estate appraiser. However, in rules 57B .0102(b) and .0103(b) an applicant who is not presently registered or licensed must have completed those courses “within the five-year period immediately preceding the date application is made to the Board.”

21 NCAC 57B .0304: Appraisal Board – The Board mistakenly filed this rule with the Rules Review Commission. They decided not to make any amendment to this rule. The rule is withdrawn from further review by the Rules Review Commission.

25 NCAC 1H .0631: State Personnel Commission – The Commission extended the period of review on this rule in accordance with N.C.G.S. 150B-21.10(3) in order to obtain some additional information about the rule and explore more fully with the agency to determine the relationship between this rule, the SPC’s statutory authority, the law affecting state job listings with the N.C. Employment Security Commission, and the actual practices of the agency. In (c) the rule specifies that a vacancy that is to be filled “from ... outside the state government workforce shall ... have an application period of not less than five working days” (emphasis

added). There is no reference anywhere within this rule to listing the vacancy with the N.C. Employment Security Commission. G.S. 96-29 appears to require such vacancies for positions “which will not be filled solely by promotion or transfer from within the existing State government work force” to be listed with the NC ESC. In addition it appears to require a posting of at least 21 days before the agency may fill the vacancy. If this rule does not actually go against the requirement in G.S. 96-29, then it at least seems to be inconsistent with the statute or capable of misleading state agencies and the public as to what the totality of the requirements in both rule and statute are. If this rule in some way is not subject to the listing requirements in G.S. 96-29, then that is not clear.

25 NCAC 1H .0635: State Personnel Commission – The Commission objected to the rule based on ambiguity. In (c), lines 18 and 19, it is unclear what is meant or required by or what result should follow when “management shall be responsible” for adverse effects. It is also unclear as to what would constitute “unreasonably construed” qualification standards that management would be responsible for using.

The meeting adjourned for a short break at 12:07 p.m. and reconvened at 12:15 p.m.

TEMPORARY RULES

Chairman Hayman presided over the review of the log of temporary rules. All rules were approved unanimously except Commissioner Welborn voted against approving the Chapter 13 rules from the Secretary of State.

Commissioners Saunders and Gray did not participate in any discussion or vote concerning the Secretary of State rules.

COMMISSION PROCEDURES AND OTHER BUSINESS

Commissioner Gray requested that a discussion of the Commissions rules, policies and procedures be added to the January agenda.

The meeting adjourned at 1:00 p.m.

The next scheduled meeting of the Commission is Thursday, January 18, 2007 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

AGENDA
RULES REVIEW COMMISSION
January 18, 2007, 10:00 A.M.

- I. Reminder of Governor’s Executive Order #1
- II. Review of minutes of last meeting
- III. Follow-Up Matters
 - A. Building Code Council – Residential Code R 322.1; 4502 (Bryan)
 - B. Coastal Resources Commission – 15A NCAC 7H .0312 (Bryan)
 - C. Appraisal Board – 21 NCAC 57A .0201; 57B .0103 (DeLuca)
 - D. Board of Community Colleges – 23 NCAC 3A .0113 (DeLuca)
 - E. State Personnel Commission – 25 NCAC 1H .0631 *Extend Period of Review* (DeLuca)
 - F. State Personnel Commission – 25 NCAC 1H .0635 (DeLuca)

- IV. Review of Rules (Log Report)
- V. Review of Temporary Rules (If Any)
- VI. 2007 State Medical Facilities Plan
- VII. Commission Business
 - Discussion of Rules Review Commission policies and procedures
- VIII. Next meeting: February 15, 2007

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.
Selina Brooks
Melissa Owens Lassiter
Don Overby*

*Beecher R. Gray
A. B. Elkins II
Joe Webster*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
Santos Ferman T/A Paraiso vs. ABC Commission	05 ABC 1828	Chess	05/31/06	
Owl's Eyes of Asheville, LLC, T/A Hooters v. ABC Commission	05 ABC 1989	Chess	06/07/06	
Carlos Salas T/A Boom Boom Boom Night Club, 1205 Elgin Avenue Hight Point, NC 27262 v. ABC Commission	06 ABC 0719	Chess	08/07/06	
ABC Commission v. T/A Minit Shop	06 ABC 0862	Morrison	10/17/06	
ABC Commission v. Carlos Salas, T/A Boom Boom Room Night Club	06 ABC 1262	Gray	01/04/07	
ABC Commission v. Kenneth A. Jones, T/A Ken One Stop	06 ABC 1368	Gray	12/04/06	
<u>CRIME VICTIMS COMPENSATION</u>				
Timothy P. Webber v. Crime Victims Compensation Commission	05 CPS 1568	Lassiter	06/08/06	21:01 NCR 109
Valerie Joy McGill v. Crime Victims Compensation Commission	06 CPS 0038	Gray	06/08/06	
Torrey Charles v. Crime Victims Compensation Commission	06 CPS 0051	Chess	09/21/06	
Charles Leon Champion v. Crime Victims Compensation Commission	06 CPS 0155	Elkins	06/08/06	
Dantevius L. Bland v. Crime Victims Compensation Commission	06 CPS 0654	Elkins	11/15/06	
Sharron Smith v. Crime Control and Public Safety	06 CPS 0708	Gray	07/12/06	
Elaine B. Deloatch v. Crime Victims Compensation Commission	06 CPS 0736	Wade	08/15/06	
Christopher Lee Vess v. Crime Control Victims Compensation Services Division	06 CPS 0890	Gray	08/23/06	
Chris K. Daniels v. Crime Control and Public Safety, Div. of Victim Compensation Commission	06 CPS 0909	Lassiter	08/01/06	
Tamika L. Howard-Smith v. Crime Victims Compensation	06 CPS 1161	Elkins	09/06/06	
Danny Thoms v. Victim Compensation	06 CPS 1237	Overby	12/04/06	
James A. Hillman v. Crime Victims Compensation Commission	06 CPS 1339	Wade	12/08/06	
Pervis R. Owens Sr v. OAH, Crime Victims Compensation Commission	06 CPS 1492	Morrison	09/28/06	
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
<u>DEPARTMENT OF AGRICULTURE</u>				
Shacond Muse Bey v. Dept. of Agriculture	06 DAG 0985	Morrison	08/16/06	
Clara Church v. Dept. of Agriculture and Consumer Services	06 DAG 1422	Wade	12/11/06	
<u>DEPARTMENT OF CULTURAL RESOURCES</u>				
William H. Miller v. Cultural Resources, State Historic Preservation	05 DCR 0439	Mann	07/03/06	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>				
Andrea Green, Parent, on behalf of her Miner Child, Andrew Price	01 DHR 2149	Gray	06/29/06	
Charles N. Long v. DHHS, Wake County Human Services	02 DHR 0932	Lassiter	12/21/06	
Michael Eugene Dalton v. DHHS, DFS	02 DHR 1456	Lassiter	10/06/06	
Marquelle's Enrichment Center for Edith James and Wilhelmenia Bridges v. Div. Child Development Regulatory Services Section	02 DHR 1537	Gray	08/21/06	

CONTESTED CASE DECISIONS

Afusat Daodu v. DHHS, DFS	03 DHR 1489	Lassiter	12/08/06	
Michael Eugene Dalton v. DHHS, DFS	04 DHR 0288	Lassiter	10/06/06	
Gerald Wanamaker v. Ms Satana T. Deberry General Coun. DHHS	04 DHR 1513	Lassiter	06/14/06	
Michael Eugene Dalton v. DHHS, DFS	04 DHR 1662	Lassiter	10/06/06	
Rebecca Hamilton, Beck's Play and Learn v. DHHS, Div. of Child Development	04 DHR 1866	Lassiter	10/02/06	
Restoration Church of God in Christ, d/b/a Restoration's Joys of the Heart Child Care Center v. DHHS, Div. of Child Development	05 DHR 0097	Elkins	08/30/06	
Restoration Church of God in Christ Inernation, d/b/a Joys of the Heart Child Care Center v. DHHS, Div. of Public Health, Child and Adult Care Food Program	05 DHR 0124	Elkins	08/30/06	
Handa of the Future, Sheila Martin v. DHHS, Child and Adult Care Food Program	05 DHR 0457	Wade	06/27/06	
Anthony Wayne Sando v. DHHS	05 DHR 0465	Gray	11/14/06	
Patricia Filyaw's FCCH vs. Div. of Child Development	05 DHR 0803	Gray	05/30/06	
Amanda M. Walters v. DHHS, DFS, Health Care Personnel Registry Section	05 DHR 1121	Chess	05/30/06	
Carolyn W. Cooper, Happy Days Child Care v. Div. of Child Development	05 DHR 1255	Lassiter	09/12/06	
Shari Ann Torain v. DHHS	05 DHR 1317	Elkins	06/08/06	
Delfina Harris v. DHHS, DFS	05 DHR 1344	Wade	10/11/06	
Patrick Francis Diamond v. DHHS	05 DHR 1356	Gray	12/14/06	
County of Buncombe & NC Radiation Therapy Management Services, Inc. d/b/a 21 st Century Oncology v. DHHS, DFS, Certificate of Need Section, & Asheville Hematology and Oncology Associates, P.A.	05 DHR 1369	Gray	05/26/06	21:01 NCR 115
Jamie Bluto, Guardian of Heather Bluto v. Mecklenburg County Area Mental Health and Developmental Disabilities	05 DHR 1427	Chess	05/17/06	
United Home Care, Inc v. DHHS, DFS, CON Section and Liberty Home Care II, LLC, Total Care Home Health of NC, INC.,	05 DHR 1456	Wade	06/19/06	
Total Care Home Health of NC, INC., v. DHHS, DFS, CON Section and Liberty Home , Care II, LLC, Total Care Home Health of NC, INC.,	05 DHR 1464	Wade	06/19/06	
Brookside Montessori School v. DHHS, Div. of Child Development	05 DHR 1465	Gray	06/28/06	
Novant Health, Inc. and Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical , Center v. DHHS, DFS, Certificate of Need Section	05 DHR 1490	Lassiter	05/31/06	
Duke University Health System d/b/a Durham Regional Hospital v. DHHS, DFS, Certificate of Need Section	05 DHR 1491	Lassiter	05/31/06	
Duke University Health System d/b/a Durham Regional Hospital v. DHHS, DFS, Certificate of Need Section	05 DHR 1492	Lassiter	05/31/06	
Community General Health Partners, Inc. d/b/a Thomasville Medical Center v. DHHS, DFS, Certificate of Need Section	05 DHR 1506	Lassiter	05/31/06	
Shannon Woodell Glidewell v. DHHS, DFS	05 DHR 1514	Gray	09/29/06	
Kamaria Smith v. DHHS, DFS, Nurse Aid Registry	05 DHR 1547	Mann	12/22/06	
LaBrenda Perry Bennett v. Health Care Personnel Registry	05 DHR 1579	Morrison	07/13/06	
Carolina Kids Academy, Inc v. DHHS, Division of Child Development	05 DHR 1906	Morrison	11/03/06	
Lisa D. Smith-Perri on behalf of Gibson Price Smith, Brother	05 DHR 1982	Gray	06/26/06	
All Braxton, The Braxton Home II v, DHHS, DFS	05 DHR 1986	Mann	07/20/06	
Bertha Graham v. DHHS, DFS, Health Care Personnel Registry	05 DHR 2040	McCotter	06/08/06	
Jeanette Clark v. State Board of Nursing, Raleigh, NC	05 DHR 2076	Gray	07/10/06	
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STATE OF NORTH CAROLINA
COUNTY OF HARNETT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

Good Hope Health System, LLC)
Petitioner)
and)
Town of Lillington)
Petitioner Intervenor)
vs.)
N. C. Department of Health and Human Services,)
Division of Facility Services,)
Certificate of Need Section)
Respondent)
and)
Harnett Health System, Inc., Harnett County, and)
WakeMed)
Respondent Intervenor)

06 DHR 0305

Harnett Health System, Inc.,)
Harnett County and WakeMed)
Petitioner)
vs.)
N. C. Department of Health and Human Services,)
Division of Facility Services,)
Certificate of Need Section)
Respondent)
and)
Good Hope Health System LLC)
Respondent Intervenor)

06 DHR 0336

RECOMMENDED DECISION

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After considering the record evidence in these consolidated contested cases, as well as the proposed recommended decisions submitted by the parties, both of which were very thorough, the undersigned Administrative Law Judge hereby enters this Recommended Decision.

The parties to these contested cases are Good Hope Hospital System, LLC (“GHHS”), Petitioner in contested case 06 DHR 0305 and Respondent-Intervenor in contested case 06 DHR 0336; Harnett Health System, Inc., Harnett County, and WakeMed, (collectively, “Harnett Health”), Respondent-Intervenors in contested case 06 DHR 0305 and Petitioners in contested case 06 DHR 0336; the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (“Agency” or “CON Section”), Respondents in both contested cases; and the Town of Lillington, Petitioner-Intervenor in contested case 06 DHR 0305.

GHHS and Harnett Health each submitted applications for a new hospital in central Harnett County after the issuance of the 2005 State Medical Facilities Plan, which projected a need for one new hospital in the central part of Harnett County with no more than 50 acute care beds and three operating rooms.

The Agency approved the Harnett Health Application, with conditions, and disapproved the competing application filed by GHHS. GHHS appealed the Agency decision to deny its application and approve the Harnett Health Application pursuant to N.C. Gen. Stat. § 150B-23(a) and N.C. Gen. Stat. § 131E-188 and 26 NCAC 3.0103(a). Harnett Health has appealed the condition imposed upon it by the Agency not to include a computed tomography (“CT”) scanner as a part of this project. GHHS and Harnett Health each have been allowed to intervene in the other petitioner’s appeal. The Town of Lillington was allowed to intervene in support of GHHS in contested case 06 DHR 0305. These two contested cases were consolidated for a hearing on the merits.

Pursuant to N.C. Gen. Stat. § 131E-188(a) and § 150B-23 through 37, a contested case hearing was held in this matter on October 16-17, 2006 in Lillington, North Carolina, and on October 18-20 and November 3, 6 and 7, 2006 in Raleigh, North Carolina before the undersigned Administrative Law Judge.

APPEARANCES

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For Respondent-Intervenor Harnett Health

APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §150B-1 *et seq.*

The substantive statutory law applicable to this contested case hearing is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 *et seq.*

The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Rules, 10A NCAC 14C .0200 and .3800, 10A NCAC 14C .2303, and 10A NCAC 14C .2102, and the Office of Administrative Hearings Rules 26 NCAC 3 .0001 *et seq.*

BURDEN OF PROOF

GHHS and Harnett Health, as Petitioners in their respective contested cases, each has the burden of proof by the greater weight of the evidence, regarding the issues presented in their respective contested cases.

ISSUES presented in this contested case

Orders Granting Partial Summary Judgment.

The GHHS Application Is Unapprovable as a Matter of Law. On October 13, 2006, the undersigned administrative law judge issued an Order Regarding Motions for Partial Summary Judgment filed by Harnett Health and GHHS. That Order is incorporated herein by reference as if fully set forth. For the reasons set forth in said Order, there is no genuine issue of material fact that the GHHS Application did not conform with Review Criteria 5 and 12, codified at N.C. Gen. Stat. § 131E-183(a)(5) and (12), respectively, and that therefore, the GHHS Application is unapprovable as a matter of law. Accordingly, the approvability of the GHHS Application was not an issue in this contested case following the entry of said Order, and it is not necessary to make findings of fact or conclusions of law regarding that issue.

Over the objections of Harnett Health, the undersigned administrative law judge allowed GHHS to offer testimony and information regarding the approvability of the GHHS Application, in the nature of an offer of proof with regard to Review Criteria 5 and 12, and as part of the evidentiary record with regard to remaining issues, for the purpose of creating a complete official record.

There is no genuine issue of Material Fact Concerning the Validity of the Memorandum of Understanding and the Sufficiency of the Financing Letter in the Harnett Health Application. On October 13, 2006, the undersigned administrative law judge issued an Order Regarding Second Motion for Partial Summary Judgment by Harnett Health. That Order is incorporated herein by reference as if fully set forth. For the reasons set forth in said Order:

There is no genuine issue of material fact regarding the enforceability of the Memorandum of Understanding Relating to a Nonprofit Health Care System for Harnett County (“MOU”) executed by Betsy Johnson Health Care Systems, Incorporated subsequent to changing its name to Harnett Health System, Inc. The MOU was appropriately executed and is a binding letter of intent upon the Harnett Health System, subject only to the conditions expressed therein;

There is no genuine issue of material fact regarding the inapplicability of Review Criteria 8, 13, and 14, codified at N.C. Gen. Stat. §§ 131E-183(a)(8), (13), and (14), respectively, to the transaction contemplated by the MOU; and

There is no genuine issue of material fact arising from the Merrill Lynch financing letter attached to the Harnett Health Application.

Therefore, the enforceability of the MOU, the applicability of Criteria 8, 13 and 14 to the MOU, and the commitment arising from the Merrill Lynch financing letter attached to the Harnett Health Application were no longer issues in this contested case following the entry of the above-described Order granting partial summary judgment. It is not necessary to make findings of fact or conclusions of law regarding these issues.

GHHS. GHHS presented the following issues in this contested case:

Whether, by its decision, the Agency deprived GHHS of property and otherwise substantially prejudiced GHHS's rights, and exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law and rule (all such violations being included in the term "wrongfully") by wrongfully: denying the application of GHHS in Project I. D.# M-7339-05 and conditionally approving the application of Harnett Health System in Project I.D. # M-7351-05.

Whether, because the Agency failed to make determinations on whether the Harnett Health System proposal as conditioned was conforming to the applicable review criteria, the Agency acted wrongfully (as defined above) and erred as a matter of law.

Whether, because the Agency was required to but failed to determine whether the Harnett Health System proposal as conditioned conformed to all of the applicable review criteria, the Agency is without statutory authority to issue a CON to Harnett.

CON Section. The CON Section presented the following issue in this contested case:

Whether the Agency exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON application of Harnett Health System.

Harnett Health. Harnett Health presented the following issues in this contested case:

Whether the Agency exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON application of Harnett Health.

Whether the Agency exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in attaching to its approval of Harnett Health's CON application the condition which provides that Harnett Health can not acquire a CT scanner as part of its proposed project.

RECORD OF THE CASE

Testimony Received at the Hearing

At the hearing, testimony was received from the following witnesses, who are affiliated with the respective parties as noted below:

<u>Volume/Date</u>	<u>Witness</u>	<u>Affiliation</u>	<u>Pages</u>
Volume I October 16, 2006	N. Earl Jones, Jr.	GHHS	55-295
Volume I	David J. French	GHHS	295-325

CONTESTED CASE DECISIONS

<u>Volume/Date</u>	<u>Witness</u>	<u>Affiliation</u>	<u>Pages</u>
October 16, 2006			
Volume II October 17, 2006	David J. French	GHHS	332-474 534-616
Volume II October 17, 2006	Tim McNeill		475-518
Volume II October 17, 2006	Glenn Johnson		519-534
Volume III October 18, 2006	David J. French	GHHS	623-863
Volume IV October 19, 2006	Michael McKillip	CON Section	859-1113
Volume V October 20, 2006	Lee B. Hoffman	CON Section	1119-1254
Volume VI November 3, 2006	Clarence A. Roberts, Jr.	Harnett Health	1378-1496 1579-1738
Volume VI November 3, 2006	Thomas G. Cavender	Harnett Health	1497-1579
Volume VII November 6, 2006	Kenneth E. Bryan	Harnett Health	1752-1794
Volume VII November 6, 2006	Michael D. DeVaughn	Harnett Health	1799-1873
Volume VII November 6, 2006	Joseph A. Baker	Harnett Health	1874-1977
Volume VIII November 7, 2006	Daniel J. Sullivan	Harnett Health	1983-2230
Volume VIII November 7, 2006	David J. French [Rebuttal]	GHHS	2238-2315
	Pat Cameron [Rebuttal]	GHHS	2315-2328

Mr. French was tendered by GHHS and accepted as an expert witness in CON preparation, health care planning and hospital management. Mr. Sullivan was tendered by Harnett Health and accepted as an expert in health care market analysis, projected utilization of proposed facilities, health care financial issues relating to utilization projections, and CON issues pertaining to the CON review criteria that relate to utilization projections, specifically Criteria 1, 3, 4, 5, 6, and 18a. **[Sullivan, Vol. VIII, pp. 1988-92].**

Exhibits Admitted at the Hearing

The following exhibits were admitted into evidence:

Common / Joint Exhibits

1. Agency File

2. GHHS Application
3. Harnett Health Application
4. 2005 State Medical Facilities Plan, including Memoranda issued on December 10 and 30, 2004 by Governor Easley

GHHS Exhibits Admitted

1. Good Hope Hospital 2001 Settlement Agreement
2. Good Hope Hospital 2001 Certificate of Need
3. Deposition Transcript: Lee B. Hoffman, CON Chief
4. Good Hope Hospital Progress Report Form Dated 6/19/02
5. Good Hope Hospital Progress Report Form Dated 11/27/02
6. Good Hope & GHHS Request for Declaratory Ruling
7. DFS Declaratory Ruling
8. Consent Motion for Stay & Order
9. Good Hope Hospital Progress Report Form Dated 3/10/03
10. Good Hope Hospital Progress Report Form Dated 6/13/03
11. Good Hope Hospital Progress Report Form Dated 9/30/03
12. Good Hope Hospital Progress Report Form Dated 1/28/04
13. Good Hope Hospital Progress Report Form Dated 5/12/04
14. Good Hope Hospital Progress Report Form Dated 11/11/04
15. Good Hope Hospital Progress Report Form Dated 2/14/05
16. Good Hope Hospital Progress Report Form Dated 7/13/05
17. Letters from Good Hope (counsel) to CON Section 5/6-12/03
18. Exemption Filing 12/11/2003
19. E-Mail Message from Stan Taylor
21. Discovery Responses from Harnett Health System 6/7/06
22. Discovery Responses from Harnett Health System 6/14/06
24. David J. French Resume
25. Written Comments of Good Hope Health System
26. Analysis of 2006 Hospital Renewal Applications
33. CON Section Discovery Response 9/18/06

- 35. Agency Findings: Cabarrus Memorial Hospital 12/19/00
- 36. Bob Fitzgerald Conference Call (Memo)
- 38. Good Hope Letter 3/11/05

Harnett Health Exhibits Admitted

- 2. Governor Easley's Memoranda to the 2005 SMFP
- 4. 3/11/05 Letter from Good Hope to Licensure and Certification Section
- 8. Good Hope Hospital's 2006 Hospital License Renewal Application
- 73. Betsy Johnson Regional Hospital's 2006 Hospital License Renewal Application
- 89. Dan Sullivan Deposition Transcript

GHHS Exhibits Not Admitted, but Tendered as Part of an Offer of Proof

- 31. Affidavit of David J. French

Harnett Health Exhibits Not Admitted, but Tendered as Part of an Offer of Proof

- 5. 2/13/06 Letter from Good Hope to Licensure and Certification Section
- 6. 30/7/06 Letter from Good Hope to Licensure and Certification Section

Affidavits Filed in the Case

Affidavit of David French filed 9/01/06

Affidavit of Ken Bryan filed 9/20/06

Affidavit of Lee B. Hoffman filed 9/20/06

Affidavit of David French filed 9/20/06

Affidavit of Azzie Conley of Licensure and Certificate Section, DFS, filed 10/06/06

Affidavit of Andrea Phillips of CON Section filed 10/06/06

FINDINGS OF FACT

The undersigned Administrative Law Judge makes the following Findings of Fact. These findings are accompanied by citations to the record, where deemed necessary and appropriate.

General Information

At issue in this case is a decision by the CON Section recorded after a review of the Harnett Health and GHHS Applications in a review cycle beginning September 1, 2005. On January 27, 2006, the CON Section conditionally approved the application by Harnett Health for a certificate of need to construct a new acute care hospital in Lillington, North Carolina ("Harnett Health Application"), and denied an application submitted by GHHS, also proposing to construct a new acute care hospital in Lillington, ("GHHS Application"). [Joint Exh. 1, Agency File, pp. 870-950]¹

¹ All page number references to material in the Agency file are to the bates-numbered pages that are centered at the bottom of each page.

All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties. The parties received notice of hearing by certified mail more than fifteen (15) days prior to the hearing.

The CON Section is the agency within the Department of Health and Human Services which carries out the Department's responsibility to review and approve the development of new institutional health services under the Certificate of Need Law, codified at Article 9 of Chapter 131E of the North Carolina General Statutes.

Harnett Health System, Inc. is a corporation that formerly was known as Betsy Johnson Healthcare Systems, Inc. As is indicated in the Harnett Health Application, upon the issuance of a certificate of need and the satisfaction of other preliminary events, Harnett Health System, Inc. would become the owner and licensed operator of Betsy Johnson Hospital in Dunn and also would become the owner and licensed operator of the new hospital proposed in Lillington. Along with Harnett Health System, Inc., Harnett County is a co-applicant because it would contribute the site for the new hospital and WakeMed is a co-applicant because it would provide management services for the new hospital. [Joint Exh. 3, Harnett Health App., pp.12-15 and 244-255]²

The Harnett Health Application described operation of a new hospital as part of a two-hospital system with two campuses: the new hospital located in Lillington ("Central Campus") and the existing Betsy Johnson Hospital in Dunn. [Joint Exh. 3, Harnett Health App., pp. 14-15, 18-19]

GHHS is a limited liability company which is owned by Triad Hospitals (90%) and by Good Hope Hospital, Inc. (10%). [Joint Exh. 2, GHHS App., pp. 1 and 352]³

The Agency reviewed the GHHS and Harnett Health Applications as part of the 2005 Harnett County Hospital Review ("Harnett Hospital Review" or "Review") beginning in September, 2005. [Joint Exh. 1, Agency File, pp. 870-874]

Good Hope History

Before the time of the 2005 Harnett Hospital Review, Good Hope Hospital ("Good Hope") had been attempting to replace its aging physical plant for several years.

The preponderance of the evidence clearly showed that at the time of the Review, Good Hope was in poor condition with numerous serious safety code deficiencies that had been acknowledged by Good Hope, and with no realistic prospect for renovating the existing hospital. [Jones, Vol. I, pp. 58-59; Joint Exh. 2, GHHS App., pp. 240-255]

In 2001, Good Hope applied for a certificate of need to develop a hospital that would be a partial replacement of its existing facility. On December 14, 2001, the Agency issued a certificate of need to Good Hope which authorized the development of a 48-bed hospital (34 acute care beds and 14 psychiatric beds) with three shared operating rooms in Erwin (the "2001 CON"). [GHHS Exh. 2]

CON holders provide progress reports to the Agency regarding the progress they are making on the implementation of the project for which they have received a CON. [Hoffman, Vol. V, pp. 1203-04].

In progress reports that it has filed since shortly after Good Hope received the 2001 CON, Good Hope reported that it had not secured financing to develop the 2001 CON, as that project was originally approved by the Agency. [Hoffman, Vol. V, pp. 1205-10]

Beginning with the progress report it filed in November of 2002, Good Hope represented to the Agency that its proposed partner, Triad Hospital, Inc. ("Triad"), would provide capital for the project but only if the Agency issued a declaratory ruling approving changes in the proposed project for which Good Hope received the 2001 CON. [See Good Hope Request for Declaratory Ruling dated November 12, 2002 (GHHS Exh. 6); Good Hope Progress Reports regarding 2001 CON dated November 27, 2002 through May 12, 2004 (GHHS Exhs. 5 and 9-13).]

In the progress report it filed in November of 2004, and continuing through the progress report filed most recently before the Review, Good Hope Hospital ceased referring to Triad as a majority partner and funding source for its 2001 certificate of need, and expressly stated that it had not identified a source willing to finance its project as it was originally **approved by the Agency**. **See Good Hope Progress Reports dated November 11, 2004 through July 13, 2005**. [Hoffman, Vol. V, pp. 1215-23; GHHS Exhs. 14-16]

² All references to page numbers in the Harnett Health Application refer to the bates-numbered pages in the bottom right corner.

³ All references to page numbers in the GHHS Application refer to bates-numbered pages in the bottom right corner.

In the progress reports which it has filed since November of 2002, Good Hope has represented that it has not expended any additional funds to develop the 2001 CON. [GHHS Exhs. 9-16]

In the progress report that it filed most recently before the 2005 Harnett Hospital Review, Good Hope indicated that the projected dates for all milestones were “unknown.” [Hoffman, Vol. V, pp. 1212-13; Good Hope’s July 13, 2005 Progress Report (GHHS Exh. 16, pp. 2-3)]

Instead of implementing its 2001 CON, Good Hope sought permission to build a replacement hospital that would be substantially different from the project for which it received the CON, but without obtaining a certificate of need for its new proposal as required by North Carolina law. This modified replacement hospital would be significantly larger than the facility the Agency approved in issuing the 2001 CON, located in a different town, Lillington, and owned by GHHS, a different legal entity. [Jones, Vol. I, p. 66-67]

Good Hope first attempted to develop this modified hospital through a Request for Declaratory Ruling seeking the Agency’s approval of the material modifications to the proposed project for which it received the 2001 CON without further review by the Agency. [See Good Hope Request for Declaratory Ruling, GHHS Exh. 6]

The Agency declined to approve Good Hope’s request. See Declaratory Ruling dated January 13, 2003 (ruling that Good Hope failed to show good cause for the transfer of its 2001 CON to a new owner and that the requested change in location and increase in size of the facility would be material changes that would require CON review). [Hoffman, Vol. V, pp. 1223-25; GHHS Exh. 7]

Good Hope appealed the Agency’s Declaratory Ruling, but obtained a stay of this appeal. [Jones, Vol. I, p. 94; GHHS Exh. 8]

Good Hope also attempted to develop a modified hospital through a request that the replacement hospital be classified as exempt from certificate of need review. See Exemption Request Letters dated August 21 and October 23, 2003 from Good Hope’s legal counsel to the Agency. [Jones, Vol. I, pp. 118-121; GHHS Exh. 18]

The Agency rejected Good Hope’s request that it be allowed to develop a replacement hospital without obtaining a certificate of need for the proposed project as required by North Carolina law; and the North Carolina Court of Appeals upheld the Agency’s denial of Good Hope’s exemption request. See *Good Hope Hospital, Inc. v. N.C. Dept. of Health and Human Servs.*, 623 S.E.2d 315, 2006 N.C. App. LEXIS 63 (N.C. App. Jan. 3, 2006) (holding that only exemption from CON review allowed for replacement of an entire facility was for replacement or repair of facilities destroyed or damaged by accident or natural disaster and that exemption provision did not grant existing hospitals such as Good Hope a franchise right of perpetual operation). [Joint Exh. 1, Agency File, pp. 662-68]

In 2003, GHHS applied for a certificate of need to build a complete replacement hospital in Lillington. [Joint Exh. 2, GHHS App., pp. 195 and following]

In its 2003 Application, GHHS identified many serious problems with Good Hope’s physical plant, and represented that “Good Hope Hospital has a compelling need for a new hospital facility.” [Joint Exh. 2, GHHS App., pp. 240-55]

The 2003 GHHS Application presented detailed information regarding the dilapidated condition of Good Hope’s facilities included the following:

- With the various building components and the different ceiling heights throughout the various components, remodeling would be difficult and would require higher than normal cost and would actually require running large amounts of duct work exposed on the roof of the structure. [GHHS App., pp. 241-242]
- 17 of 20 different heating and cooling systems were in poor condition and needed to be replaced as soon as possible. There was a single gas hot water heater for the entire facility. [Id. at p. 242]
- A major concern with the electrical system involved water pipes that crossed the main electrical panel in the basement which could pose problems if the pipes leaked. [Id. at p. 243]
- Problems in the critical care unit with access problems for emergencies because of a narrow corridor and because the area does not have a ramp and only has steps for access to the critical care unit. [Id. at pp. 244-245]

- Problems in the emergency and radiology department with lack of space and the lack of toilet facilities in the emergency department as well as generally crowded conditions and a lack of a decontamination room or a negative pressure room for patients who present with infectious diseases. [Id. at pp. 249-250]

- Problems with water seepage and flooding in the surgery and laboratory departments. The below-ground location of these departments creates moisture problems. Because of the flooding in the laboratory department, power cords must be strung from the ceiling to prevent problems that would occur if these cords were exposed to standing water that is occasionally present in the laboratory department. [Id. at pp. 252-254]

The record also contains information regarding inspections by State and Federal government agencies, which reflected the unacceptable condition of Good Hope's facilities. This information included the following:

- A letter from the Centers for Medicare & Medicaid Services ("CMS") notifying Good Hope that CMS had determined the facility did not comply with National Fire Protection Association's Life Safety Code, which rendered the hospital non-conforming with a necessary condition of participation in the Medicare Program; and

- A Letter from the Director of Harnett County Emergency Services Department stating, "It is our opinion that the report prepared by C. Ross Architecture L.L.C. and L.C. Thomasson Associates, Inc. accurately summarizes the imminent safety hazards at Good Hope Hospital . . . ,"

[Joint Exh. 1, Agency File, pp. 667-668]

The poor condition of Good Hope's physical plant was the basis for GHHS's assertion that "imminent safety hazards" at the hospital justified construction of a replacement hospital. [Id. at p. 668]

The Agency denied GHHS's 2003 Application, in part, because the 2003 SMFP did not contain a need for a hospital with three operating rooms in Harnett County, as proposed by GHHS. GHHS appealed the Agency's denial of its application. [Joint Exh. 1, Agency File, pp. 821 and 655]

In 2005, Governor Easley amended the 2005 State Medical Facilities Plan ("SMFP") to include a need for a new 50-bed hospital with three operating rooms in Harnett County. [Joint Exh. 4, SMFP, Easley Memoranda dated December 10 and 30, 2004]

In 2005, GHHS and Harnett Health filed their respective Applications at issue in this contested case. GHHS applied for a certificate of need to develop a hospital with 34 acute care beds, 12 psychiatric beds, and three operating rooms in Lillington. [Joint Exh. 1, Agency File, p. 873]

Following GHHS's 2005 application, the North Carolina Court of Appeals dismissed its appeal of the denial of its 2003 application for mootness. *See Good Hope Health System, L.L.C. v. N.C. Dept. of Health and Human Servs.*, 623 S.E.2d 307, 2006 N.C. App. LEXIS 62 (N.C. App. Jan. 3, 2006) (holding that GHHS had been afforded an adequate remedy in having the hospital project proposed in its 2003 application reviewed under the 2005 SMFP which specifically recognized the need for a new hospital in central Harnett County). [Joint Exh. 1, Agency File, pp. 654-661]

CT Condition Regarding Harnett Health Application

The Agency has adopted special Criteria and Standards for Computed Tomography, which are codified at 10A NCAC 14C.2301 *et seq.*

The Agency's rules for CT services include provisions that: (1) "each existing CT scanner in the applicant's CT service area shall have performed at least 5,100 HECT units in the 12 month period prior to submittal of the application;" and (2) "each existing and approved CT scanner in the applicant's CT service area shall be projected to perform at least 5,100 HECT units in the third year of operation of the proposed equipment." 10A NCAC 14C.2303(2) and (3) (collectively, the "CT Rule").

In approving the Harnett Health Application, the Agency attached a condition which provided that Harnett Health could not acquire a Computed Tomography ("CT") scanner as part of this project. The reasons for this condition, based on the Agency Findings, were the provisions in the CON Section's administrative rules pertaining to CT services. Those provisions address the past and future utilization level of existing CT scanners within the service area where a new CT scanner is proposed. [Joint Exh. 1, Agency File, pp. 935-36]

At the time of the Review, there were three existing CT scanners in Harnett Health's defined service area. [Hoffman, Vol. V, pp. 1162-65; Joint Exh. 1, Agency File, pp. 935-936]

Good Hope's CT scanner did not perform 5,100 HECT units during the 12-month period prior to submittal of the Harnett Health Application. [Joint Exh. 1, Agency File, p. 935-936]

The Good Hope CT scanner was the only CT scanner in Harnett Health's defined service area that was operating below the required utilization level. The other CT scanners operating within Harnett Health's defined service area were located at Highsmith-Rainey Regional Medical Center in Fayetteville and Betsy Johnson Regional Hospital, and were performing above the required utilization level. [Joint Exh. 1, Agency File, p. 935]

A CT scanner or the availability of CT services are important components of the services offered by a community hospital in North Carolina. The Chief of the CON Section testified that she would expect a community hospital such as the one proposed by Harnett Health to have a CT scanner or offer CT services. [GHHS Exh. 3, Hoffman Dep., pp. 54-56.]

When the Agency reviewed the GHHS and Harnett Health Applications, the Agency was aware that GHHS's attempts to obtain the Agency's approval to establish a new hospital in Lillington had failed. The Agency knew that GHHS's requests for a Declaratory Ruling and exemption from certificate of need review had been denied; and the Court of Appeals' decisions in those cases were contained in the Agency file. [Hoffman, Vol. V, pp. 1212-32].

Prior to and during the Review, there was substantial information available to the Agency to indicate that Good Hope Hospital would soon close its doors. This information included the following:

- Good Hope's representations to the Department, acknowledged in the Easley Memoranda, that Good Hope would close in 2006.
- Good Hope's notice to the Division of Facility Services ("DFS") that it had closed its Emergency Department on April 1, 2005 and its psychiatric unit in March of 2005. [See 2006 Good Hope License Renewal Application (Harnett Health Exh. 8); GHHS Exh. 38.]
- The exemption request filed by Good Hope with DFS, asking that it be permitted to build a replacement hospital without obtaining a certificate of need since closure of its existing facility was imminent due to the deteriorated condition of its facility. [See Exemption Request Letters dated August 21 and October 23, 2003 from Good Hope's legal counsel to Agency (GHHS Exh. 18).]
- The survey of Good Hope Hospital conducted by the Centers for Medicare & Medicaid Services in March of 2002, in which CMS found severe deficiencies in Good Hope's physical plant. [Joint Exh. 3, Harnett Health App., pp. 293-308]
- The October 13, 2005 testimony of Mr. Earl Jones, the Chair of Good Hope's Board of Trustees, presented at a public hearing convened by the CON Section as part of its review of these applications, in which Mr. Jones acknowledged that Good Hope's existing hospital facility required substantial renovations which would be cost-prohibitive and would require closure of the hospital. [See Joint Exh. 1, Agency File, p. 542.]

Prior to and during the Review, there also was substantial information available to the Agency to indicate that none of the alternatives that had been pursued by GHHS before the Review would result in the construction and operation of a new hospital in Lillington.

At the hearing, the Chair of Good Hope's Board of Trustees testified in general terms about contacts with potential lenders concerning the possibility of financing a project pursuant to the 2001 CON, but he did not provide any details regarding those negotiations or any concrete plans that had been worked out for financing such a project. The Chair also testified that Triad was only willing to finance a replacement hospital if changes to the project for which the 2001 CON was issued were approved through one of GHHS's pending appeals. [Jones, Vol. I, pp. 104-06].

The Chair of Good Hope's Board further testified that GHHS viewed implementation of the project approved under the 2001 CON as its last resort, and that GHHS would pursue this option only if it failed in all of its pending legal appeals regarding its efforts to obtain permission from the Agency to construct a larger hospital owned and financed by a different entity and located in a different town. [Jones, Vol. I, pp. 104-06].

No evidence was presented to demonstrate that GHHS will be able to finance and implement the 2001 CON. [Hoffman, Vol. V, pp. 1202-15; GHHS Exhs. 9-16]

The information presented to the Agency before it conducted the 2005 Harnett Hospital Review indicated that Good Hope was not making any progress in implementing its 2001 CON, and that GHHS considers development of a project pursuant to the 2001 CON its last resort. Every indication was that the only avenue GHHS was pursuing was construction of a new hospital in Lillington with Triad as a partner. [Jones, Vol. I, pp. 105, 218-26]

The information described above strongly indicated that Good Hope Hospital would close in 2006 and that a replacement hospital would not be constructed by 2011, the third projected operating year of the hospital proposed in the Harnett Health Application.

At the time of the Review, the Agency assumed that Good Hope would close by November 2006, based on Good Hope's representations to the Department of Health and Human Services (the "Department"). [Hoffman Aff., ¶ 18; GHHS Exh. 3, Hoffman Dep., pp. 57-58.]

Harnett Health's expert testified that in developing the Harnett Health Application's projection of CT utilization, he did not rely upon or focus on data reflecting the utilization of Good Hope's CT scanner, which was being utilized at only about 20-21% of its capacity, because Good Hope was not reflective of a stable, ongoing operating since it was struggling and he did not want to base his projections on a struggling hospital. He testified that utilization was declining at Good Hope and thus it would not be a reliable basis for modeling future utilization projections. [Sullivan, Vol. VIII, pp. 2176-77]

The Agency assumed that Good Hope's CT scanner would not be performing 5100 HECT units per year in the future, since Good Hope would be closing. [Hoffman, Vol. V, pp. 1162-70]

Because the Good Hope CT scanner had performed less than 5,100 HECT units during the 12-month period prior to submittal of the Harnett Health Application, the Agency apparently felt obligated to approve the Harnett Health Application subject to a condition that Harnett Health "shall not acquire a computed tomography scanner as part of this project." [Joint Exh. 1, Agency File, pp. 935-936, 949; Hoffman Aff., ¶ 10] As Ms. Hoffman has acknowledged, "the condition precluding Harnett Health from acquiring a CT scanner as part of their proposed project was based exclusively on the utilization of the CT scanner at Good Hope Hospital." [Hoffman Aff., ¶ 11]

There is no evidence to support the assertion that Good Hope or GHHS will have a CT scanner operational by 2011, Harnett Health's proposed third year of operation.

Need

Review Criterion 1

Review Criterion 1 codified at N.C. Gen. Stat. § 131E-183(a)(1) requires a proposed project to be "consistent with applicable policies and need determinations in the State Medical Facilities Plan"

The Harnett Health and GHHS Applications were filed in response to a need identified in the 2005 SMFP for a new hospital with not more than 50 acute care beds and three operating rooms in the central part of Harnett County. This need was identified as a result of memoranda issued on December 10 and 30, 2004 by Governor Easley in connection with his final approval of the SMFP (the "Easley Memoranda"). [Harnett Health Exh. 2]

The Harnett Health Application proposed to develop a full-service hospital with 50 acute care beds and three operating rooms in Lillington. [Roberts, Vol. VI, pp. 1404-06; Joint Exh. 1, Agency File, p. 874]

As explained in detail below in the findings regarding Review Criteria 3, 6 and 18a, Harnett Health's proposed hospital is consistent with the need for a new acute care hospital in central Harnett County which the Governor identified in the 2005 SMFP.

Review Criterion 3

GHHS's expert testified that there is no single style or way of developing a CON application or presenting the requested information. [French, Vol. III, p. 817]

Review Criterion 3 codified at N.C. Gen. Stat. § 131E-183(a)(3) requires an applicant to “identify the population to be served by the proposed project,” and to “demonstrate the need that the population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.”

In determining that there was a need for a new hospital in central Harnett County, Governor Easley expressly recognized: “[t]he physical plant . . . of Good Hope Hospital is nearing the end of its useful life. In fact, the owners of Good Hope Hospital have represented to the Department [of Health and Human Services] that, based on a Plan of Correction submitted to and approved by the Federal Centers for Medicare and Medicaid Services, its present facilities cannot be used for patient care after November 2006.” [See Harnett Health Exh. 2, Memorandum dated December 30, 2004.]

The Easley Memorandum dated December 30, 2004 made clear the Governor’s intention that any entity could apply to meet the need determination for a new acute care hospital in central Harnett County. [Harnett Health Exh. 2].

The Easley Memorandum dated December 10, 2004, included an attachment which contained a detailed utilization projection in support of the need for a new hospital in central Harnett County. This utilization projection identified an estimated 12,130 days of care attributable to a new hospital located in central Harnett County, based on a computation of data from 2003 which showed about 12,500 patient discharges of Harnett County residents from hospitals located outside Harnett County. [Harnett Health Exh. 2]

This utilization projection “conservatively estimated that one-third (33%) of the patients associated with these discharges would use a new, centrally located hospital.” [Sullivan, Vol. VIII, pp. 1992-95; Harnett Health Exh. 2]

The Easley Memorandum dated December 10, 2004 and the supporting utilization projections attached indicated that the need which the Governor identified in the 2005 SMFP was intended to address a significant out-migration of Harnett County residents to other counties for hospital services by providing Harnett County residents a geographically accessible acute care hospital in their home County.

The need for a new acute care hospital in central Harnett County which the Governor identified in the 2005 SMFP and the Easley Memoranda also strongly indicated that insufficient hospital resources were available to serve that area.

The Harnett Health Application proposed to serve primarily residents of Harnett County, as well a smaller percentage of residents from surrounding counties. [Joint Exh. 3, Harnett Health App., pp. 86-88]

The Harnett Health Application assumed that individuals who lived closest to Lillington would be most likely to reverse their out-migration, while people living near Dunn or Erwin might choose to stay at Betsy Johnson or to go somewhere else outside Harnett County for hospital services. [Sullivan, Vol. VIII, pp. 2019-21]

The Harnett Health Application assumed that a higher proportion of Medicaid and self-pay patients would utilize services at the new hospital in Lillington because they would tend to be more likely to be individuals of limited means with more limited resources to seek or access acute care outside Harnett County. A number of studies support Harnett Health’s assumption that the persons who are most able to travel are those with the most financial resources. [Sullivan, Vol. VIII, pp. 2021-22]

The Harnett Health Application set forth utilization projections for the services to be provided by its proposed Central Campus hospital, and the underlying methodology and assumptions used to develop those projections. [Sullivan, Vol. VIII, p. 2002; Joint Exh. 3, Harnett Health App., pp. 84-123]

The projected inpatient days of care in the Harnett Health Application parallels the utilization projection of 12,130 inpatient days of care attributed to a new centrally located Harnett County hospital which was included with the Easley Memorandum dated December 10, 2004. Harnett Health projected the number of days of care in the third year of its operation in 2011 to be 12,913. [Joint Exh. 3, Harnett Health App., p. 102]

Harnett Health identified the primary service area for the proposed Central Campus hospital to include all zip codes in Harnett County, and the secondary service area to include a number of zip codes in areas of neighboring counties that border on Harnett County (primary and secondary service areas collectively referred to as the “Service Area”). [Sullivan, Vol. VIII, pp. 2002-03; Roberts, Vol. VI, pp. 1427-29; Joint Exh. 3, Harnett Health App., pp. 86-89]

Because the primary service area identified in the Harnett Health Application included all the zip codes in Harnett County, it is consistent with the geographic area the Governor intended to be served through the need he identified in the 2005 SMFP for a new hospital in central Harnett County.

After identifying the Service Area for the Central Campus hospital, Harnett Health used the Claritas demographic database to project the population of each zip code in the Service Area. Harnett Health then used the Solucient health care services data base to project the number of patient days per thousand for each zip code. The projected number of patient days per thousand was then applied to the total population for each zip code to determine the projected patient days for each zip code in the Service Area. This computation was used to project the number of patient days in the Service Area for years 2009 through 2011. [Sullivan, Vol. VIII, pp. 2003-04; Roberts, Vol. VI, pp. 1414-15, 1432-30; Joint Exh. 3, Harnett Health App., pp. 88-99]

One additional factor considered by Harnett Health in projecting the number of patient days in the future was the fact that the population of Harnett County was aging. The Harnett Health Application presented information showing that the County's population in the 45 and older age group was growing faster than other segments of the population. To account for the higher rate of healthcare service utilization by these older individuals, Harnett Health reasonably assumed that the use rates among the zip codes in the Service Area would grow by about .25% per year. [Sullivan, Vol. VIII, pp. 2006-07; Roberts, Vol. VI, pp. 1415-16; Joint Exh. 3, Harnett Health App., p. 96]

Finally, to determine the projected utilization of the proposed Central Campus hospital, Harnett Health applied the market share it assumed Harnett Health System would serve to the total number of projected patient days in the Service Area. Harnett Health then apportioned this projected market share between Betsy Johnson and the proposed Central Campus hospital. [Sullivan, Vol. VIII, pp. 2025-27; Roberts, Vol. VI, pp. 1416-17; Joint Exh. 3, Harnett Health App., pp. 96-99]

In analyzing and determining the projected market share for the Harnett Health System Hospitals, Harnett Health considered the historic market share of Betsy Johnson Hospital, recent significant growth that had occurred in Betsy Johnson's utilization during the 12 months before the Application was filed, and the assumption that Good Hope would close. [Sullivan, Vol. VIII, pp. 2007-10; Roberts, Vol. VI, pp. 1444-45; Joint Exh. 3, Harnett Health App., pp. 96, 99]

The Harnett Health Application presented information showing that occupancy of Betsy Johnson was between 47% and 49% per quarter for the 12-month period ending June 30, 2004. Beginning in January 2005 there was a significant jump from 48.4% to 61.2% and then again in the second quarter from 61.2% to 64%, a significant increase in a short period of time. That jump in utilization indicated Harnett Health could not rely on 2004 data alone in estimating market share for the future. Harnett Health relied upon this trend of increased utilization in developing projections of utilization for its Central Campus hospital. [Sullivan, Vol. VIII, pp. 2010-12; Roberts, Vol. VI, p. 1446; Joint Exh. 3, Harnett Health App., p. 126]

The increased utilization of Betsy Johnson was driven in part by Good Hope's closure and reduction of services, including the closure of the emergency department and psychiatric unit, and reduction of overall operations. [Sullivan, Vol. VIII, pp. 2010-12]

In analyzing and determining the projected market share for the Harnett Health System Hospitals, Harnett Health also factored in its assumption that Good Hope would close, and the potential positive impact on market share that would result from management by WakeMed. [Sullivan, Vol. VIII, pp. 2007-10; Joint Exh. 3, Harnett Health App., p. 96]

In 2011, the third year of operation, the Harnett Health System Hospital's projected market share of the primary service area patient days was 44.1 percent. [Sullivan, Vol. VIII, p. 2026; Joint Exh. 3, Harnett Health App., pp. 96, 99].

Harnett Health's expert testified that this was an appropriate and conservative market share given the expected closure of Good Hope and the reasonable assumption that individuals who had been traveling outside of the County to receive hospital services would choose to receive services closer to home at a new hospital in a central location in the County. The Harnett Health Application projected 44% of the discharges staying in the County in comparison with 56% which were leaving the County for acute care at the end of year three. [Sullivan, Vol. VIII, pp. 2012-16]

Harnett Health's expert testified that establishing a new hospital in an area that did not previously have a hospital with an emergency room and surgical and medical services would create an increase in market share at the new hospital, particularly when it is part of a two-hospital system and is coordinating services with WakeMed. [Sullivan, Vol. VIII, pp. 2012-16]

Harnett Health's assumption that almost 56% of Harnett County residents would continue to leave the County for acute care and that only 44% would use the two hospitals in the County with better geographic locations than currently exist was a conservative

assumption. In many markets throughout the country, a single provider captures far more than 44% of their home county market. [Sullivan, Vol. VIII, p. 2015]

Harnett Health assumed a relatively small increase in market share of 2.7% between 2005 and 2006 due to the changing circumstances in the County and then very minimal increases in 2007 and 2008 because the projections indicated that Betsy Johnson Hospital would be getting fairly full at that time, running close to 75% occupancy by 2008. [Sullivan, Vol. VIII, pp. 2017-18]

Harnett Health's utilization projections for the years 2005 through 2011 are reasonable and conservative given the dynamics of the closure of Good Hope, the County's population growth, the presence of WakeMed, and the anticipated recruitment of additional physicians. [Sullivan, Vol. VIII, pp. 2022-23]

In projecting utilization of the Central Campus hospital, Harnett Health relied on an average length of stay of 4.19 days based on Betsy Johnson's 2004 actual length of stay. Harnett Health calculated this average length of stay by dividing the number of discharges into the total number of days of patient care, both of which are historical data from 2004. The number of discharges was then projected for each year until 2011, and the average length of stay of 4.19 was applied to each year's discharges to project the total patient days for each year. In 2011, for example, there were 21,881 projected discharges which, when multiplied by the 4.19 average length of stay yielded 91,682 patient days from the Harnett Health Service Area. This was a reasonable approach to projecting the total number of days of care. [Sullivan, Vol. VIII, pp. 2085-87; Joint Exh. 3, Harnett Health App., pp. 99-103, 129]

Harnett Health's expert explained that because Betsy Johnson's average length of stay was based on a patient population that included obstetrical patients who typically have a shorter length of stay than medical patients, this was a conservative approach to proposed utilization for the Central Campus hospital since the Central Campus would not have obstetrical services. [Sullivan, Vol. VIII, pp. 2086-87]

After calculating the total number of days of care projected for each year, Harnett Health estimated the distribution of days of care among the hospital's two units – medical/surgical and telemetry. The goal was to determine reasonable expectations of how many patient days would occur in the telemetry unit versus the medical/surgical unit. A 4.19 average length of stay was used consistently for all years and never changed. The distribution of days of care and average length of stay among these two units set forth in the Application was more indicative of how the total days of care would be allocated between the two units than of a precise calculation of the average length of stay for each unit. [Sullivan, Vol. VIII, pp. 2088-93; Joint Exh. 3, Harnett Health App., pp. 128-29]

The 14-day length of stay shown in the for the telemetry unit is really an artificial number as it relates to individual unit length of stay and is a function of the number of patient days in the telemetry unit divided by the number of discharges. Most patients spend only a few days in the telemetry unit and then may be moved to a medical/surgical bed. Since only a few patients spend their entire time in the telemetry unit, and are then discharged directly from there, that small number of discharges (projected as 71 in 2009) when divided into the total days spent in the unit (projected to be 1,000 in 2009) yields an artificially-high number for telemetry length of stay. This is purely a mathematical calculation, based on how the CON application form asks you to report that information. The important point is that the telemetry unit utilization was computed based on the same 4.19 average length of stay used across all years in the application and used in the medical/surgical unit projections also, based on historical Betsy Johnson 2004 data. [*Id.*]

After projecting total patient days for the two-campus system, Harnett Health also needed to allocate the total patient days computed for its unified hospital system between the existing Betsy Johnson campus and the new Central Campus. Harnett's data projections showed that Betsy Johnson hospital would become relatively full in 2008. In allocating days of care between the two hospitals, Harnett Health assumed that a smaller percentage of the total market share would go to Central Campus in the first operating year but that by the third operating year, when the Betsy Johnson campus would be nearing its bed capacity, most of the growth would then occur at Central Campus. This was a reasonable approach because the utilization at the new hospital would tend to increase after it has been operated for a period of time and patients become more familiar with its services. [Sullivan, Vol. VIII, pp. 2093-94; Roberts, Vol. VI, pp. 1416-17]

The heavier utilization of Betsy Johnson is documented in the Harnett Health application which shows Betsy Johnson's medical/surgical beds at almost 75% occupancy in the year 2008. An average occupancy of 75% over an entire calendar quarter indicates that on some days of higher utilization (i.e., Tuesday, Wednesday, and Thursday are usually peak capacity days), the beds may be occupied at 95 or 100%, and this indicates the hospital is nearing its realistic capacity. [Sullivan, Vol. VIII, pp. 2095-96; Joint Exh. 3, Harnett Health App., p. 127]

The projection of the utilization of obstetric beds at Betsy Johnson was reasonable. In projecting the utilization of obstetric beds in future years, Harnett Health assumed that certain female patients could be shifted from the medical/surgical unit to the

obstetrics unit, still leaving ample room in the obstetrics unit for the projected obstetrics demand. This shifted some of the patient days and discharges from the medical/surgical beds to the obstetrical unit as a way to effectively utilize all the bed capacity at Betsy Johnson to the greatest extent possible. It is not unusual for hospitals to serve some of its female patients in available beds in the obstetrical unit. Harnett Health did not assume any dramatic growth in obstetric services. [Sullivan, Vol. VIII, p. 2101-04; Joint Exh. 3, Harnett Health App., pp. 127, 129, 131.]

The utilization data presented in the Harnett Health Application indicated a slight increase in average length of stay for medical/surgical beds from 3.5 days for the first and second operating years to 3.7 days for the third operating year. Harnett Health's expert explained that this slight increase simply resulted from the allocation of patient days between the medical/surgical and telemetry units as the 8-bed telemetry unit became full and was not significant in any regard. It simply reflects a shift of some patients back towards the medical/surgical unit as the telemetry unit reached capacity. The same 4.19 length of stay was used for projecting utilization and reflected in this portion of the application are, again, just an allocation of patient days among units, not a change in the actual length of stay projected. [Sullivan, Vol. VIII, p. 2101-04; Joint Exh. 3, Harnett Health App. p. 129]

In developing Harnett Health's utilization projections, Harnett's expert relied upon the assumption that Good Hope was closing and testified that this was a reasonable assumption to make. He did not assume that Good Hope would reopen during the time periods relevant to the and project development. This assumption was based on discussions with WakeMed representatives and the Governor's memorandum establishing the need for a new hospital in central Harnett County. The Governor's memorandum said that based on a plan of correction submitted to the Centers for Medicare and Medicaid Services, Good Hope's present facilities could not be used for patient care after November 2006. The implication of this memorandum was that Good Hope would not reopen and that was Harnett Health's interpretation. [Sullivan, Vol. VIII, pp. 2127-30]

Harnett Health's expert was aware that Good Hope held a 2001 CON for a partial replacement hospital in Erwin. However, he did not discuss this in the Harnett Health Application because Good Hope had made no progress towards developing that facility. Its progress reports showed no progress on that project. In addition, GHHS, of which Good Hope was an owner, had filed a 2003 application in which it indicated that its 2003 application was its preferred alternative and so Harnett Health assumed the Good Hope 2001 CON would not be implemented. The Agency also did not discuss the 2001 Good Hope CON in its decision. Harnett Health's expert testified that he usually considers existing and approved CONs in evaluating need and utilization in a CON application, if an approved project is one that is going to be implemented. However, Good Hope's own public statements about its 2001 CON foreclosed that option in this case. [Sullivan, Vol. VIII, pp. 2127-30, 2132-39]

Harnett Health's demonstration of need for its proposed project assumed that Harnett Health System would be the only hospital provider in Harnett County. Harnett Health's financial projections are based on the same assumption. [Sullivan, Vol. VIII, pp. 2141-43]

However, Harnett Health's market share projections, which drives both its need and financial projections, were not necessarily based on Harnett Health System being the only provider in the county. This is because Harnett Health projects a total market share for both of its hospitals of only 44%, which is less than a majority of the patients needing hospital services in the county. That market share is conservative and would potentially allow for a third hospital to operate in the county without impacting Harnett Health's projected market share. Harnett Health's expert testified that Harnett Health did not discuss this option in the application because he did not think the possibility of Good Hope opening a third hospital in the county was realistic, but he did speculate about it and concluded that the possibility of a third hospital in Harnett County would not preclude Harnett Health's projected market share of 44%. He has often seen a single hospital in a county attract a market share of 60% or more and Harnett Health's projection of 44% was much lower than that. His opinion in this regard was based on his experience in other markets. [Sullivan, Vol. VIII, pp. 2141-49; 2183-87]

Although the 2005 SMFP included Good Hope's hospital beds and operating rooms in the existing inventory for Harnett County, the Governor's memorandum establishing the need for a new hospital in central Harnett County did not say anything about this inventory information. The referenced inventory was located in Erwin, not central Harnett County. Also, the SMFP data showing Good Hope's beds simply reported historical utilization data and projected that forward. The future utilization projected in the SMFP is independent of whether a particular provider's beds will be in operation or not and the utilization is independent of the number of beds that exist. [Sullivan, Vol. VIII, pp. 2172-75; 2216-19; Joint Exh. 4, 2005 SMFP, pp. 44, 58]

Harnett Health's projected surgery utilization was based on historical surgery utilization data for Harnett County in the 2005 SMFP, and applied this rate to the population to project utilization of inpatient and outpatient surgery services. Harnett Health assumed this surgery utilization rate would increase annually until it reached the statewide average. Harnett's expert testified that these projections are reasonable and are based on the demographics of the area, the level of expected demand, and the fact that there will be a new facility with three operating rooms in central Harnett County. [Roberts, Vol. VI, pp. 1424-26; Sullivan, Vol. VIII, pp. 2104-06; Joint Exh. 3, Harnett Health App., p. 94]

The Harnett Health Application adjusted the total number of patient days by deleting the number of days attributed to babies' stay in the hospital. Newborns typically occupy a bassinet rather than a licensed acute care bed and so these newborn days are deleted from the total numbers in the chart on page 102 of the Harnett Health application. This adjusted number of patient days, excluding the days associated with normal newborns, was the number that was used in the utilization chart in Exhibit 16 on page 126 of the Application. [Sullivan, Vol. VIII, pp. 2023-25; Joint Exh. 3, Harnett Health App., pp. 99-102]

Once the normal newborn days are excluded, Harnett Health's projected patient days shown in Exhibit 12 on page 102 of the Application tie exactly to the patient days shown for the Central Campus in years 1 (4.726 patient days), year 2 (7.237 patient days), and year 3 (12.913 patient days). [Sullivan, Vol. VIII, pp. 2028-33; Joint Exh. 3, Harnett Health App., pp. 102, 126, 128]

Harnett Health projects that 91.7% of its patient days will come from zip codes within the primary service area which includes all of the zip codes identified in the 2005 need allocation established by Governor Easley; and that 8.3% of the patient days would come from outside the primary service area. [Sullivan, Vol. VIII, p. 2027; Joint Exh. 3, Harnett Health App., p. 99]

Harnett Health's expert testified that based on the detailed and conservative methodology set forth in its Application, Harnett Health demonstrated a need for the inpatient acute care services that it proposed and identified a population to be served. [Sullivan, Vol. VIII, pp. 2033-34; 2056]

Physician support letters are not determinative evidence of need or support for a new hospital. A physician's willingness to write a support letter or not is often driven by considerations other than pure need. Because Good Hope's attempts to develop a new hospital in Harnett County had been in contention and litigation for several years before the Review, it is not surprising that many physicians were not willing to write a letter in support of Harnett Health's proposed hospital. [Sullivan, Vol. VIII, pp. 2069-71]

Harnett Health's expert testified that he had experienced similar phenomena in other projects, and described two specific examples involving hospitals in Myrtle Beach and Florida. Both cases involved new hospitals or expansions where many local physicians were linked to a larger nearby hospital and refused therefore to write support letters for the new hospital or expansion. In both cases, after the new hospitals were approved and built, they both were full within two years and both had to expand their bed capacity. [Sullivan, Vol. VIII, pp. 2071-73]

It would not be appropriate to identify specific physicians not already present in the community who would be providing service at the future hospital. At the time a certificate of need application for a proposed hospital is developed, it remains unknown whether the hospital will be constructed and it is difficult to persuade physicians to commit to staff a hospital that will open four or five years in the future. [Sullivan, Vol. VIII, pp. 2076-77]

Instead, the questions are whether the applicant will have a recruitment plan in place and whether there is a reasonable expectation the applicant will be able to recruit physicians. The addressed these questions by describing its recruitment plan, a policy which has been adopted by the Board of Trustees of Betsy Johnson and was updated in 2005. A copy of that policy was included in the . [Sullivan, Vol. VIII, pp. 2076-78, 2200-02; Bryan, Vol. VII, pp. 1768-69; Joint Exh. 3, Harnett Health App., pp. 52, 677-79]

The involvement of WakeMed as manager of the new Central Campus hospital also will help Harnett Health recruit new physicians to staff the hospital. [Sullivan, Vol. VIII, pp. 2188-89, 2200-02].

GHHS's expert conceded that Lillington is a more effective location for a new hospital than Erwin. Mr. French indicated that a hospital located in Lillington would have a stronger utilization. [French, Vol. I, p. 311]

In addition to the hospital beds and operating rooms, fundamental services for the new hospital developed in response to the need the Governor identified in the 2005 SMFP are an emergency department, inpatient and outpatient surgery, and a compliment of diagnostic imaging services such as radiography, fluoroscopy and CT scanning, all fundamental services. [Sullivan, Vol. VIII, pp. 1995-96]

There are no CT scanners in central Harnett County as defined in the Easley Memoranda. [Sullivan, Vol. VIII, pp. 1998-99]

A CT scanner is an important diagnostic tool for a hospital's emergency department because it can provide a quick scan of the entire body and avoids the potentially serious side effects of using the very powerful magnets in a magnetic resonance imaging (MRI) machine for patients who have metal or metal fragments in their bodies. [Sullivan, Vol. VIII, pp. 2039-41]

Unlike with the projection of acute care patient days, there is no similar commercial database for CT scanner utilization. The Harnett Health Application reviewed the relationship between emergency department visits and CT scans at Betsy Johnson based on

that hospital's historic data. Emergency department visits are not the only driver of CT volume, but the emergency department is a significant driver of CT volume. Since this was the best surrogate measure for projecting future CT scans, this was a realistic and reasonable methodology to use. [Sullivan, Vol. VIII, pp. 2043-45]

Based on this methodology, Harnett Health reasonably assumed a CT use rate computed at .27 CT scans per emergency department visit, and reasonably projected the number of CT scans for the Central Campus. [Sullivan, Vol. VIII, p. 2045; Joint Exh. 3, Harnett Health App., p. 108]

Review Criterion 4

Review Criterion 4 codified at N.C. Gen. Stat. § 131E-183(a)(4) requires that where alternative methods of meeting the needs for the proposed project exist, the applicant must "demonstrate that the least costly or most effective alternative has been proposed."

The Harnett Health Application specifically addressed the need for a new acute care hospital in Section II. Harnett Health began with the premise that there was an identified need for a new hospital and then examined alternatives to a new hospital. [Sullivan, Vol. VIII, pp. 1999-2002; Joint Exh. 3, Harnett Health App., pp. 40-43]

Harnett Health concluded the only appropriate way to address the need was a new inpatient facility, and that this option best met the need identified by the Governor. [Sullivan, Vol. VIII, pp. 2001-02; Joint Exh. 3, Harnett Health App., pp. 40-43]

Review Criterion 6

Review Criterion 6 codified at N.C. Gen. Stat. § 131E-183(a)(6) requires an applicant to "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health services capabilities or facilities."

The out-migration of Harnett County residents to other counties for hospital services indicated that there were insufficient hospital services available in Harnett County, which was part of the reason the Governor wrote the need into the 2005 SMFP. [Joint Exh. 4, 2005 SMFP, Easley Memoranda]

The Harnett Health Application contained a Harnett County market analysis which also indicated that insufficient hospital resources were available to serve Harnett County and supported the need for additional hospital resources in that County.

The Harnett Health Application appropriately addressed the out-migration of Harnett County residents for hospital services. [Sullivan, Vol. VIII, p. 2034; Roberts, Vol. VI, pp. 1409-12]

The evidence presented indicated there is a need for additional emergency room capacity and emergency room capacity that is more accessible to the central area of Harnett County. [Sullivan, Vol. VIII, pp. 2034-39]

Harnett Health's proposal to operate an emergency department as part of the new Central Campus would not duplicate existing emergency department services in Harnett County in light of Good Hope's closure of its emergency department and the significant increase in emergency department utilization at Betsy Johnson. [Sullivan, Vol. VIII, pp. 2034-39]

By allowing more Harnett County residents to receive hospital care closer to home, Harnett Health's proposed hospital will augment hospital services that are currently available in the County, not unnecessarily duplicate existing services in and around Harnett County. [Sullivan, Vol. VIII, p. 2034; Roberts, Vol. VI, pp. 1409-12]

Review Criterion 18a

Review Criterion 18a codified at N.C. Gen. Stat. § 131E-183(a)(18a) requires an applicant to "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed"

The historic levels of significant out-migration from Harnett County to other counties resulted, in part, from the existence of two unassociated hospitals in the County that did not share resources or coordinate efforts to effectively serve Harnett County residents. [Sullivan, Vol. VIII, pp. 2106-09]

The unified hospital system Harnett Health proposed to develop, including Betsy Johnson and the proposed new Central Campus, will enable a sharing of resources and coordination of efforts which will in turn enable Betsy Johnson and the Central

Campus hospitals to compete more effectively with established health systems and facilities in other counties that surround Harnett County. [Sullivan, Vol. VIII, pp. 2106-09]

In determining the impact of Harnett Health's proposed hospital system on cost effectiveness, quality, access to the services, and competition, the appropriate market to review is Harnett County as well as all of the counties where Harnett County residents are currently receiving hospital services. The key question is how does the applicant compete to keep patients in Harnett County and establish a viable provider who can serve those patients' needs. [Sullivan, Vol. VIII, pp. 2210-14]

Financial Feasibility

Review Criterion 5

Review Criterion 5 codified at N.C. Gen. Stat. § 131E-183(a)(5) provides that financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

Financial Feasibility - Availability of Funds for Capital Costs

The Harnett Health Application estimated the total capital cost of its project to be \$46,040,919. [Joint Exh. 3, Harnett Health App., pp. 171-172]

In support of this capital cost projection, the Harnett Health Application included a certification of estimated construction costs of \$45,552,959 from a licensed/certified North Carolina architect. [Joint Exh. 3, Harnett Health App., pp. 171, 1237.]

The Harnett Health Application included documentation of the intent and willingness of Harnett County to donate the land needed for the Central Campus hospital and indicated the value of that donation (\$487,960.00). [Joint Exh. 3, Harnett Health App., pp. 172-173, 316.]

Tax-exempt organizations qualify for tax-exempt financing through the Medical Care Commission. [DeVaughn, Vol. VII, p. 1801]

The Harnett Health System is a nonprofit tax-exempt corporation. [Joint Exh. 3, Harnett Health App., p. 15]

On page 173 in Section VIII of the Harnett Health application, there is a bond issue amount shown on line 3b of \$45,552,959. [DeVaughn, Vol. VII, p. 1816-17]

The Harnett Health Application included and demonstrated the availability of funds for capital needs by discussing its plans to borrow up to \$60 million through publicly offered tax-exempt bonds to be issued by the N.C. Medical Care Commission based on a partial guaranty from WakeMed sufficient to secure a Aaa/AAA commercial bond insurance policy for the corporation. Harnett Health's ability to fund its capital needs in this manner was evidenced by a letter from Joe Marion, Managing Director of Merrill Lynch and Senior Managing Underwriter for the bonds proposed by the Harnett Health Applicants. WakeMed has had several experiences in working with Mr. Marion of Merrill Lynch in financing projects. In addition, WakeMed committed to work with third parties to enhance the credit of Harnett Health System, Inc. so that entity could issue long-term debt through the N.C. Medical Care Commission to fund the construction of its proposed new hospital in central Harnett County [Joint Exh. 3, Harnett Health App., pp. 173-174, 1238-39; DeVaughn, Vol. VII, pp. 1801, 1811-14]

In the pro formas in the Harnett Health Application on page 197, there is a system-wide cash flow statement and under the year 2008, there is an entry for proceeds from issuance of LTD or long-term debt and the amount shown is \$47,500,000. This was the amount anticipated to be issued through Medical Care Commission bonds. This sum is more than the sum projected in the Application as coming from Medical Care Commission funding. [Baker, Vol. VII, pp. 1890-91; DeVaughn, Vol. VII, p. 1817; Joint Exh. 3, Harnett Health App., p. 197]

The financial statements also reflect the principal and/or interest payments for the Central Campus for long-term debt. The Harnett Health Application's pro forma income statement for Central Campus has a category interest expense under expenses which in year 1 is \$2,589,775. In year 2 it is \$2,538,414, and in year 3 it is \$2,484,156. This is the interest expense related to long-term debt. HHS financial consultant Joe Baker also included the debt regarding the working capital loan under non-operating income or loss.

That amount in year 1 is \$143,043, in year 2 it's \$186,571, and in year 3 it's \$115,053. Those numbers appear on the next to last line of the chart labeled 'non-operating income or loss.' [Baker, Vol. VII, pp. 1892-93; Joint Exh. 3, Harnett Health App., p. 199]

Regarding the working capital loan from WakeMed, the pro forma financial statements indicate that in 2008, the year-end balance is \$2,459,000. At the end of 2009, which is year 1, the balance is \$4,884,328. At the end of year 2, or 2010, the balance is \$4,870,247. At the end of year 3, or 2011, the balance is \$1,566,572. These numbers reflect the balance on December 31 of each year indicated. Nothing on the pro formas identifies a balance on the working capital loan at any point except at the end of each fiscal year. Based on the pro formas, there is no evidence that the Working Capital Loan balance ever reaches a total of \$7.4 million or that the balance of the loan increases at all after the end of year two. [Baker, Vol. VII, pp. 1881-89]

The source for the \$20 million in funds comprising the working capital loan would be WakeMed's cash reserves. The financial statements for WakeMed appear at page 1292 of the Harnett Health application. The balance sheet information for WakeMed shows current assets of \$21.7 million and short-term investments of \$171.7 million. [DeVaughn, Vol. VII, pp. 1809-11; Joint Exh. 3, Harnett Health App., pp. 1302-03]

The Chief of the CON Section testified, and it is found as a fact, that the Harnett Health Application presented adequate documentation of the commitment of financing for its proposed project. [Hoffman, Vol. V, pp. 1232-34]

Financial Feasibility - Operating Revenues and Costs

Harnett Health documented the immediate and long-term financial feasibility of their proposed project, based upon reasonable projections of the costs and charges for providing health services. Harnett Health provided in Section X of its application, and in the related pro formas called for by the CON application form, information regarding its costs and charges, including its projected charges for the services under review, and the projected total inpatient cost per day for each of the first three years of its operation, and by providing each direct and indirect cost item and its related amount for the proposed project for the first three years of operation after completion of the project. [Joint Exh. 3, Harnett Health App., pp. 183-87; 196-215]

The Harnett Health Application demonstrated the availability of funds for operating needs, in part, by providing evidence of WakeMed's commitment and willingness to loan the applicant funds from WakeMed's accumulated reserves sufficient to fund the start-up expenses and initial operating expenses. At its meeting on June 23, 2005, the WakeMed Board of Directors considered its participation in the Harnett Health project and authorized spending up to \$20 million for start-up, working capital and debt service coverage ("DSC") guaranty. WakeMed specifically committed to loan the applicant up to \$7,400,000 in working capital during the first two years of operation of the new facility. WakeMed documented the availability of sufficient current assets to fund both the working capital loan and credit enhancement for the Harnett Health Applicants, including current assets of \$21.7 million and short-term investments of \$171.77 million. [DeVaughn, Vol. VII, pp. 1803-07, 1809-11; Joint Exh. 3, Harnett Health App., pp. 173, 182, 244-255, 1238, 1292-1359]

The financial operating projections in the Harnett Health Application were based on a financial analysis by WakeMed financial consultant Joe Baker which included pro forma financial statements. These were then given to Robbie Roberts of the WakeMed planning staff who was coordinating that work on the Harnett Health Application. Baker was experienced in the methods typically used for projecting revenues and costs for both inpatient and outpatient acute care services from his prior professional positions as a private accountant serving hospital clients and positions at other hospitals in revenue modeling. [Baker, Vol. VII, pp. 1874-79]

Consultant Baker worked with a group of executive staff from WakeMed and officials at Betsy Johnson to develop the package of financial projections, based on a set of assumptions provided to him. That group reviewed his financial projections and determined that the proposed new hospital in central Harnett County would be financially feasible, reflecting a profit in its third year of operation. [Baker, Vol. VII, pp. 1875-76]

Consultant Baker also computed revenues projected from operation of the Central Campus hospital. In year 2009, that amount was \$35,540,104. For year 2, the Harnett Health Application reflected gross patient services revenue of \$54,278,012 on Form B1 of the Application. Year 3 gross revenue is \$79,230,841 on Form B1. These numbers match the numbers referenced by Baker on his work papers, with the exception of a rounding error of \$1.00 in year 1. [Baker, Vol. VII, pp. 1894-97; Joint Exh. 3, Harnett Health App., p. 199]

Consultant Baker used acute care days in projecting patient services revenue. The Harnett Health Application reflects patient days for the Central Campus and shows 4,726 patient days in year one - 2009; 7,237 patient days in year two - 2010; and 12,913 patient days in year three - 2011. These numbers match the patient day totals reflected in consultant Baker's workpapers that he

referenced during his testimony. They also match the patient day figures in the Application. [Baker, Vol. VII, pp. 1897-1900; Joint Exh. 3, Harnett Health App., p. 129]

The Harnett Health Application shows a total of 28,116 acute care days for 2009; 28,678 days for 2010; and 29,294 for 2011. These projected acute care days match the numbers in consultant Baker's workpapers. [Baker, Vol. VII, pp. 1901-02; Joint Exh. 3, Harnett Health App., p. 132]

There was no credible evidence presented at hearing that Harnett Health's projected costs and charges were unreasonable. In addition, the Harnett Health proformas indicate that the project will show a profit in year three of its operation, a fact cited and relied upon by the Agency in its decision conditionally-approving the Harnett Health Application. [Joint Exh. 3, Harnett Health App., pp. 196-215; Joint Exh. 1, Agency File, pp. 899-900]

In preparing the Harnett Health Application, there was discussion of what payor percentages in terms of Medicaid, Medicare, commercial insurance and self pay patients to project. Harnett Health considered historical data from Betsy Johnson concerning how much Medicaid and Medicare contributed as a percentage of total in-patient revenues. A conscious decision was made to project a higher Medicaid percentage at the Central Campus, even though there would be no obstetrical service there, because it was assumed that patients with more limited resources, such as those eligible for Medicaid, would be less likely to travel and thus more likely to reverse the out-migration and receive acute care services at a hospital in Harnett County. [Sullivan, Vol. VIII, pp. 2062-69; Joint Exh. 3, Harnett Health App., pp. 158, 160, 198-199, 201-212]

Harnett Health's assumption that its new hospital would serve higher percentages of Medicaid and self-pay inpatients is a reasonable and conservative assumption with regard to financial projections because these types of patients often result in less revenue to the hospital per visit. [Sullivan, Vol. VIII, pp. 2065-69]

The gross revenues by payor type set forth in the Harnett Health Application on Form B-1a for Betsy Johnson and Central Campus match the figures in the pro formas. When the individual components of inpatient, CT scanner, emergency department, inpatient surgery, outpatient surgery and all other outpatient services are added together, those numbers tie back to the total gross revenue shown in the pro formas. [Sullivan, Vol. VIII, pp. 2058-59; Joint Exh. 3, Harnett Health App., pp. 198-212]

To the extent the payor percentages in the proformas reflect a payor mix for Central Campus that may be similar or equal to that of Betsy Johnson's historical payor mix, that is explained by the fact that the proformas reflect revenue for all services combined together, not just inpatient revenue. The evidence presented by Harnett Health was that the inpatient revenues projected for Central Campus were premised on an assumption of a higher level of Medicaid and self-pay patients than at Betsy Johnson, not that the Central Campus project higher Medicaid and self-pay for all services combined. [Sullivan, Vol. VIII, pp. 2191-96; Joint Exh. 3, Harnett Health App. pp. 158-162, 198-199]

There was no evidence presented regarding inconsistencies in Harnett Health's proposed projected payor mix that would negatively impact its projected utilization or revenues.

In the assumptions to the proformas, the average charge for each payor group is identical. This is a common approach in certificate of need applications because of the fluctuations in gross patient revenue. [Sullivan, Vol., VIII, pp. 2061-262]

The proforma assumptions on page 214 of the Harnett Health Application reflect a negative percentage growth in the gross dollar amounts shown in the supply costs in 2009. This results from a projected decline in the activity at Betsy Johnson in 2009 due to the opening of the new Central Campus. This decline results from a decline in the overall activity at the Betsy Johnson campus, including all inpatient and outpatient services to be offered by Betsy Johnson, not simply the number of acute care days provided. This decline is also reflected on Form B1 of the Application which shows a decline in gross patient services revenue at Betsy Johnson of \$10,600,000 for the same time period. [Sullivan, Vol. VIII, pp. 2079-80; Joint Exh. 3, Harnett Health App., pp. 198, 214]

Regarding staffing expenses for Harnett Health's proposed hospital, Exhibit 23 of the Application projected the number of staff needed to operate the new hospital, and salary midpoints for those positions. This document was prepared by Robbie Roberts of WakeMed and Dennis Coffey, the chief financial officer of Betsy Johnson. This document presented all of the full-time equivalent staff positions that would be needed to operate the new hospital. Although the Harnett Health Application referenced the possibility of shared staffing between Betsy Johnson and the new Central Campus hospital, Exhibit 23 did not assume or count on any shared staffing, and projected all of the staff positions needed for the new hospital. [Roberts, Vol. VI, pp. 1734-37; Joint Exh. 3, Harnett Health App., pp. 163-170, 898-905]

Regarding salaries for the three operating years shown in the Harnett Health Application, those numbers match the same numbers computed by Baker in his workpapers. The personnel, taxes and benefits for the three operating years also match the numbers he calculated, labeled as fringe benefits, in his workpapers. The contracted services line item also matches the numbers in his worksheets. The interest expenses, depreciation and amortization numbers in the application also match the numbers he computed. [Baker, Vol. VII, pp. 1906-1907; Joint Exh. 3, Harnett Health App., p. 199]

The gross revenues by payor set forth for Betsy Johnson and for Central Campus match the figures in the financial proformas. If you take the individual components of inpatient, CT scanner, emergency department, inpatient surgery, outpatient surgery, and other outpatient revenue and add those numbers together, the total ties back to the total gross revenue for Betsy Johnson on page 198 of the proformas and for Central Campus on page 199 of the proformas. That amount in 2011 would be \$203,241,548. [Sullivan, Vol. VIII, pp. 2058-59]

Harnett Health's expert testified that the operational projections in the Harnett Health Application support a determination that the application is financially feasible and thus conforms with Review Criterion 5. [Sullivan, Vol. VIII, p. 2109]

The Harnett Health Application also demonstrated the availability and commitment of funding for all of the identified capital expenditures.

Other Conformity Issues Support Services

The Harnett Health Application did not contain specific information regarding surgery charges and services and items included in said charges as required by 10A NCAC 14C .2102(b)(7). [Joint Exh. 1, Agency File, p. 924]

The Agency has authority to impose conditions on Harnett Health which call for the provision of additional information needed to ensure conformance with applicable review criteria. [Sullivan, Vol. VIII, pp. 2109-10].

Harnett Health did not propose to develop psychiatric beds as part of its proposed project because it was not an existing provider and could not move beds from another facility, and because the 2005 SMFP did not contain a need for psychiatric beds in the applicable service area. [Sullivan, Vol. VIII, pp. 2113-14; Bryan, Vol. VII, p. 1772]

In response to the CON application question requesting copies of written policies and procedures for the provision of care at the new hospital, the Harnett Health Applicants included the operating policies of Betsy Johnson Hospital in their application. Harnett's expert testified that the Betsy Johnson policies were used in the application because while WakeMed would be the manager of the new hospital, Betsy Johnson would be the owner, so the assumption was that the Betsy Johnson policies would be utilized and WakeMed, as manager, would implement those policies. Harnett's workgroup discussed this issue early on and the decision was made that Betsy Johnson's policies would be the relevant ones. [Sullivan, Vol. VIII, pp. 2189-90; Joint Exh. 3, Harnett Health App., pp. 55, 387-461]

Review Criterion 12

Review Criterion 12 codified at N.C. Gen. Stat. § 131E-183(a)(12) requires an application involving construction to demonstrate that "the proposed cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans."

The Harnett Health Application, Volume 1, Exhibit 9, at page 317, shows the elevation for the proposed facility. Page 318 shows a site plan for a 22-acre site. Page 318a shows the facility and a freestanding mechanical building to the northwest of the parking lot. The site includes future development space for possible medical offices, if needed. [Cavender, Vol. VI, pp. 1503-06; Joint Exh. 3, Harnett Health App., pp. 317-318A]

There is no standard in the CON law that specifies the level of detail on these drawings. The drawings are designed to meet general licensure requirements and there are no specific CON requirements for architect's drawings. [Cavender, Vol. VI, pp. 1517-18]

Mr. Cavender, WakeMed's Vice President for Facilities and Construction testified that he believed the critical access hospital ("CAH") model would work well for the proposed Harnett County project because it met the needs regarding functional and clinical

perspectives. CAH is a federal program to assist development of hospitals in rural areas. It focuses on critical outpatient clinical services and limited inpatient beds. It includes a critical mass of services in a CAH hospital. The proposed plan involved a first floor for ancillary services called for by a CAH model and the second floor would involve acute care beds. [Cavender, Vol. VI, pp. 1499-1502, 1556-57]

Although the site is located near a flood plain, the evidence showed that no part of the flood plain touches the footprint of the proposed Central Campus Hospital, or touches any of the outlying areas on the site which have been identified for future construction. [Cavender, Vol. VI, p. 1578]

All the spaces shown on the site plan are those recommended for a CAH hospital in a community hospital setting. The plan allows for future expansion. At the top of the floor plan between ambulance entrance and staff entrance are corridors that will allow for growth behind the current building in any of the departments. [Cavender, Vol. VI, pp. 1508-11]

The first floor plan of Harnett Health's proposed hospital includes clinical support areas, the emergency department and to the right of that, radiology and imaging. [Cavender, Vol. VI, p. 1506; Joint Exh. 3, Harnett Health App., p. 318C]

The second floor plan of Harnett Health's proposed hospital includes inpatient rooms and nursing units. The model used a universal patient room concept with standardized size that can be used for private or semi-private rooms. [Cavender, Vol. VI, p. 1519]

Square footage for the mechanical building discussed on page 190 of the Application is included in the square footage on the floor plan. [Cavender, Vol. VI, pp. 1521-23; Joint Exh. 3, Harnett Health App., p. 190]

Page 194-195 of the Application is the construction schedule which Cavender helped develop with his department. [Cavender, Vol. VI, pp. 1524; Joint Exh. 3, Harnett Health App. pp. 194-95]

At page 172 of the Application, Mr. Cavender compiled the data on lines 5, 8, 10, 11, 17 and 21. He helped develop lines 13 and 14 with the procurement staff. [Cavender, Vol. VI, p. 1526; Joint Exh. 3, Harnett Health App., p. 172]

BBH was Harnett Health System's design consultant in designing the hospital plans and providing cost estimates. Exhibit 37 is a certified cost estimate by BBH designer, dated August 9, 2005. [Cavender, Vol. VI, p. 1532; Joint Exh. 3, Harnett Health App., p. 1237]

Anesthesia would be covered in the clinical support area. The Harnett Health Application designates the specific functions to be handled in the clinical support space in terms of gross square footage. [Cavender, Vol. VI, pp. 1536-37]

The kitchen area of Harnett Health's proposed hospital is adequate to prepare meals for patients and customers of the café and also would accommodate a thermal reheating program for food prepared elsewhere. [Cavender, Vol. VI, pp. 1539-40]

Although the CAH hospital model is smaller than some hospitals, the CAH model is not a "minimal" hospital. [Cavender, Vol. VI, pp. 1551-54]

Comparative Analysis

The Agency's comparative analysis of the GHHS and Harnett Health Applications was not the focus of evidence presented during the hearing.

GHHS refiled its 2003 Application in the 2005 Harnett Hospital Review, without updating any of the projections and data contained in the 2003 Application, all of which were at least two years old. As the Agency noted in its comparative analysis, even though GHHS's proposed hospital would be developed at least two years later than the project described in its 2003 Application, GHHS did not provide any updated projections in the application submitted in the 2005 Review, to take into account any changes that had occurred or to adjust cost projections for inflation. [Joint Exh. 1, Agency File, pp. 948].

Because GHHS simply refiled a two-year old application without any updated data and projections, especially in key areas such as financial feasibility, need, and utilization, GHHS failed to present to the Agency much of the fundamental information that it needed to demonstrate that its proposed hospital and the proposed services it would provide could, in fact, be accomplished. [Joint Exh. 1, Agency File, pp. 877-80, 894-98, 909, 945-46].

GHHS failed to demonstrate that its projected capital costs were reasonable because it refiled its 2003 Application without updating any of the projected construction costs and other capital costs contained in the 2003 Application or any of the supporting data. [Joint Exh. 1, Agency File, pp. 895-97, 903-04, 946-47].

Harnett Health was the only applicant in the Harnett Hospital Review that adequately demonstrated that its projected capital costs were reasonable by presenting current projected capital costs and supporting data in its Application. [Joint Exh. 1, Agency File, pp. 898-900, 904, 946-47].

GHHS failed to demonstrate that its projected operating costs, charges and revenues for the first year of operation of its proposed hospital were reasonable because it refiled its 2003 Application in the 2005 Harnett Hospital Review, without updating any of the projected operating costs, charges, and revenues and supporting data. GHHS also failed to provide any projections of operating costs, charges and revenues for the second and third years of operation of its proposed hospital. [Joint Exh. 1, Agency File, pp. 897-98, 909, 945-46].

Harnett Health was the only applicant that adequately demonstrated that its projected operating costs, charges and revenues for the first three years of operation of its proposed hospital were reasonable by presenting current projected operating costs, charges, and revenues and supporting data in its Application. [Joint Exh. 1, Agency File, pp. 899-900, 909, 945-46].

With regard to scope of services, the Agency determined that the GHHS Application was a more effective alternative than the Harnett Health Application because GHHS proposed to develop 12 inpatient psychiatric beds and offer mobile MRI and cardiac catheterization services. [Joint Exh. 1, Agency File, pp. 942-43]. However, GHHS's failure to present current utilization or financial data and projections raises serious questions regarding whether GHHS could actually provide these services as proposed.

Since Good Hope had closed its psychiatric beds in March of 2005, and the GHHS Application did not provide any updated utilization projections for psychiatric beds beyond the outdated data which was included in its 2003 Application, no current information regarding identification of the population to be served in the psychiatric beds or the need of that population for this particular service were documented. Accordingly, it is not possible to determine what weight should be accorded to the presence or absence of psychiatric beds. [Joint Exh. 1, Agency File, p. 879]

Since the GHHS Application did not provide any updated utilization projections for observation beds and intensive care beds beyond the outdated data which was included in its 2003 Application, the identification of the population to be served in those beds and the need of that population for those particular services were not documented in the Application. Accordingly, it is not possible to determine what weight should be accorded to the presence or absence of observation beds and intensive care beds, or to the presence of intensive care beds versus the telemetry beds proposed in the Harnett Health Application. [Joint Exh. 1, Agency File, pp. 881-83, 941-48]

CONCLUSIONS OF LAW

Upon consideration of the materials filed by the parties and the oral arguments of counsel, and based upon the foregoing Findings of Fact, the undersigned enters the following Conclusions of Law:

The parties properly are before the Office of Administrative Hearings. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such findings of fact shall be deemed incorporated herein by reference as Conclusions of Law.

Unapprovability of GHHS Application

Administrative law judges specifically are authorized to grant summary judgment pursuant to a motion made in accordance with G.S. § 1A-1, Rule 56. See N.C. Gen. Stat. § 150B-36(d) and 26 NCAC 3.0105(6).

Summary judgment is permitted in CON cases if appropriate under Rule 56 of the North Carolina Rules of Civil Procedure, including where an application fails to supply information required by the statutory review criteria codified at N.C.G.S. § 131E-183(a), and the rules adopted by the Agency pursuant N.C.G.S. § 131E-183(b). See, e.g., *Johnston Health Care Center, LLC v. N.C. Department of Human Resources*, 136 N.C. App. 307, 524 S.E.2d 352 (2000) (summary judgment appropriate where a lending bank's letter of commitment expired before commencement of the project and thus application contained no evidence of availability and commitment of funds required by Criterion 5); *Koltis v. N.C. Department of Human Resources*, 125 N.C. App. 268, 480 S.E.2d 702 (1997); *Presbyterian-Orthopaedic Hospital v. N.C. Department of Human Resources*, 122 N.C. App. 529, 470 S.E.2d 831 (holding

that summary judgment was appropriate against an applicant whose application failed to show, on its face, evidence of staffing sufficient to meet required number of therapy hours per patient day).

To receive a CON for a proposed project, an applicant's proposal must satisfy every applicable review criterion specified in § 131E-183(a). N.C. Gen. Stat. § 131E-183(a); *Bio-Medical Applications of North Carolina, Inc. v. N.C. Department of Human Resources*, 136 N.C. App. 103, 523 S.E.2d 677 (1999); *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996).

By Order dated October 13, 2006, the undersigned administrative law judge granted partial summary judgment that the GHHS Application did not conform with Review Criteria 5 and 12, and that therefore, the GHHS Application was unapprovable as a matter of law.

Because the GHHS Application failed to conform to Review Criteria 5 and 12, and therefore, was unapprovable as a matter of law, it is not necessary to address whether the GHHS Application conformed to other applicable statutory and regulatory review criteria.

The North Carolina Court of Appeals previously has held that our State's Certificate of Need Law affords competitive CON applicants an opportunity for a contested case hearing at which they are allowed to present testimony and evidence regarding their respective applications. *Living Centers-Southeast, Inc. v. N.C. Dept. of Health and Human Servs.*, 138 N.C. App. 572, 580, 532 S.E.2d 192, 197 (2000).

The 2005 Harnett Hospital Review gave rise to an exceptional situation where one of the competing applicants did not file an application based on contemporaneous information and assumptions. GHHS refiled its 2003 Application, which was based on data that was at least two years old and was unsupported by current data, assumptions and operational experience. GHHS's failure to prepare current data and projections in support of its Application resulted in a fatal flaw regarding the proposed project's financial feasibility and called into serious question other key areas of the application such as utilization. In addition, the GHHS Application did not take into account the pending closure of Good Hope, an event that would have significant impact on the Harnett County market for hospital services.

In contrast, Harnett Health filed an application based on contemporaneous data, operational experience and assumptions, and factored into its assumptions and projections the pending closure of Good Hope.

In this unique situation, it is clear, as a matter of law, that the GHHS Application did not conform with key review criteria and thus, could not be approved.

Nonetheless, in view of *Living Centers*, over the objections of Harnett Health, the undersigned administrative law judge allowed GHHS to offer testimony and information regarding the approvability of the GHHS Application, in the nature of an offer of proof with regard to Review Criteria 5 and 12, and as part of the evidentiary record with regard to remaining issues, for the purpose of creating a complete official record.

CT Condition Regarding Harnett Health Application

The Agency is authorized by N.C. Gen. Stat. § 131E-183(b) to adopt rules for the review of particular types of applications that will be used in addition to the statutory review criteria set forth in G.S. 131E-183(a). The Agency has adopted special Criteria and Standards for Computed Tomography, which are codified at 10A NCAC 14C.2301 *et seq.*

The Agency's rules for CT services require an applicant proposing to acquire a CT Scanner to demonstrate that it meets the following performance standards:

- (1) each fixed or mobile CT Scanner to be acquired shall be projected to perform 5,100 HECT units annually in the third year of operation of the proposed equipment;
- (2) each existing fixed CT scanner in the applicant's CT service area shall have performed at least 5,100 HECT units in the 12 month period prior to submittal of the application;
- (3) each existing and approved fixed CT scanner in the applicant's CT service area shall be projected to perform 5,100 HECT units annually in the third year of operation of the proposed equipment;

- (4) each existing mobile CT scanner in the proposed CT service area performed at least an average of 20 HECT units per day per site in the CT scanner service area in the 12 months prior to submittal of the application; and
- (5) each existing and approved mobile CT scanner shall perform at least an average of 20 HECT units per day per site in the CT scanner service area in the third year of operation of the proposed equipment.

10A NCAC 14C.2303.

These performance standards for CT services were designed to help assure that there is a need for a proposed new CT scanner and that the new scanner will not result in an unnecessary duplication of services.

In view of the situation in which Good Hope found itself and the importance of having CT services at the new hospital, the Agency should have determined that the utilization of the CT scanner at Good Hope for the recent past as well as future years was irrelevant to the need for the CT scanner Harnett Health proposed to acquire as part of the proposed new hospital in central Harnett County.

Consistent with Governor Easley's stated reliance on the closure of Good Hope in writing a need for a new hospital in central Harnett County into the SMFP, as well as the Agency's own assumption that Good Hope would close, the Agency should have concluded that the historical utilization of Good Hope's CT scanner was irrelevant to its review of the Harnett Health Application, and that 10A NCAC 14C.2303(2) was void as applied to the Harnett Health Application.

For these reasons, the Agency also should have concluded that the future utilization of any CT scanner that was approved with the issuance of Good Hope's 2001 CON was irrelevant to its review of the Harnett Health Application, and that 10A NCAC 14C.2303(3) was void as applied to the Harnett Health Application.

Given the imminent closure of Good Hope Hospital and the elimination and reduction of services there, the utilization standards set forth in the CT Rule are void as applied to the Harnett Health Application because it was not reasonably necessary for the Agency to fulfill its statutory duties in implementing the CON Law. The historical and future utilization of an existing CT scanner in a hospital that will close before Harnett Health's proposed new CT scanner is projected to be operational is not relevant to the question of need or duplication of services with regard to Harnett Health's proposed new CT scanner.

Given that the need which Harnett Health applied to meet was based on Governor Easley's assumption that Good Hope would close in 2006 and that the Agency itself made this same assumption, there was no reasonable basis for the Agency to consider the past utilization of Good Hope's CT scanner in determining whether Harnett Health could acquire a CT scanner as part of its proposed hospital. The Agency erroneously determined that the Harnett Health could not acquire a CT scanner as part of hospital project solely upon the substandard utilization of the CT scanner at a hospital the Agency knew would soon close its doors.

The CON Section's application of the CT Rule to the Harnett Health Application was not in accordance with the need determination identified by Governor Easley, which expressly relied upon the pending closure of Good Hope Hospital.

The CON Section's application of the CT Rule to the Harnett Health Application also was not in accordance with GHHS's lack of progress in developing a hospital pursuant to its 2001 CON.

The CON Section's application of the CT Rule to the Harnett Health Application was not in accordance with a fundamental objective of the Certificate of Need Law, which the General Assembly has expressed in N.C. Gen. Stat. § 131E-175(3a):

That access to health care services and health care facilities is critical to the welfare of rural North Carolinians, and to the continued viability of rural communities, and that the needs of rural North Carolinians should be considered in the certificate of need review process.

The Agency's application of the CT Rule in this manner frustrated the purpose and prevented proper implementation of the Certificate of Need Law, the SMFP, and the CT Rule itself.

The performance standards set forth in 10A NCAC 14C.2303(2) and (3) (collectively, the "CT Rule") are void as applied to the Harnett Health Application.

The condition imposed by the Agency regarding the Harnett Health Application which precludes Harnett Health from acquiring a CT scanner, was not necessary to ensure that Harnett Health's proposal to develop a new community hospital which would include a new CT scanner would be consistent with the CT Rule or any other applicable review criteria. Therefore, the Agency acted erroneously and exceeded its authority in subjecting its approval of the Harnett Health Application to this condition.

Because the utilization of Good Hope's CT scanner, as measured by the CT Rule, was the sole basis for the Agency's CT Condition, the Condition itself also is void and without merit.

Harnett Health proved by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in applying regulatory criteria 10A NCAC 14C.2303(2) and (3) regarding CT scanner utilization standards to the Harnett Health Application and determining that the Application did not conform with these regulatory criteria.

Harnett Health Application – Conformance With Review Criteria

Harnett Health and GHHS are each an "affected person," as defined by N.C. Gen. Stat. § 131E-188(c).

In order to prevail in a contested case, a petitioner must prove by the preponderance of the evidence that the Agency named as Respondent has:

- a. deprived Petitioner of property, ordered Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced Petitioner's rights; and
- b. that the Agency has
 - (1) exceeded its authority or jurisdiction;
 - (2) acted erroneously;
 - (3) failed to use proper procedure;
 - (4) acted arbitrarily or capriciously;
 - (5) or failed to act as required by law or rule.

The CON Section demonstrated knowledge and expertise with regard to its application of the CON Law to the Harnett Health Application, with the limited exception of the condition prohibiting Harnett Health from acquiring a CT scanner as part of its proposed project.

The undersigned administrative law judge has given due regard to this demonstrated knowledge and expertise of the CON Section, pursuant to N.C. Gen. Stat. § 150B-34.

Need

Review Criterion 1 codified at N.C. Gen. Stat. §131E-183(a)(1) provides as follows:

- (1) The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.

The Harnett Health Application proposed to develop a 50-bed acute care hospital with three operating rooms in central Harnett County, consistent with the need determination in the SMFP. The CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 1. Agency File, pp. 870-74.

Governor Easley, the Chief of our State's Executive Branch, specifically identified in the 2005 SMFP a need for a 50-bed acute care hospital in central Harnett County. See Easley Memorandum dated December 10, 2004.

Part of the basis for the need Governor Easley identified in the SMFP was the imminent closure of Good Hope. Governor Easley assumed Good Hope would soon close. *See* Easley Memorandum dated December 30, 2004.

The specific need for a 50-bed acute care hospital in central Harnett County which Governor Easley identified in the SMFP, constituted an express determination by the Governor that residents of central Harnett County were in need of a new acute care hospital.

The Harnett Health Application adequately identified a population to be served by its proposed hospital, which included residents of Harnett County and surrounding counties and thus, encompassed the central Harnett County population addressed in Governor Easley's need determination.

The need for a new full-service community hospital in central Harnett County which Governor Easley identified in the SMFP necessarily encompassed a CT scanner.

Review Criterion 3 codified at N.C. Gen. Stat. § 131E-183(a)(3) provides as follows:

- (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

Given Governor Easley's specific need determination for a new acute care hospital in central Harnett County, it was not necessary for the Harnett Health Application to demonstrate the need that the residents of Harnett County have for such a hospital pursuant to N.C. Gen. Stat. § 131E-183(a)(3).

Nonetheless, the Harnett Health Application adequately demonstrated there was a population in and around Harnett County in need of all of the services proposed in the Application, including CT services. Therefore, the CON Section correctly and reasonably determined the Harnett Health Application conformed with Review Criterion 3. Agency File, pp. 883-93; Affidavit of Lee B. Hoffman dated September 19, 2006, filed by Harnett Health on September 20, 2006, ¶ 8.

Harnett Health reasonably and appropriately relied upon historical utilization data of Betsy Johnson Regional Hospital.

Harnett Health's obstetrics utilization projections were reasonable.

Harnett Health's projections for acute care beds were reasonable.

Harnett Health's length of stay projections for telemetry beds were reasonable.

Harnett Health's inpatient and outpatient surgery projections were reasonable.

Harnett Health's CT scanner utilization projections were reasonable.

Harnett Health's utilization projections were reasonable.

The preponderance of the evidence demonstrates that physicians will refer patients based on available services, equipment and patient preference.

The preponderance of the evidence indicates that letters of support from physicians are only one of numerous indicators of physician support for a proposed project.

Harnett Health had strong physician support for its proposed hospital.

Governor Easley and the Agency correctly and reasonably assumed that Good Hope Hospital would close by November of 2006.

The Agency correctly and reasonably considered and relied upon the increases in market share that would result from the closure of Good Hope Hospital in determining that Harnett Health adequately demonstrated the need for its proposed hospital and the services it would provide. Agency File, pp. 885-92.

Harnett Health correctly and reasonably assumed that Good Hope Hospital would close and cease offering any services by the time Harnett Health's proposed hospital was projected to open and begin operations.

Harnett Health reasonably assumed that Good Hope Hospital would not develop a replacement hospital pursuant to its 2001 CON.

Harnett Health experienced significant growth in utilization in 2005 as Good Hope Hospital began to close its key service areas.

Harnett Health correctly and reasonably assumed that it would capture Good Hope Hospital's share of the market following the closure of that hospital.

The Agency's rules require an applicant proposing to develop new acute care beds to demonstrate that it meets the following performance standards:

- (a) An applicant proposing to develop new acute care beds shall demonstrate that the projected average daily census (ADC) of the total number of licensed acute care beds proposed to be licensed within the service area, under common ownership with the applicant, divided by the total number of those licensed acute care beds is reasonably projected to be at least 66.7 percent when the projected ADC is less than 100 patients, 71.4 percent when the projected ADC is 100 to 200 patients, and 75.2 percent when the projected ADC is greater than 200 patients, in the third operating year following completion of the proposed project or in the year for which the need determination is identified in the State Medical Facilities Plan, whichever is later.
- (b) An applicant proposing to develop new acute care beds shall provide all assumptions and data used to develop the projections required in this rule and demonstrate that they support the projected inpatient utilization and average daily census.

10 NCAC 14C.3803.

Review Criterion 4 codified at N.C. Gen. Stat. § 131E-183(a)(4) provides:

- (4) Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.

Harnett Health appropriately identified the establishment of a new acute care hospital in Lillington as the best alternative available to it to meet the need identified in the SMFP, and so the CON Section appropriately determined that the Harnett Health Application conformed with Review Criterion 4. Agency File, p. 895.

Review Criterion 6 codified at N.C. Gen. Stat. § 131E-183(a)(6) provides:

- (6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capacities or facilities.

The Harnett Health Application will not result in the unnecessary duplication of existing or approved health service capabilities or facilities. The CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 6. Agency File, p. 900.

Review Criterion 18a codified at N.C. Gen. Stat. § 131E-183(a)(18a) provides:

- (18a) The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

The Harnett Health Application demonstrated that it would offer quality services and would create a two-hospital system for Harnett County with broader geographic accessibility and enhanced ability to compete with hospitals in neighboring counties to which Harnett County citizens have been traveling for hospital services.

Harnett Health demonstrated that its proposed Central Campus will positively impact the cost effectiveness, quality and access to hospital services for residents of Harnett County and surrounding counties. Accordingly, Harnett Health adequately demonstrated that its proposed hospital will have a positive effect on the cost effectiveness, quality, and access to the services it proposes to provide, and so the CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 18a. Agency File, p. 909.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 1.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with Review Criterion 3.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with Review Criterion 4.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with Review Criterion 6.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with Review Criterion 18a.

Financial Feasibility

Review Criterion 5 codified at N.C. Gen. Stat. §131E-183(a)(5) provides:

(5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

Harnett Health demonstrated the availability of funds for capital and operating needs of its proposed hospital. Agency File, pp. 898-99.

Harnett Health's projected start-up expenses are reasonable.

Harnett Health's projected payor mix is reasonable. Any variations in payor mix contained in the Harnett Health Application are insignificant and do not impact the financial feasibility of Harnett Health's proposed hospital.

Harnett Health demonstrated the immediate and long-term financial feasibility of its proposed hospital because the project's reasonably projected revenues will exceed expenses by the third year of operation. and therefore, conformed with Review Criterion 5. Agency File, pp. 899-900.

The CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 5.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 5.

Other Conformity Issues

The Harnett Health Application appropriately identified the availability of resources including health manpower and management to provide the services that it proposed, and accordingly, the CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 7. Agency File, p. 901.

The Harnett Health Application adequately demonstrated the availability of all ancillary and support services, including the availability of anesthesiologists and surgeons. Accordingly, the CON Section appropriately determined that the Harnett Health Application conformed with Review Criterion 8. Agency File, pp. 902.

Review Criterion 12 codified at N.C. Gen. Stat. § 131E-183(a)(12) provides:

(12) Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

The floor plan and square footage of Harnett Health's proposed hospital were reasonable.

Harnett Health adequately demonstrated that the cost, design and means of construction of its proposed project are reasonable and will not unduly increase the cost of providing inpatient and outpatient health services. Therefore, the CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 12. Agency File, p. 904.

Harnett Health adequately demonstrated that Betsy Johnson Regional Hospital provides adequate access to medically underserved populations, and so the CON Section correctly determined that the Harnett Health Application conformed with Review Criterion 13(a). Agency File, p. 906.

The CON Section properly determined that the Harnett Health Application conformed with Review Criteria 13(b), (c), and (d). Agency File, p. 907-08.

Harnett Health appropriately demonstrated that its proposed hospital will accommodate the clinical needs of professional training programs in and around Harnett County through its partnership with Campbell University. Therefore, the CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 14. Agency File, p. 909.

Harnett Health demonstrated that Betsy Johnson Regional Hospital and WakeMed each provides quality care. Thus, the CON Section correctly and reasonably determined that the Harnett Health Application conformed with Review Criterion 20. Agency File, p. 910.

The CON Section has clear and express statutory authority to approve applications with conditions. [French, Vol. 3, pp. 814-815]

Although the Harnett Health Application did not contain specific information regarding surgery charges and services and items included in said charges as required by 10 N.C.A.C. 14C.2102(b)(7), the CON Section correctly and reasonably determined that this deficiency can be cured with a condition.

Harnett Health has not amended its application.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 7.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 8.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 12.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 13(a) through (d).

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 14.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with Review Criterion 20.

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with all applicable statutory review criteria set forth in N.C. Gen. Stat. Section 131E-183(a).

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming or conditionally conforming with regulatory review criterion 10 NCAC 14C.2102(b)(7).

GHHS has failed to prove by a preponderance of the evidence that the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the Harnett Health Application was conforming with all applicable regulatory criteria at issue in this contested case.

GHHS has failed to prove by a preponderance of the evidence that the Agency (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule in approving the Harnett Health Application to develop a new acute care hospital in Lillington, North Carolina.

The Agency has not deprived GHHS of any property or ordered it to pay a fine or civil penalty.

GHHS has failed to prove by a preponderance of the evidence that the CON Section has otherwise substantially prejudiced GHHS's rights.

Comparative Analysis

In *Living Centers*, the North Carolina Court of Appeals held that because the subject of a contested case involving a competitive certificate of need review is the Agency's decision, the administrative law judge should review the conformity of each application with applicable review criteria as well as the comparative analysis of the applications. 138 N.C. App. at 581, 532 S.E.2d at 198.

As explained above, the undersigned administrative law judge concluded that the GHHS Application was unapprovable as a matter of law, and therefore could not be awarded the certificate of need at issue in this case.

Nonetheless, consistent with the Court of Appeals' opinion in *Living Centers*, the undersigned administrative law judge carefully review and considered the CON Section's comparative analysis of the GHHS and Harnett Health Applications contained in the Agency Findings.

GHHS failed to demonstrate the accuracy and reasonableness of key aspects of its proposed hospital – including financial feasibility, need and utilization, because it refiled its 2003 Application in the 2005 Harnett Hospital Review, without updating any of the projections and supporting data and methodologies in the 2003 Application.

CONTESTED CASE DECISIONS

The Agency correctly and reasonably determined that financial feasibility issues were key factors in the comparative analysis of the GHHS and Harnett Health Applications.

The Agency correctly and reasonably concluded that the Harnett Health Application was the only effective alternative with regard to projected operating costs, charges and revenues.

The Agency correctly concluded it was not possible to make a conclusive comparison of the GHHS and Harnett Health Applications in the areas of facility design and staffing.

The Agency correctly compared the GHHS and Harnett Health Applications with regard to geographic access.

There is insufficient evidence to demonstrate the Agency erred in its comparison of the GHHS and Harnett Health Applications with regard to access by underserved groups, local participation on governing body, coordination with existing health care system and community support.

The Agency's ultimate conclusion that the Harnett Health Application was comparatively superior to the GHHS Application, and that therefore, Harnett Health should be awarded the certificate of need to develop an acute care hospital in Lillington, was correct and reasonable and is supported by a preponderance of the evidence.

The Harnett Health Application was the only effective alternative in the 2005 Harnett Hospital Review because Harnett Health was the only applicant that presented current projections and supporting data necessary to demonstrate that its proposed hospital and the services it would provide could, in fact, be accomplished.

The relief sought by GHHS in the above-captioned contested case should be denied.

RECOMMENDED DECISION

It hereby is recommended that the Director of the Division of Facility Services, Department of Health and Human Services, uphold the decision of the Agency to conditionally approve the Harnett Health Application at issue in this contested case, but without the condition which precluded the acquisition of a CT scanner as part of the project. It further is recommended that, for the reasons stated in this decision, the Director of the Division of Facility Services affirm the Agency's decision to deny the CON application of Good Hope Health Services

ORDER

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

NOTICE

The Agency that will make the Final Decision in this contested case is the North Carolina Department of Health and Human Services.

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Recommended Decision and to present written arguments to those in the Agency who will make the final decision. N.C.G.S. § 150B-36(a).

This the 20th day of November, 2006.

Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF ONSLOW

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
06 DOJ 0815

DAVID HENRY LAROCHE)
Petitioner,)

v.)

NORTH CAROLINA SHERIFFS')
EDUCATION AND TRAINING)
STANDARDS COMMISSION)
Respondent.)

PROPOSAL FOR DECISION

On August 17, 2006, Chief Administrative law Judge Julian Mann, III heard this contested case in the Pender County Courthouse, Burgaw, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40(e), under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: David Henry Laroche, pro se
301 Banks Street
Jacksonville, North Carolina 28540

Respondent: John J. Aldridge, III
Special Deputy Attorney General
N.C. Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

Did Petitioner fail to give the Respondent proper notice of a criminal charge and does the Petitioner possess the good moral character required of detention officers?

Based upon the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Both parties properly are before this Administrative Law Judge, in that jurisdiction and venue are proper, that both parties received Notice of Hearing, and that Petitioner received by certified mail the proposed revocation of Justice Officer Certification letter mailed by Respondent Sheriffs' Commission on March 22, 2006.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereafter referred to as the Sheriffs' Commission) has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. 12 NCAC 10B.0204(b)(2) provides that the Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the application for certification or the certified officer fails to meet or maintain any of the minimum employment standards required by 12 NCAC 10B .0300.

4. 12 NCAC 10B .301(a)(7) provides, in pertinent part, that “every justice officer employed or certified as a deputy sheriff or jailer in North Carolina shall, within 5 working days, notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged; and shall also give notification, in writing to the Standards Division and the appointing department head following the adjudication of these criminal charges. This shall include all criminal offenses except minor traffic offenses and shall specifically include any offense of driving under the influence or driving while impaired. A minor traffic offense is defined, for purposes of this subparagraph, as an offense where the maximum punishment allowable is 60 days or less. ... The initial notification required must specify the nature of the offense, date of offense, and the arresting agency. The notifications of adjudication required must specify the nature of the offense, the court in which the case was handled, and the date of disposition, and must include a certified copy of the final disposition from the Clerk of Court in the county of adjudication. The notifications of adjudication must be received by the Standards Division within 30 days of the date the case was disposed of in court....”

5. 12 NCAC 10B .0301(a)(8) provides that every justice officer employed or certified in North Carolina shall be of good moral character. The allegation by Respondent as to the lack of good moral character is alleged as follows:

Additionally, probable cause is established to believe you no longer possess the minimum standard of good moral character which is required of all justice officers as set out in Rule 12 NCAC 10B .0301 Minimum Standards for Justice Officers:

- (a) Every Justice Officer employed or certified in North Carolina shall:
 - (8) be of good moral character;

Specifically, you committed the misdemeanor criminal offense of “Simple Assault” in violation of North Carolina General Statute 14-33(a), when you did unlawfully and willfully assault and strike a visitor to the Onslow County Detention Center, by pushing and restraining him. Your conduct was unwarranted in the performance of your duties as a detention officer. You committed this act while holding certification as a justice officer. The facts and circumstances surrounding this act establish probable cause to believe that you no longer possess the good moral character required of all justice officers.

6. The Petitioner was appointed as a detention officer through the Onslow County Sheriff’s Office on October 13, 2003. The Petitioner was appointed as a deputy sheriff through the Onslow County Sheriff’s Office on April 2, 2004. The Petitioner was issued general and probationary certifications respectively, as a result of these appointments.

7. The petitioner separated from the Onslow County Sheriff’s Office as a detention officer and deputy sheriff on March 1, 2005.

8. The Petitioner subsequently was reappointed as a detention officer through the Onslow County Sheriff’s Office on April 25, 2005.

9. The Petitioner was charged on August 31, 2005 by a warrant for arrest with the criminal offense of misdemeanor assault. Specifically, the Petitioner was charged with unlawfully and willfully assaulting and striking Paul Deondre Scott by pushing and restraining him on August 20, 2005. This warrant for arrest was sworn out by Special Agent Steve Combs of the North Carolina State Bureau of Investigation following his investigation into allegations that the Petitioner used excessive force against Mr. Scott while he was a visitor at the Onslow County jail. After a trial on this misdemeanor assault charge in alleged violation of G. S. 14-33(a), the Honorable William A. Christian, District Court Judge presiding, on December 19, 2005, found Petitioner not guilty of this charge in the General Court of Justice, District Criminal Court of Onslow County of this offense as charged in a warrant. (Respondent’s Exhibit #9)

10. The Petitioner, based on his conduct on August 20, 2005 was separated from the Onslow county Sheriff’s Office. Sheriff Brown, on the Report of Separation form of the Petitioner, wrote on November 21, 2005, that the Petitioner was dismissed at the discretion of the sheriff because, “It is the discretion of the sheriff that he no longer needs this employee to represent him as a dialer/deputy sheriff.

11. In January 2006, Julia Lohman, Director of the Sheriffs’ Standards Division, was discussing certification issues with Major Lyla Love of the Onslow County Sheriff’s Office. In the course of this conversation, Ms. Love informed Ms. Lohman that the Petitioner had been charged in August 2005 with the criminal offense of assault. This was the first notification the Sheriffs’ Standards Division had received regarding the Petitioner being charged with this criminal offense. Based on Petitioner’s failure to notify the Division of this criminal charge, and because the allegations against the Petitioner involved his excessive use of force against a visitor

to the Onslow County Jail, the Sheriffs' Standards Division staff initiated an investigation into the conduct of the Petitioner.

12. Robert Underhill is the director of law enforcement training at Coastal Carolina Community College. Mr. Underhill was the school director for the detention officer certification course attended by the Petitioner in October 2004. Mr. Underhill personally delivered the course orientation block of instruction in this detention officer's class. In this block of instruction, Mr. Underhill specifically discussed the requirements of notifying the Respondent when a detention officer is charged with a criminal offense. The exact language contained in 12 NCAC 10B .0301(a)(7) is reproduced in the course orientation block of instruction. Additionally, Mr. Underhill gave all members of this detention officer's class the name, address, and telephone number of the Sheriffs' Standards Division in order to make any necessary notifications. The Petitioner signed an acknowledgment form that he had received this orientation by Mr. Underhill on October 11, 2004. The Petitioner acknowledges that he did not make timely notification of his criminal charge of assault to the Sheriffs' Standards Division staff.

13. On August 20, 2005, Paul Scott filed a complaint with Sergeant Jeffrey Eason of the Onslow County Sheriff's Office reporting that he had been assaulted while at the Onslow County Jail. Mr. Scott reported that he arrived at the Onslow County Jail at approximately 12:30 a.m. on August 20, 2005 to visit his brother, who was then incarcerated at the facility. Mr. Scott had been to the jail to visit his brother the previous evening in this approximate time frame and believed that he would have been allowed to do so again on this date. Other visitors who do not have an out-of-state identification are not permitted the privilege of visiting inmates outside of normal visiting hours. Mr. Scott possessed a South Carolina identification card and visiting after hours would have been allowable for out of state persons under jail policy. Mr. Paul Scott, although subpoenaed to offer testimony at this hearing, did not appear to testify, representing mechanical difficulties with his automobile. Mr. Paul D Scott's home address listed on Respondent's Exhibit #10 is: 108 New River Drive, Jacksonville, North Carolina.

14. Various summary statements were attributed to Mr. Scott in Respondent's Exhibit #8. Mr. Scott stated that he was talking with an individual on the telephone at the front door of the jail (later identified as the Petitioner) and was informed by the Petitioner that he could not talk to his brother. Mr. Scott acknowledged that he used profanity towards the Petitioner when he was not allowed to visit with his brother. Mr. Scott then hung up the telephone and proceeded to leave the jail. Mr. Scott stated that he could hear someone running up behind him quickly and that it was a jailer named "Dave". Mr. Scott stated that the Petitioner then grabbed him and pushed him against the wall. Mr. Scott reported that he was then pushed to the ground by the Petitioner, and another detention officer "jumped on him".

15. After being forcibly taken to the ground, Mr. Scott stated that he was then released and the Petitioner wanted to know what his problem was. Mr. Scott then left the jail facility and went to the hospital because his left shoulder starting hurting.

16. Sergeant Eason forwarded Mr. Scott's complaint to Colonel Mark Shivers of the Onslow County Sheriff's Office for follow-up.

17. At the request of Colonel Shivers, the Petitioner submitted a statement explaining his version of what occurred on August 20, 2005. The Petitioner stated that Mr. Scott cursed at him and "slammed the phone down". The Petitioner stated that he told Officer Sarkisian to watch the control room and to let him out the front door. The Petitioner said he then went out the front door and told Mr. Scott to come back over to where he was at. The Petitioner stepped up to Mr. Scott and asked him what his problem was. The Petitioner explained that he then saw Mr. Scott bring his hands up in a quick motion and that is when the Petitioner used his two hands to shove Mr. Scott backwards. The Petitioner stated that at that point in time Mr. Scott "stepped off the wall and began to swing at me". The Petitioner explained that it was at that moment that he and Officer Sandstrom took Mr. Scott to the ground.

18. After discussing his preliminary findings with Sheriff Ed Brown, the decision was made to refer the investigation and complaint to the North Carolina State Bureau of Investigation for follow up investigation. The case was subsequently assigned to Special Agent Steve Combs of the State Bureau of Investigation. In furtherance of his investigation, Special Agent Combs reviewed the preliminary statements made by the Petitioner, Mr. Scott, and several detention officers present at the time of the incident. Additionally, Special Agent Combs took possession of a computer compact disk containing film footage depicting the altercation between Mr. Scott and the Petitioner. Special Agent Combs also conducted numerous follow-up interviews.

19. On August 26, 2005, Special Agent Combs interviewed the Petitioner in a non-custodial setting. In this interview, the Petitioner again told Special Agent Combs that Mr. Scott cursed at him for not allowing Mr. Scott to visit his brother. Petitioner stated that Mr. Scott "slammed the phone down." The Petitioner told Special Agent Combs that as he (Petitioner) approached Mr. Scott, that Mr. Scott began to raise both of his hands up. The Petitioner stated that he immediately pushed Scott in his chest with both of his hands and stepped back. The Petitioner told Special Agent Combs that he does not remember if Mr. Scott made contact with him before he pushed Scott. The Petitioner stated that after he pushed him, Mr. Scott brought his hands up in a fighting stance.

20. When asked by Special Agent Combs why he left the control room, the Petitioner stated that he did not know why, he just wanted to know what Mr. Scott's problem was. Special Agent Combs asked the Petitioner if he felt Mr. Scott was going to assault him just before the Petitioner pushed Mr. Scott. The Petitioner stated that he did not know if Mr. Scott was going to assault him when Petitioner first pushed him. When asked by Special Agent Combs why he let Mr. Scott go and did not contact a deputy to come out and arrest Mr. Scott, the Petitioner stated that this did not even cross his mind. The Petitioner told Special Agent Combs that he did not think the Petitioner had broken any law prior to the confrontation. There were apparently no previous problems between the Petitioner and Mr. Scott.

21. Special Agent Combs also interviewed an eyewitness to the incident between the Petitioner and Mr. Scott. Bridget Shrout was employed as a detention officer with the Onslow County Sheriff's Office on August 20, 2005. She observed Mr. Scott talking to the Petitioner on the telephone. She said Mr. Scott did not slam the telephone down as described by Petitioner. Ms. Shrout told Special Agent Combs that just prior to the confrontation between the Petitioner and Mr. Scott, she heard the Petitioner yell from the control room, "Let me out." She then saw the Petitioner quickly proceed from the control room through the jail doors. Ms. Shrout followed the Petitioner through the doors. Once through the doors, she saw the Petitioner shove Mr. Scott repeatedly into a corner. She said that Mr. Scott was trying to get away from the Petitioner but could not because he was cornered. She stated that she saw detention officer Sandstrom grab Mr. Scott and body slam him into the floor. She stated that the Petitioner was using a great deal of foul language at the time of the encounter.

22. Ms. Shrout stated that she saw no justification for the Petitioner shoving or striking Mr. Scott and that Mr. Scott at no time raised his hands in an effort to strike the Petitioner. Once the Petitioner allowed Mr. Scott to get up from the floor and leave the facility, Ms. Shrout followed the Petitioner out the door and apologized to him for the actions of the Petitioner. Ms. Shrout told Special Agent Combs that after the incident, when the other detention officers were writing their statements about what transpired, they were comparing what they wrote.

23. Ms. Shrout never saw Mr. Scott with his hands formed into a fist. She stated that Mr. Scott's hands were open because he was trying to move the Petitioner's arms away from him to get out of the corner.

24. Ms. Shrout's testimony at the administrative hearing was consistent with her statement to Special Agent Combs. Ms. Shrout attended the same detention officer class as Petitioner and received the same use of force instruction as the Petitioner. She stated nothing in this block of instruction justified the use of force against Mr. Scott. She testified that Petitioner's use of force against Mr. Scott was not justified.

25. Ms. Shrout further testified that this incident was so out of line with the actions of a responsible detention officer, that the incident interfered with her sleeping at night. She stated that it was her opinion that the Petitioner's actions were a gross deviation from the values of a detention officer.

26. Special Agent Combs also interviewed Paul Scott. Mr. Scott told Special Agent Combs that when the Petitioner would not allow him to visit his brother at the Onslow County Jail, he cursed at the Petitioner and hung up the telephone. Mr. Scott stated that he then immediately turned and tried to walk out of the jail. Mr. Scott told Special Agent Combs that after he had taken a few steps he heard the door to the jail open behind him and saw the Petitioner coming at him full speed. Mr. Scott said that the Petitioner did not say anything to him, but immediately pushed him into the wall. The Petitioner then grabbed Mr. Scott in a bear hug and slammed him to the ground. Mr. Scott told Special Agent Combs that his neck was swollen as a result of the assault and that he had bruises on both of his hands. Mr. Scott told Special Agent Combs that he went to the hospital that evening and was told he had torn ligaments in his arm. Mr. Scott denied drinking alcohol before the incident, and Ms. Shrout confirmed that she did not detect any odor of alcohol on Mr. Scott that evening. However, Mr. Scott was denied a warrant by Magistrate Hall because of Mr. Scott's condition on that evening.

27. Subsequent to his investigation, Special Agent Combs swore out warrants for arrest against the Petitioner and Detention Officer Sandstrom for assault on Mr. Scott. Both defendants were found not guilty. Special Agent Combs attended the criminal trials. Special Agent Combs felt that the assistant district attorney that tried the cases did not properly present the State's case. Specifically, the assistant district attorney failed to call the eyewitness, Ms. Shrout, to testify in the case. He was so bothered by the trial that he wrote a letter of complaint to the elected District Attorney.

28. The Petitioner testified at the administrative hearing that he was agitated by the language directed at him by Mr. Scott. Petitioner described Mr. Scott's language in the Respondent's Interrogatories as a "verbal attack". While he admitted that no damage was done to the telephone in the jail, Petitioner nonetheless said that he confronted the Petitioner because he felt he had a duty to protect the property of the jail. Petitioner indicated in his testimony that Mr. Sandstrom actually pulled Mr. Scott to the floor. The Petitioner admitted that Mr. Scott committed no criminal offense while at the jail. Petitioner concedes that verbal abuse does not justify the use of physical force. Petitioner testified that Mr. Scott had a strong odor of alcohol on his breath.

29. Petitioner admits that he had to go through three locked doors to get access to Mr. Scott. Petitioner concedes his actions created a security risk. While Petitioner testified at this hearing that Mr. Scott began to swing at him, he did not tell Special Agent Combs this fact when interviewed.

30. The Petitioner is approximately 6' 4" tall and weighs approximately 260 pounds. Mr. Scott is approximately 5' 8" and approximately 180 pounds.

31. A review of the compact disc showing the interaction between the Petitioner and Mr. Scott on August 20, 2005 does not support the Petitioner's testimony that Mr. Scott slammed the telephone down after their conversation. The video disc is not conclusive as to whether or not Mr. Scott attempted to strike, or raise his arms in any aggressive manner towards the Petitioner prior to the Petitioner forcibly pushing Mr. Scott into the wall and then taking him to the ground with Mr. Sandstrom.

32. Sheriff Ed Brown testified that it was irresponsible on the part of the Petitioner to leave the control room to confront Mr. Scott. By leaving the control room, the Petitioner left the Onslow County Jail in a vulnerable and unsecured situation. Sheriff Brown has had to counsel the Petitioner about anger issues. Specifically, the Petitioner was previously directed to undergo anger management counseling as a result of a conflict he had with representatives of the Department of Social Services over a family issue. It is because of these issues that the Petitioner ceased performing the duties of a deputy sheriff and began working full time in the jail.

33. It is consistent with the Onslow County jail policy to allow individuals with out-of-state identification to have special exceptions made for visitation after jail hours. Mr. Scott on August 20, 2005, possessed and displayed to the Petitioner a South Carolina identification.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge and jurisdiction and venue are proper.
2. The North Carolina Sheriff's Education and Training Standards Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B to certify justice officers and to deny, revoke or suspend such certification.
3. Pursuant to 12 NCAC 10B .0204(b)(2), the Commission shall revoke, deny, or suspend the certification of a justice officer when the commission finds that the applicant for certification or other certified officer has failed to meet or maintain any of the minimum employment standards required by 12 NCAC 10B .0300.
4. The Petitioner failed to notify the Sheriffs' Standards Division within five working days that he was served on August 31, 2005 with a misdemeanor summons for the criminal offense of assault, which is in violation of 12 NCAC 10B .0301(a)(7).
5. At a criminal proceeding in the District Court of Onslow County, North Carolina, on the Misdemeanor Assault charge, after a trial before the Honorable William Christian, District Court Judge presiding, the Petitioner was found not guilty. As such, Respondent may therefore not rely on "conviction of a criminal offense" or "committed" a "criminal offense" to conclude that Petitioner lacks good moral character based upon a violation of G.S. 14-33(a). "Simple Assault" in violation of G.S. 14-33(a), as to Petitioner's culpability, has been judicially determined.
6. The Office of Administrative Hearings, a quasi-judicial tribunal, must give great deference to the verdict rendered by the Honorable William Christian, District Court Judge presiding in District Criminal Division of the General Court of Justice of Onslow County, in a judicial court.
7. Petitioner is entitled to rely on the principle of merger, that is, a collateral aspect of res judicata which determines the scope of claims precluded from relitigation by existing judgments. While res judicata precludes subsequent action based on the same claim, collateral estoppel bars subsequent determination of the same issue, even though the action may be premised upon a different claim. Collateral estoppel should be applied in particular situations as fairness and justice require.
8. The facts alleged by Respondent are the same facts raised in both the District Court action and in this contested case. The facts and issues concerning the commission of a criminal offense in this contested case are the same facts and issues as a commission of a criminal offense, in the District Court trial. The matters of guilt regarding the offenses of Misdemeanor Assault have already been adjudicated in that District Court, after trial, by a finding of not guilty. The facts at the hearing establish that the Petitioner's conduct was reprehensible but cannot overcome the correctness of the District Court's adjudication.

9. The Respondent's proposed suspension of the Petitioner's certification as a Justice Officer for violation of the reporting requirements of 12 NCAC 10B .0301(a)(7) is supported by the preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that the Respondent suspend Petitioner's Justice Officer certification for a period of 2 years based on his failure to notify the Sheriff's Standards Division staff that he was charged with the misdemeanor offense of assault on August 31, 2005.

NOTICE AND ORDER

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exception to this Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C.G.S. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 24th day of October, 2006.

Julian Mann, III
Chief Administrative Law Judge