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NORTH CAROLINA REGISTER
Publication Schedule for January 2015 – December 2015

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

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

(1) temporary rules;
(2) text of proposed rules;
(3) text of permanent rules approved by the Rules Review Commission;
(4) emergency rules
(5) Executive Orders of the Governor;
(6) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H; and
(7) other information the Codifier of Rules determines to be helpful to the public.

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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The 2016 Low-Income Housing Tax Credit Qualified Allocation Plan For the State of North Carolina

I. INTRODUCTION

The 2016 Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term "Agency" shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

The Plan was reviewed in one public hearing and met the other legal requirements prior to final adoption by the Committee. The staff of the Agency was present at the hearing to take comments and answer questions.

The Agency will only allocate low-income housing tax credits in compliance with the Plan. The Code requires the Plan contain certain elements. These elements, and others added by the Committee, are listed below.

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

B. Threshold, underwriting and process requirements.

C. Description of the Agency's compliance monitoring program, including procedures to notify the Internal Revenue Service of noncompliance with the requirements of the program.

In the process of administering the tax credit and Rental Production Program (RPP), the Agency will make decisions and interpretations regarding project applications and the Plan. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations. The Agency reserves the right to amend, modify, or withdraw provisions contained in the Plan that are inconsistent or in conflict with state or federal laws or regulations. In the event of a major:
- natural disaster,
- disruption in the financial markets, or
- reduction in subsidy resources available, including tax credits and RPP funding,

the Agency may disregard any section of the Plan, including point scoring and evaluation criteria, that interferes with an appropriate response.

II. SET-ASIDES, AWARD LIMITATIONS AND COUNTY DESIGNATIONS

The Agency will determine whether applications are eligible under Section II(A) or II(B). This Section II only applies to 9% Tax Credit applications.

A. REHABILITATION SET-ASIDE

The Agency will award up to ten percent (10%) of tax credits available after forward commitments to projects proposing rehabilitation of existing housing. The Agency may exceed this limitation in order to completely fund a project request. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

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

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

B. NEW CONSTRUCTION SET-ASIDES

1. GEOGRAPHIC REGIONS

The Agency will award tax credits remaining after awards described above to new construction projects, starting with those earning the highest scoring totals within each of the following four geographic set-asides and continuing in descending score order through the last project that can be fully funded. The Agency reserves the right to revise the available credits in each set-aside in order to award the next highest scoring application statewide under Section II(G)(1).

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

2. REDEVELOPMENT PROJECTS

(a) If necessary, the Agency will adjust the awards under the Plan to ensure the overall allocation results in awards for ~~three (3)~~two (2) Redevelopment Projects. Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not meet the criteria below will be awarded to the next highest ranking Redevelopment Project(s). The Agency may make such adjustment(s) in any set-aside.

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

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

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

(iii) Any required demolition has been completed or is scheduled for completion in 2016 (not including the project buildings).

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

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

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

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

C. USDA RURAL DEVELOPMENT

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

D. NONPROFIT AND CHDO SET-ASIDES AND LIMITS

1. SET-ASIDES

If necessary, the Agency will adjust the awards under the Plan to ensure that the overall allocation results in

- ten percent (10%) of the state's federal tax credit ceiling being awarded to projects involving tax exempt organizations (nonprofits) and
- fifteen percent (15%) of the Agency's HOME funds being awarded to projects involving Community Housing Development Organizations certified by the Agency (CHDOs).

Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not fall into one of these categories will be awarded to the next highest ranking project(s) that do(es) until the overall allocation(s) reach(es) the necessary percentage(s). The Agency may make such adjustment(s) in any set-aside.

(a) Nonprofit Set-Aside

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

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

(b) CHDO Set-Aside

In order to qualify as a CHDO application,

- the proposed project must meet the requirements of subsection (D)(1)(a) above and 24 CFR 92.300(a)(1),
- ~~as of the full application deadline,~~ the ~~a~~Applicant, any Principal, or any affiliate must not undertake any choice-limiting activity prior to successful completion of the U.S. Department of Housing and Urban Development (HUD) environmental clearance review, and
- the project and owner must comply with regulations regarding the federal CHDO set-aside.

The Agency may determine ~~that~~ the requirements of the federal CHDO set-aside have been or will be met without implementing subsection (D)(1)(b).

2. LIMITS

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

E. PRINCIPAL AND PROJECT AWARD LIMITS; BASIS BOOST

1. PRINCIPAL LIMITS

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

(b) The Agency may further limit awards based on unforeseen circumstances.

(c) For purposes of the maximum allowed in this subsection (E)(1), the Agency may determine that a person or entity not included in an application is a Principal for the proposed project. Such determination would include consideration of relationships between the parties in previously awarded projects and other common interests. Standard fee for service contract relationships (such as accountants or attorneys) will not be considered.

2. PROJECT LIMIT

The maximum award to any one project will be $1,000,000.

3. AGENCY-DESIGNATED BASIS BOOST

The Agency may boost the eligible basis of all projects ~~awarded in 2016~~ by up to ~~an additional~~ fifteen percent (15%) if the flat nine percent tax credit rate in Section 42(b)(2)(A) is not reinstated. The Agency will boost the eligible basis of rehabilitation projects and those committing to the targeting in Section IV(B)(2) by up to an additional fifteen percent (15%). ~~(~~Projects using the DDA or QCT basis increase are not eligible under this section.~~)~~

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

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

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

(b) Metro Region

The initial maximum award(s) for a county will be its percent share of the Metro region based on population (see **Appendix K**), unless exceeding this amount is necessary to complete a project request. If any tax credits remain, the Agency will make awards to the next highest scoring application(s). A county may receive one additional award, even if in excess of its share.

2. INCOME DESIGNATIONS

The Agency is responsible for designating each county as High, Moderate or Low Income. The chart below follows the N.C. Department of Commerce 20145 County Tier designations. Specifically, Tier 3 are High Income, Tier 2 are Moderate, and Tier 1 are Low.

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

G. OTHER AWARDS AND RETURNED ALLOCATIONS

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

2. An owner returning a valid allocation of 201~~2~~3 tax credits between October 1, 20145 and December 31, 20145 will receive an allocation of the same amount of 20156 tax credits if:
   - the project has obtained a building permit and closed its construction loan,
   - the owner pays a fee equal to the original allocation fee amount upon the return, and
   - the project's design is the same as approved at full application (other than changes approved by the Agency ~~in writing~~).

   None of the Principals for the returned project may be part of a 20156 application. ~~The project must place in service in 2015.~~

3. The Agency may make a forward commitment of the next year's tax credits in an amount necessary to fully fund project(s) with a partial award or to any project application that was submitted in a prior year if such application meets all the minimum requirements of the Plan. In the event that credits are returned or the state receives credits from the national pool, the Agency may elect to carry such credits forward, make an award to any project application (subject only to the nonprofit set aside), or a combination of both.

III. DEADLINES, APPLICATION AND FEES

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2016 application process for 9% Tax Credits and the first round of tax-exempt bond volume and 4% Tax Credits. The Agency will announce the application schedule for a second round of bond volume and 4% Tax Credits at a later time.

January 2~~3~~2	Deadline for submission of preliminary applications (12:00 noon)
March 1~~6~~4	Market analysts will submit studies to the Agency and Applicants
March 2~~7~~4	Notification of final site scores
April ~~6~~4	Deadline for market-related project revisions
April 1~~3~~1	Deadline for the Agency and Applicant to receive the revised market study, if applicable
May 1~~5~~3	Deadline for full applications (12:00 noon)
August	Notification of tax credit awards

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

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All Applicants are required to pay a nonrefundable fee of $5,~~68~~700 at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a $1,~~28~~300 preliminary application processing fee (which will be assessed for every electronic application submitted). The Agency may charge additional fee(s) to cover the cost of direct contracting with other providers (such as appraisers).
2. All Applicants are required to pay a nonrefundable processing fee of $1,~~28~~300 upon submission of the full application.
3. Entities receiving tax credit awards, including those involving tax-exempt bond volume, are required to pay a nonrefundable allocation fee equal to 0.74~~6~~% of the project's total qualified basis.
4. The allocation fee will be due at the time of either the carryover allocation or bond volume award. Failure to return the required documentation and fee by the date specified may result in cancellation of the allocation. The Agency may assess other fees for additional monitoring responsibilities.
5. Owners must pay a monitoring fee of $8~~2~~40 per unit (includes all units, qualified, unrestricted and employee) prior to issuance of the project's IRS Form 8609.
6. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Committee or Agency.
7. The Agency may assess Applicants or owners a fee of up to $2,000 for each instance of failure to comply with a written requirement, whether or not such requirement is in the Plan. The Agency will

not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed; such a delay in processing may result in disqualification of application(s).

8. The Agency will assess $1,500 for a Workforce Housing Loan Program closing and $2,000 for an RPP closing.

C. APPLICATION PROCESS AND REQUIREMENTS

1. The Agency may require Applicants to submit any information, letter, or representation relating to Plan requirements or point scoring as part of the application process.

2. Any failure to comply with an Agency request under subsection (C)(1) above or any misrepresentation, false information or omission in any application document may result in disqualification of that application and any other involving the same owner(s), Principal(s), consultant(s) and/or application preparer(s). Any misrepresentation, false information or omission in the application document may also result in a revocation of a tax credit allocation.

3. Only one (1) application can be submitted per site (new construction or rehabilitation).

43. The Agency may elect to treat applications involving more than one site, population type (family/elderly) or activity (new/rehabilitation) as separate for purposes of the Agency's application process. Each application would require a separate initial application fee. The Agency may allow such applications to be considered as one for the full application underwriting if all sites are secured by one permanent mortgage and are not intended for separation and sale after the tax credit allocation.

54. The Agency will notify the appropriate unit of government about the project after submission of the full application.

65. For each application one individual or validly existing entity must be identified as the Applicant and execute the preliminary and full applications. An entity may be one of the following:

(a) corporation, including nonprofits,

(b) limited partnership, or

(c) limited liability company.

Only the identified Applicant will have the ability to make decisions with regard to that application and be considered under Section IV(D)(1). The Applicant may enter into joint venture or other agreements but the Agency will not be responsible for evaluating those documents to determine the relative rights of the parties. If the application receives an award the Applicant must become a managing member or general partner of the ownership entity.

IV. SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

Applications must meet all applicable threshold requirements to be considered for award and funding. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2016 cycle.

A. SITE AND MARKET EVALUATION

The Agency will not accept a full application where the preliminary application does not meet all site and market threshold requirements.

1. SITE EVALUATION (MAXIMUM 60 POINTS)

(a) General Site Requirements:

(i) Sites must be sized to accommodate the number and type of units proposed. The Applicant or a Principal must have site control by the preliminary application deadline as evidenced by an option, contract or deed. The documentation of site control must include a plot plan.

(ii) Required zoning must be in place by the full application ~~submission date~~deadline, including special/conditional use permits, and any other discretionary land use approval required (includes all legislative or quasi-judicial decisions).

(iii) Utilities (water, sewer and electricity) must be available with adequate capacity to serve the site. Sites should be accessed directly by existing paved, publicly maintained roads. If not, it will be the owner's responsibility to extend utilities and roads to the site. In such cases, the Applicant must explain and budget for such plans ~~at the preliminary application stage~~ and document the right to perform such work.

(iv) ~~In order t~~To be eligible for RPP funds, the preliminary application must contain the Agency's "Notice of Real Property Acquisition" form. The form must be executed by all parties before or at the same time as the option or contract.

(b) Criteria for Site Score Evaluation:

Site scores will be based on the following factors. Each will also serve as a threshold requirement; the Agency may remove an application from consideration if the site is sufficiently inadequate in one of the categories.

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 18 POINTS)

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

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

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

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

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

(ii) AMENITIES (MAXIMUM 27 POINTS)

Other than applications with tribally-appropriated funds or near bus/transit stops (described at the end of this subsection), points will be determined according to the matrix below. ~~In order f~~For an amenity to be eligible for points, the application must include documentation required by the Agency of meeting the applicable criteria. In all cases the establishment must be open to the general public and operating as of the preliminary application deadline.

	Driving Distance in Miles			
Primary Amenities				
(maximum 21 points)	≤ 1	≤ 2	≤ 3	> 3
Grocery	~~15~~1 pts.	~~12~~8 pts.	~~9~~5 pts.	0 pts.
Shopping ~~or Pharmacy~~	~~6~~5 pts.	~~4~~3 pts.	~~2~~1 pts.	0 pts.
Pharmacy	5 pts	3 pts	1 pt	0 pts.
Secondary Amenities				
(maximum 6 points)	≤ 1	≤ 2	≤ 3	> 3
Other Primary Amenity	3 pts.	2 pts.	1 pt.	0 pts.
Other Service	3 pts.	2 pts.	1 pt.	0 pts.
Healthcare	3 pts.	2 pts.	1 pt.	0 pts.
Public Facility	3 pts.	2 pts.	1 pt.	0 pts.

Only one establishment will count for each row under Primary and Secondary Amenities. For example, an application for a site with a public park, middle school and community center all between one mile and two miles will receive only 2 points under Public Facility.

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

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

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

The following establishments qualify as a Grocery:

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

The following establishments qualify as Shopping:

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

*Will not qualify as Shopping if receiving points as a Grocery

To qualify as a Pharmacy the establishment must have general merchandise items for sale (not including pharmacies within hospitals). A Pharmacy will not qualify for points if it is located within a Grocery or Shopping establishment which is receiving points.

To qualify as a Secondary Amenity, the establishment must meet the applicable requirement(s) below.

Other Primary Amenity: A second Grocery, Shopping or Pharmacy (not used as Primary Amenity)

Other Service: A restaurant, bank/credit union, or gas station with convenience store. A restaurant or bank/credit union will not qualify for points if it is located within a Grocery, Shopping or Pharmacy establishment which is receiving points.

Healthcare: A hospital, urgent care business, general/family practice, or dentist (not to include orthodontist); does not include medical specialists or clinics within pharmacies

Public Facility: Any of the following:

- community or senior center with scheduled activities operated by a local government

- public park owned and maintained by a local government containing, at a minimum, playground equipment and/or walking/bike trails and listed on a map, website, or other official means
- library operated by a local government open at least five days a week
- public school (elementary, middle, or high school)

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

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

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

A bus/transit stop qualifies for 2 points, not to exceed the total for subsection (ii), if all of the above criteria are met except for a covered waiting area.

(iii) SITE SUITABILITY (MAXIMUM 15 POINTS)

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

Half Mile

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

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

- adult entertainment establishment
- electrical utility substation, whether active or not
- distribution facility
- factory or similar operation
- jail or prison
- large swamp

Any of the following within 250 feet of a proposed project building:

- frequently used railroad tracks
- high traffic corridor
- power transmission lines and tower

3 points if there are no negative features, design challenges, physical barriers, or other unusual and problematic circumstances that would impede project construction or adversely affect future tenants, including but not limited to: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive reuse projects: suitability for residential use and difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition)

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

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

2. MARKET ANALYSIS

The Agency will administer the market study process based on this Section and the terms of **Appendix A** (incorporated herein by reference).

(a) The Agency will contract directly with market analysts to perform studies. Applicants may interact with market analysts and will have an opportunity to revise their project (unit mix, targeting). Any revisions must be submitted in writing to both the market analyst and to the Agency, following the schedule in Section III(A), and will be binding on the Applicant for the full application.

(b) The Agency will limit the number of projects awarded in the same application round to those that it determines can be supported in the market.

(c) The following four criteria are threshold requirements for new construction applications:

(i) the project's capture rate,

(ii) the project's absorption rate,

(iii) the vacancy rate at comparable properties (what qualifies as a comparable will vary based on the circumstances), and

(iv) the project's effect on existing or awarded properties with 9% Tax Credits or Agency loans.

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

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

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

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

(e) The Agency is not bound by the conclusions or recommendations of the market analyst(s), and will use its discretion in evaluating the criteria listed in this subsection (A)(2).

(f) Projects may not give preferences to potential tenants based on:

(i) residing in the jurisdiction of a particular local government,

(ii) having a particular disability, or

(iii) being part of a specific occupational group (e.g. artists).

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

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CFR Part 983) must submit a letter from the issuing authority in a form approved by the Agency. Conversion of vouchers will be treated as a funding source under Section VI(B)(6)(d); a project will be ineligible for an allocation if it does not meet requirements set

by the Agency as part of the application and award process. Such requirements may involve the public housing authority's (PHA's) Annual Plan, selection policy, and approval for advertising.

2. TENANT RENT LEVELS FOR AGENCY BOOST AND RPP

(a) To qualify for the Agency-designated boost in Section II(E)(3) or an RPP loan, new construction applications must commit to one of the following:

- If the project is in a High Income county, at least twenty percent (20%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of area median income.
- If the project is in a Moderate Income county, at least twenty percent (20%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of area median income.
- If the project is in a Low Income county, at least twenty percent (20%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

(b) To qualify for an RPP loan, all applications must commit that at least forty percent (40%) of qualified low-income units in a project will be affordable to and occupied by households with incomes at or below fifty percent (50%) of median income. Targeting in subsection (a) above counts towards this requirement.

C. PROJECT DEVELOPMENT COSTS, RPP LIMITATIONS, AND WHLP

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 10 POINTS)

(a) The Agency will assess negative points to applications listing more than the following in lines 5 and 6 of the Project Development Cost (PDC) description, as outlined in Chart A below. The point structure in Chart B will apply to the following:

- all units are detached single family houses or duplexes,
- serving persons with severe mobility impairments,
- development challenges resulting from being within or adjacent to a central business district,
- public housing redevelopment projects, or
- building(s) with both steel and concrete construction and at least four stories of housing.

The per-unit amount calculation includes all items covered by the construction contract, building permits, Energy Star, certifications for green programs, and any other costs not unique to the specific proposal.

Chart A		**Chart B**	
$66,000	-10	$77,000	-10

(b) Lines 5 and 6 of the PDC description must total at least $60,000 per unit.

(c) The Agency will review proposed costs for historic adaptive re-use projects and approve the amount during the application review process.

See Sections VI(B)~~(7), (8), and (9)~~ for other cost restrictions.

2. RESTRICTIONS ON RPP AWARDS

(a) Projects requesting RPP funds must submit the Agency's "Notice of Real Property Acquisition" form with the preliminary application and may not:

(i) request RPP funds in excess of the following amounts per unit- $15,000 in High Income counties; $20,000 in Moderate Income counties; $25,000 in Low Income counties,

(ii) include market-rate units,

(iii) involve Principals who have entered into a workout or deferment plan within the previous year for an RPP loan awarded after January 1, 2004,

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

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

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

The maximum award of RPP funds to any one Principal will be a total of $1,600,000. Requesting an RPP loan may result in an application being ineligible under Section VI(B)(6)(d) if the Agency has inadequate funds.

(b) Projects may only request an RPP loan if the principal and interest payments for RPP and any local government financing will be equal to the anticipated net operating income divided by 1.15, less conventional debt service:

Repayment of RPP and local government loans = (NOI / 1.15) – conventional debt service.

The amount of repayment will be split between the RPP loan and local government lenders based on their relative percentage of loan amounts. For example:

RPP Loan = $400,000

local government loan = $200,000

	Year 1	Year 2	Year 3	Year 4
Anticipated amount available for repayment	$10,000	$8,000	$6,000	$4,000
RPP principal and interest payments	$6,667	$5,333	$4,000	$2,667
local government P&I payments	$3,333	$2,667	$2,000	$1,333

(c) Loan payments made to the Applicant, any Principal, member or partner of the ownership entity, or any affiliate thereof, will be taken out of cash flow remaining after RPP payments.

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

3. WORKFORCE HOUSING LOAN PROGRAM

(a) ~~Other than those in counties listed below, p~~Projects with 9% Tax Credits which meet the Agency's loan criteria are eligible for the Workforce Housing Loan Program (WHLP). These criteria support the financing of projects similar to those created under the legacy state tax credit program. Applications in the ~~following~~ Metro counties may not list WHLP as a funding source.~~:~~ For any application outside of the Metro counties with a commitment of local funds, the combination of local funds plus WHLP requested may not exceed the initial WHLP maximum as calculated in (c) below.

~~Alamance~~	~~Cabarrus~~	~~Durham~~	~~Henderson~~	~~New Hanover~~
~~Alexander~~	~~Caldwell~~	~~Forsyth~~	~~Iredell~~	~~Pitt~~
~~Buncombe~~	~~Catawba~~	~~Gaston~~	~~Madison~~	~~Transylvania~~

~~Burke~~	~~Cumberland~~	~~Guilford~~	~~Mecklenburg~~	~~Wake~~

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

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

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

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

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE ~~(MAXIMUM 5 POINTS)~~

(a) ~~In order t~~To be eligible for an award of 9% Tax Credits, at least one Principal must have successfully developed, operated and maintained in compliance either one (1) Tax Credit project in North Carolina or six (6) separate Tax Credit projects totaling in excess of 200 units. The project(s) must have been placed in service between January 1, 20089 and January 1, 20145. Such Principal must:

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

(ii) become a general partner or managing member of the ownership entity, and

(iii) remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service. The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

(b) All owners and Principals must disclose all previous participation in the low-income housing tax credit program. Additionally, owners and Principals that have participated in an out of state tax credit allocation may be required to complete an Authorization for Release of Information form.

(c) The Agency reserves the right to determine that a particular development team does not meet the threshold requirement of subsection (D)(1)(a) due to differences between its prior work and the proposed project. Particularly important in this evaluation is the type of subsidy program used in the previous experience (such as tax-exempt bonds, RD).

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

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

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

2. MANAGEMENT EXPERIENCE

The management agent must ~~have at least~~:

(a) have at least one similar tax credit project in their current portfolio, ~~and~~

(b) be requesting Key Program assistance timely and accurately (if applicable),

(c) be reporting in the Agency's Rental Compliance Reporting System (RCRS) timely and accurately (if applicable)

(d) have at least one staff person in a supervisory capacity with regard to the project who has attended at least one Agency sponsored training within the past 12 months as of the full application deadline, and

(~~b~~e)have at least one staff person serving in a supervisory capacity with regard to the project who has been certified as a tax credit compliance specialist.

Such certification must be from an organization ~~accepted~~approved by the Agency (~~refer to the list in~~ see **Appendix C**). None of the persons or entities serving as management agent may have in their portfolio a project with material or uncorrected non-compliance beyond the cure period unless there is a plan of action to address the issue(s). The management agent listed on the application must be retained by the ownership entity for at least two (2) years after project completion, unless the Agency approves a change.

3. PROJECT TEAM DISQUALIFICATIONS

The Agency may disqualify any owner, Principal or management agent, who:

(a) has been debarred or received a limited denial of participation in the past ten years by any federal or state agency from participating in any development program;

(b) within the past ten years has been in a bankruptcy, an adverse fair housing settlement, an adverse civil rights settlement, or an adverse federal or state government proceeding and settlement;

(c) has been in a mortgage default or arrearage of three months or more within the last five years on any publicly subsidized project;

(d) has been involved within the past ten years in a project which previously received an allocation of tax credits but failed to meet standards or requirements of the tax credit allocation or failed to fulfill one of the representations contained in an application for tax credits;

(e) has been found to be directly or indirectly responsible for any other project within the past five years in which there is or was uncorrected noncompliance more than three months from the date of notification by the Agency or any other state allocating agency;

(f) interferes with a tax credit application for which it is not an owner or Principal at a public hearing or other official meeting;

(g) has outstanding flags in HUD's national 2530 National Participation system;

(h) has been involved in any project awarded 9% Tax Credits in 20145 for which either the equity investment has not closed as of the full application deadline or the "10% test" has not been met;

(i) has been involved in any project awarded tax credits after 2000 where there has been a change in general partners or managing members during the last five years that the Agency did not approve in writing beforehand;

(j) would be removed from the ownership of a project that is the subject of an application under the rehabilitation set-aside in the current cycle;

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

(l) is not in good standing with the Agency.

A disqualification under this subsection (D)(3) will result in the individual or entity involved not being allowed to participate in the 2016 cycle and removing from consideration any application where they are identified.

E. UNIT MIX AND PROJECT SIZE

1. Ten (-10) points will be subtracted from any full application that includes market-rate units. This penalty will not apply where either
   - the rents for all market rate units are at least five percent (5%) higher than the maximum allowed for a unit at 60% AMI and the market study indicates that such rents are feasible, or
   - there is a commitment for a grant or no-payment financing equal to at least the amount of foregone federal tax credit equity.
2. New construction 9% Tax Credit projects may not exceed the following:
   - Metro Region - one hundred and twenty (120) units
   - Central, East, and West Regions - eighty (80) units.
3. New construction tax-exempt bond projects may not exceed two hundred (200) units.
4. All projects must have at least twenty four (24) qualified low-income units.

The Agency reserves the right to waive the penalties and limitations in this Section IV(E) for proposals that reduce low-income and minority concentration, including public housing projects, and subsection (E)(2) for proposals that are within a transit station area as defined by the Charlotte Region Transit Station Area Joint Development Principles and Policy Guidelines or adaptive re-use projects where made necessary by the building(s) physical structure.

F. SPECIAL CRITERIA AND TIEBREAKERS

1. ENERGY STAR

   New construction residential buildings must comply with all Energy Star standards as defined in **Appendix B** (incorporated herein by reference). Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

2. ~~GENERAL CONTRACTOR (MAXIMUM 2 POINTS)~~

   ~~Two (2) points will be awarded if the general contractor listed in the full application has its principal office in North Carolina (see **Appendix J** for guidance).~~
   CREDITS PER UNIT AVERAGE (MAXIMUM 3 POINTS)

   The Agency will calculate the average federal tax credits per unit requested on a Geographic Region basis among new construction full applications and award points based on the following:

More than 15% below the average	3 points
Between 10% and 15% below the average	2 points
Between 5% and 10% below the average	1 point
Within 5% of the average	0 points
Between 5% and 10% above the average	-1 point
Between 10% and 15% above the average	-2 points
More than 15% above the average	-3 points

3. UNITS FOR THE MOBILITY IMPAIRED

Five percent (5%) of all units in new construction projects must meet the accessibility standards as defined in **Appendix B** (incorporated herein by reference). THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. Units for the mobility impaired should be available to all tenants who would benefit from their design and are not necessarily reserved under the Targeting Plan requirements of subsection (F)(4).

4. TARGETING PLANS

~~All projects will be required to target ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects with federal project-based rental assistance must target at least five (5) units regardless of size. Projects that are targeting units under this subsection are not required to provide onsite supportive services or a service coordinator.~~

~~Owners must demonstrate a partnership with a local lead agency and submit a Targeting Plan for review and certification by the N.C. Department of Health and Human Services (DHHS). At a minimum, Targeting Plans must include:~~

~~(a) A description of how the project will meet the needs of the targeted tenants including access to supportive services, transportation, proximity to community amenities, etc.~~

~~(b) A description of the experience of the local lead agency and their capacity to provide access to supportive services, and to maintain relationships with the management agent and community service providers for the duration of the compliance period.~~

~~(c) A Memorandum of Understanding (MOU) between the developer(s), management agent and the lead local agency. The MOU will include~~

~~(i) A commitment from the local lead agency to provide, coordinate and/or act as a referral agent to assure that supportive services will be available to the targeted tenants.~~

~~(ii) The referral and screening process that will be used to refer tenants to the project, the screening criteria that will be used, and the willingness of all parties to negotiate reasonable accommodations to facilitate the admittance of persons with disabilities into the project.~~

~~(iii) A communications plan between the project management and the local lead agency that will accommodate staff turnover and assure continuing linkages between the project and the local lead agency for the duration of the compliance period.~~

~~(d) Certification that participation in supportive services will not be a condition of tenancy.~~

~~(e) Agreement that for a period of ninety (90) days after certificate of occupancy, the required number of units for persons with disabilities will be held vacant other than for such population(s).~~

~~(f) Agreement to maintain a separate waiting list for persons with disabilities and prioritizing these individuals for any units that may become vacant after the initial rent-up period, up to the required number of units.~~

~~(g) Agreement to affirmatively market to persons with disabilities.~~

~~(h) Agreement to include a section on reasonable accommodation in property management's application for tenancy.~~

~~(i) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and~~

~~not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.~~

~~(j) A description of how the project will make the targeted units affordable to persons with extremely low incomes. NOTE: Key Program assistance is only available to persons receiving income based upon a disability. Projects targeting units to non-disabled homeless populations or persons in recovery with only a substance abuse diagnosis must have an alternative mechanism to assure affordability.~~

~~The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines that they are not feasible. A Targeting Plan template and other documents related to this subsection are included in **Appendix D** (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and **Appendix D** by the earlier of July 15, 2016 or four months prior to the project's placed in service date. (The Agency may set additional interim requirements.) This subsection (F)(4) does not apply to tax-exempt bond applications.~~
All projects will be required to target ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects with federal project-based rental assistance must target at least five (5) units regardless of size. Projects that have targeting units under this subsection are not required to provide onsite supportive services or a service coordinator.

Owners must complete a Targeting Plan template provided by the Agency as well as provide any specified addenda and must submit the Targeting Plan and addenda to the Agency for review and acceptance. At a minimum, Targeting Plans must include:

(a) A general description of the property.
(b) A summary of tenant selection and screening criteria and an agreement to proactively make program applicants aware of their right to request a reasonable accommodation should they not meet screening criteria.
(c) A summary of communication requirements and contact information for property management, the Agency and DHHS that addresses staff turnover and assures continuing linkages between the property, DHHS and the Agency for the duration of the compliance period.
(d) A commitment to ensure site and compliance staff annually obtain Agency sponsored Targeting and Key training.
(e) Certification that participation in supportive services will not be a condition of tenancy.
(f) Agreement to use the separate waiting list for persons with disabilities maintained by DHHS and prioritize these individuals for targeted units during the initial rent-up period, and for any units that may become vacant after the initial rent-up period, up to the total number of targeted units.
(g) Agreement that for a period of ninety (90) days after certificate of occupancy, the required number of targeted units for persons with disabilities will be held vacant other than for such population(s).
(h) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.
(i) A description of how the project will make the targeted units affordable to persons with very low incomes. NOTE: Key program assistance is only available to persons receiving income based upon a disability. Projects must have an alternative mechanism to assure affordability if targeting units to non-disabled homeless populations or persons in recovery with only a substance abuse diagnosis. (The Social Security Administration deems people ineligible for disability benefits if substance abuse is the sole disabling condition).

The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines they are not feasible. A Targeting Plan template and other documents related to this

subsection are included in **Appendix D** (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and **Appendix D** by the earlier of July 14, 2017 or four months prior to the project's placed in service date. The Agency may set additional interim requirements.

5. OLMSTEAD SETTLEMENT INITIATIVE (MAXIMUM 4 POINTS)

(a) Projects proposing 1 bedroom units as a percentage of the total project units will be awarded points based on the following:

5% of total units	1 point
7.5% of total units	2 points
10% of total units	3 points

(b) Projects proposed in the following DHHS priority counties will be awarded 1 point.

Buncombe	Craven	Gaston	Mecklenburg	Robeson
Burke	Cumberland	Guilford	New Hanover	Rowan
Cabarrus	Durham	Iredell	Onslow	Wake
Caldwell	Forsyth	Johnston	Pitt	Wayne

~~5~~6. SECTION 1602 EXCHANGE PROJECTS (~~-40 POINT DEDUCTION~~NEGATIVE 40 POINTS)

The Agency may deduct up to forty (-40) points from any application if the Applicant, any owner, Principal or affiliate thereof is also involved in a Section 1602 Exchange project with uncorrected material noncompliance.

~~6~~7. TIEBREAKER CRITERIA

The following will be used to award tax credits in the event that the final scores of more than one project are identical.

(a) First Tiebreaker: The project requesting the least amount of federal tax credits per unit based on the Agency's equity needs analysis.

(b) Second Tiebreaker: Tenants with Children: Projects that can serve tenant populations with children. Projects will qualify for this designation if at least twenty-five (25%) of the units are three or four bedrooms. This tiebreaker will only apply where the market study shows a clear demand for this population (as determined by the Agency).

(c) Third Tiebreaker: Tenant Ownership: Projects that are intended for eventual tenant ownership. Such projects must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 30-year compliance period.

In the event that a tie remains after considering the above tiebreakers, the project requesting the least amount of federal tax credits will be awarded.

G. DESIGN STANDARDS

All proposed measures must be shown in the application ~~in order~~ to receive points.

1. THRESHOLD REQUIREMENTS

The minimum threshold requirements for design are found in **Appendix B** (incorporated herein by reference) and must be used for all projects receiving tax credits or RPP funding.

2. CRITERIA FOR SCORE EVALUATION (MAXIMUM ~~OF~~ 30 POINTS)

The Agency will determine points based on the following criteria as applied to the site drawings submitted with the full application.

(a) Site Layout

The Agency will award up to five (5) points based on its evaluation of the site layout. The following characteristics will be considered.

(i) The location of residential buildings in relation to parking, site amenities, community building, postal facilities and trash collection areas.

(ii) The degree to which site layout ensures a low, controlled traffic speed through the project.

(b) Quality of Design and Construction

(The points in this subsection are mutually exclusive with Section IV(G)(2)(c) below.)

The Agency will award up to twenty five (25) points for new construction projects based on its evaluation of the quality of the building design, and the materials and finishes specified. The following characteristics will be considered:

(i) The extent to which the design uses multiple roof lines, gables, dormers and similar elements to break up large roof sections.

(ii) The extent to which the design uses multiple types, styles, and colors of siding and brick veneer to add visual appeal to the building elevations.

(iii) The level of detail that is achieved through the use of porches, railings, and other exterior features.

(iv) Use of brick veneer or masonry products on building exteriors.

(c) Adaptive Re-Use

(The points in this subsection are mutually exclusive with Section IV(G)(2)(b) above.)

The Agency will award up to twenty five (25) points based on the following characteristics:

(i) The extent to which the building(s) fit with surrounding streetscape after adaptation or have problems with orientation, sightlines, bulk and scale.

(ii) Aesthetics after adaptation.

(iii) Presence of special design elements or architectural features that may not be physically or financially available if new construction was introduced on the same site.

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

1. GENERAL THRESHOLD REQUIREMENTS

~~In order t~~To be eligible for ~~funding~~ an allocation under Section II(A), a project must:

(a) have either (i) received a tax credit allocation and be in the extended use period or (ii) federal project-based rental assistance for at least thirty percent (30%) of the total units,

(b) have been placed in service on or before December 31, 1998<u>9</u>,

(c) require rehabilitation expenses in excess of $15,000 per unit (as supported by a physical needs assessment conducted or approved by the Agency),

(d) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,

(e) not be feasible using tax-exempt bonds (as determined by the Agency),

(f) not have received an Agency loan in the last five years,

(g) not be deteriorated to the point of requiring demolition,

(h) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five years, and

(i) have total replacement costs of less than $120,000 per unit, including all Agency-required rehabilitation work.

Rehabilitation expenses include hard construction costs directly attributable to the project, excluding costs for a new community building, as calculated using lines 2 through 7 (less line 6) in the PDC description.

2. THRESHOLD DESIGN REQUIREMENTS

In addition to the relevant sections of **Appendix B**, the Agency will require owners to complete the following as appropriate for their project.

(a) Improve site amenities and common areas by upgrading or adding a freestanding community building, making repairs and additions to landscaping, adding new site amenities such as playgrounds, and repairing parking areas.

(b) Improve building exteriors by replacing deteriorated siding, replacing aged roofing, adding gutters and downspouts, and adding new architectural features to improve appearance.

(c) Upgrade unit interiors by replacing flooring, installing new cabinets and countertops, replacing damaged interior doors, replacing light fixtures, and repainting units.

(d) Replace and upgrade mechanical systems and appliances including HVAC systems, water heaters and plumbing fixtures, electrical panels, refrigerators, and ranges.

(e) Improve energy efficiency by replacing inefficient doors and windows, adding additional insulation in attics, and upgrading the efficiency of mechanical systems and appliances.

(f) Improve site and unit accessibility for persons with disabilities by making necessary alterations at common areas, alterations at single story ground floor units, adding or improving handicapped parking areas, and repairing or replacing sidewalks along accessible routes.

3. EVALUATION CRITERIA

The Agency will evaluate applications under Section II(A) based on the following criteria, which are listed in order of importance. Each one will serve both to determine awards and as a threshold requirement; the Agency may remove an application from consideration if the proposal is sufficiently inadequate in any of the categories. For purposes of making awards, the Agency will not consider subsections (d) through (f) below if the outcome is determined by the criteria in subsections (a) through (c).

(a) The Agency will give the highest priority to applications proposing to rehabilitate the most distressed housing with a tax credit allocation, particularly buildings with accessibility or life, health and safety problems.

(b) Applications will have a reduced likelihood of being awarded tax credits to the extent that the purpose is to subsidize an ownership transfer.

(c) Shortcomings in the above criteria will be mitigated to the extent that a tax credit allocation is necessary to prevent (i) conversion of units to market rate rents or (ii) loss of government resources (including past, present and future investments).

(d) The Agency will give priority to applications that have mortgage subsidy resources committed as part of the application.

(e) Applications will have priority to the extent that the rehabilitation improvements are a part of a community revitalization plan or will benefit the surrounding community. However, projects in severely distressed areas will have a reduced likelihood of being awarded tax credits.

(f) Applications will have a reduced likelihood of being awarded tax credits based on the number of tenants that would be permanently relocated (including market-rate).

(g) While the rehabilitation set-aside is not subject to any regional set-aside, the Agency will consider the geographic distribution of this resource and will attempt to avoid a concentration of awards in any one area of the state.

V. ALLOCATION OF BOND CAP

A. ORDER OF PRIORITY

The Committee will allocate the multifamily portion of the state's tax-exempt bond authority in the following order of priority:

1. Projects that serve as a component of an overall public housing revitalization effort.
2. Rehabilitation of existing rent restricted housing.
3. Rehabilitation of projects consisting of entirely market-rate units.
4. Adaptive reuse projects.
5. Other new construction projects.

Applications will only be allocated bond authority if there is enough remaining after awarding all eligible applications in higher priority levels. Within each category, applications seeking the least amount of authority per low-income unit will have priority.

B. ELIGIBILITY FOR AWARD

Except as otherwise indicated, owners of projects with tax-exempt bonds and 4% Tax Credits must meet all requirements of the Plan. Even with an allocation of bond authority, projects must meet the threshold requirements to be eligible for tax credits.

1. All projects must meet the requirements under Section IV(F)(4).~~one of the following requirements:~~

   ~~(a) at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or~~

   ~~(b) at least five percent (5%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.~~

2. Rehabilitation applications must:

   (a) have been placed in service on or before December 31, 19989,

   (b) require rehabilitation expenses in excess of $10,000 per unit,

   (c) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,

   (d) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five years, and

   (e) not be deteriorated to the point of requiring demolition.

3. The inducement resolution must be submitted with the full application.

4. ~~In order t~~To be eligible for an award of tax-exempt bond volume, at least one Principal must have successfully developed, operated and maintained in compliance either one 9% Tax Credit project in North Carolina or one tax-exempt bond project. The project(s) must have been placed in service between January 1, 2008~~9~~ and January 1, 2014~~5~~. Such Principal must:
   - be identified in the preliminary application as the Applicant under Section III(C)(5),
   - become a general partner or managing member of the ownership entity, and
   - remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service.

   The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

VI. GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. PROJECTS WITH HISTORIC TAX CREDITS

   Buildings either must be on the National Register of Historic Places or approved for the State Historic Preservation Office's study list at the time of the full application. Evidence of meeting this requirement should be provided.

2. NONPROFIT SET-ASIDE

   For purposes of being considered as a nonprofit sponsored application under Section II(D)(1)(a), at least one nonprofit entity (or, where applicable, its qualified corporation) involved in a project must:

   (a) be qualified under Section 501(c)(3) or (4) of the Code,

   (b) materially participate, as defined under federal law, in the acquisition, development, ownership, and ongoing operation of the property for the entire compliance period,

   (c) have as one of its exempt purposes the fostering of low-income housing,

   (d) be a managing member or general partner of the ownership entity.

   The Agency reserves the right to make a determination that the nonprofit owner is not affiliated with or controlled by a for-profit entity or entities other than a qualified corporation. There can be no identity of interest between any nonprofit owner and for-profit entity, other than a qualified corporation.

3. REQUIRED REPORTS

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

   (a) For projects built prior to 1978, a hazardous material report which provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. The testing must be performed by professionals licensed to do hazardous materials testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

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

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

4. APPRAISALS

The Agency will not allow the project budget to include more for land costs than the lesser of its appraised market value or the purchase price. Applicants must submit with the full application a real estate "as is" appraisal that is a) dated no more than six (6) months from the full application deadline, b) prepared by an independent, state certified appraiser and c) complies with the Uniform Standards of Professional Appraisal Practice. The Agency may order an additional appraisal with costs to be paid by the Applicant. Appraisals for rehabilitation and adaptive reuse projects must break out the land and building values from the total value.

5. CONCENTRATION

Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site's census tract with the community overall). The Agency may make an exception for projects in economically distressed areas which have community revitalization plans with public funds committed to support the effort.

6. DISPLACEMENT

For rehabilitation projects and in every other instance of tenant displacement, including temporary, the Applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The owner is responsible for all relocation expenses, which must be included in the project's development budget. Owners must also comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as revised in 49 C.F.R. Part 24.

7. FEASIBILITY

The Agency will not allocate tax credits or RPP funding to applications that may have difficulty being completed or operated for the compliance period. Examples include projects that may not secure an equity investment or a Principal that has inadequate capacity to successfully carry out the development process.

8. SMOKE-FREE HOUSING

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

B. UNDERWRITING THRESHOLD REQUIREMENTS

The following minimum financial underwriting requirements apply to all projects. Projects that cannot meet these minimum requirements, as determined by the Agency, will not receive tax credits or RPP funding. Any documentation required as part of the application must be dated and be within 6 months of the application deadline, unless otherwise stated.

1. LOAN UNDERWRITING STANDARDS

(a) Projects applying for tax credits only will be underwritten with rents escalating at two percent (2%) and operating expenses escalating at three percent (3%).

(b) All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect a 1.15 Debt Coverage Ratio (DCR) for twenty (20) years.

(c) Applications requesting RPP funds must use current HOME rents and may be required to comply with HOME program requirements, including 42 U.S.C. 12701 et seq., 24 C.F.R. Part 92 and all relevant administrative guidance. Projects awarded RPP funds must also comply with the RPP Guidelines in **Appendix G**.

(d) The Agency may determine that the interest rate on a loan must be reduced where an application shows an excessive amount accruing towards a balloon payment.

2. OPERATING EXPENSES

(a) New construction (excluding adaptive reuse): minimum of $3,4600 per unit per year not including taxes, reserves and resident support services.

(b) Renovation (includes rehabilitation and adaptive reuse): minimum of $3,6800 per unit per year not including taxes, reserves and resident support services. For projects with RD loans, the operating expenses will be based upon the current RD approved operating budget.

(c) The proposed management agent (or management staff if there is an identity of interest) must sign a statement (to be submitted with the full application) agreeing that the operating expense projections are reasonable.

3. EQUITY PRICING

(a) The Agency will conduct a survey of tax credit equity investors to determine appropriate pricing assumptions. Projects will be underwritten using the greater of this amount and the Applicant's projection. The Agency may also set a maximum price. The Agency will announce these amounts by the deadline for market analysts to ~~mail~~submit studies. The tax credit rates used for underwriting will be those in effect ~~for~~ the months before the ~~preliminary and~~ full application deadlines.

(b) Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

4. RESERVES

(a) Rent-up Reserve: Required for all except tax-exempt bond projects. A reasonable amount must be established based on the projected rent-up time considering the market and target population, but in no event shall be less than $300 per unit. These funds must be available to the management agent to pay rent-up expenses incurred in excess of rent-up expenses budgeted for in the PDC description. The funds are to be deposited in a separate bank account and evidence of such transaction provided to the Agency ninety (90) days prior to the expected placed in service date. All funds remaining in the rent-up reserve at the time the project reaches ninety-three (93%) occupancy must be transferred to the project replacement reserve account.

For those projects receiving loan funds from RD, the 2% initial operating and maintenance capital established by RD will be considered the required rent-up reserve deposit.

(b) Operating Reserve: Required for all projects except those receiving loan funds from RD. The operating reserve will be the greater of a) $1,500 per unit or b) six month's debt service and operating expenses (four months for tax-exempt bond projects), and must be maintained for the duration of the extended use period.

The operating reserve can be funded by deferring the developer fees of the project. If this method is utilized, the deferred amounts owed to the developer can only be repaid from cash flow if all required replacement reserve deposits have been made. For tax credit projects where no RPP loan applies, the operating reserve can be capitalized by an equity pay in up to one year after certificate of occupancy is received. This will be monitored by the Agency.

(c) Replacement Reserve: All new construction projects must budget replacement reserves of $250 per unit per year. Rehabilitation and adaptive reuse projects must budget replacement reserves of

$350 per unit per year. The replacement reserve must be capitalized from the project's operations, escalating by four percent (4%) annually.

In both types of renovation projects mentioned above, the Agency reserves the right to increase the required amount of annual replacement reserves if the Agency determines such an increase is warranted after a detailed review of the project's physical needs assessment.

For those projects receiving RD loan funds, the required funding of the replacement reserve will be established, administered and approved by RD.

5. DEFERRED DEVELOPER FEES

Developer fees can be deferred to cover a gap in funding sources as long as:

(a) the entire amount will be paid within fifteen years and meets the standards required by the IRS to stay in basis,

(b) the deferred portion does not exceed fifty percent (50%) of the total amount as of the full application, and

(c) payment projections do not negatively impact the operation of the project.

Each of these will be determined by the Agency. Nonprofit organizations must include a resolution from the Board of Directors allowing such a deferred payment obligation to the project. The developer may not charge interest on the deferred amount in excess of the long term AFR.

6. FINANCING COMMITMENT

(a) For all projects proposing private permanent financing, a letter of intent is required (see **Appendix E**). This letter must clearly state the term of the permanent loan is at least fifteen (15) years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for fifteen years.

(b) For all projects proposing public permanent financing, binding commitments are required to be submitted by the full application deadline (see **Appendix E**). Local governments also must identify the source of funding (e.g. HOME, trust fund). All loans must have a fixed interest rate and no balloon payments for at least fifteen (15) years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.

(c) The Agency may request a letter from a construction lender documenting the loan amount, interest rate, and any origination fees.

(d) Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an amount or under the terms described in the application. The Agency may waive this limitation if the project otherwise demonstrates financial feasibility. Project cash flow may not be used as a source of funds.

7. DEVELOPER FEES

(a) Developer fees shall be up to $13,000 per unit for new construction projects and twenty-eight percent point five (28.5%) of PDC line item 4 for rehabilitation projects, both being set at award.

(b) Notwithstanding the amount calculated in subsection (7)(a), the developer fee for any project shall be a maximum of $1,~~1~~300,000 (the maximum for projects with tax-exempt bonds is $1,~~7~~900,000).

(c) ~~Builder's~~ Contractor general requirements shall be limited to six percent (6%) of hard costs.

(d) ~~Builder's~~Contractor profit and overhead shall be limited to ten percent (10%) (8% profit, 2% overhead) of total hard costs, including general requirements.

(e) Where an identity of interest exists between the owner and ~~builder~~contractor, the ~~builder's~~contractor profit and overhead shall be limited to eight percent (8%) (6% profit, 2% overhead).

8. CONSULTING FEES

The total amount of any consulting fees and developer fees shall be no more than the maximum developer fee allowed to that project.

9. ARCHITECTS' FEES

The architects' fees, including design and inspection fees, shall be limited to three percent (3%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the PDC description). This amount does not include engineering costs.

10. INVESTOR SERVICES FEES

Investor services fees must be paid from net cash flow and not be calculated into the minimum debt coverage ratio.

11. PROJECT CONTINGENCY FUNDING

All new construction projects shall have a hard cost contingency line item of ~~NO MORE THAN~~ five percent (5%) of total hard costs, including general requirements, ~~builder~~contractor profit and overhead. Rehabilitation and adaptive reuse projects shall include a hard cost contingency line item of ~~NO MORE THAN~~ ten percent (10%) of total hard costs.

12. PROJECT OWNERSHIP

There must be common ownership between all units and buildings within a single project for the duration of the compliance period.

13. SECTION 8 PROJECT-BASED RENTAL ASSISTANCE

For all new construction projects that propose to utilize Section 8 project-based rental assistance, the Agency will underwrite the rents according to the tax credit and HOME limits. These limits are based on data published annually by HUD. If the Section 8 contract administrator is willing to allow rents above these limits, the project may receive the additional revenue in practice, but Agency underwriting will use the lower revenue projections regardless of the length of the Section 8 contract.

Given the uncertainty of long-term federal commitment to Section 8 rental assistance, the Agency considers underwriting to the more conservative revenue levels to best serve the project's long-term financial viability.

14. WATER, SEWER, AND TAP FEES

Any water, sewer, and tap fees charged to the project must be entered on a separate line item of the PDC description. Applications must provide letters from local provider(s) documenting either the amounts or if no fees will be charged.

VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. ALLOCATION TERMS AND REVOCATION

1. At any time between award and issuance of ~~the~~IRS Form 8609, owners must have ~~written~~ approval from the Agency prior to:

   (a) changing the anticipated or final sources (amount, terms, or provider), including equity;

   (b) increasing the anticipated or final uses by more than two percent (2%);

   (c) altering the designs approved by
   - the Agency at full application, or
   - local building code office,

   including amenities, site layout, floor plans and elevations ("Approved Design");

   (d) starting construction, including sitework; ~~or~~

   (e) increasing rents for low-income units (does not apply to tax-exempt bonds)~~.~~; or

   (f) any other change to the awarded application.

   If an increase in uses or design alteration is due to a local government requirement, owners do not need prior approval but rather must provide the Agency with prompt written notice. Failure to comply with a requirement of this subsection may result in a fine of up to $25,000, revocation of the reservation or allocation, future disqualification under Section IV(D)(3) of any Principal involved, or other recourse available to the Agency.

2. Ownership entities must submit a completed carryover agreement and expend at least ten percent (10%) of the project's reasonably expected basis, both by dates to be determined by the Agency.

3. ~~A federal~~IRS ~~f~~Form 8609 will not be issued until:

   (a) submission of a Final Cost Certification that complies with the Agency's requirements;

   (b) the owner and management company document attendance at an Agency sponsored or approved tax credit compliance seminar sponsored within the previous 12 months (see **Appendix C** for list of approved seminars);

   (c) monitoring fees have been paid;

   (d) the project has been built according to the Approved Design;

   (e) the Agency determines the project has adhered to all representations made in the approved application and will meet all relevant Plan requirements;

   (f) documentation of the ownership entity having paid all applicable state and local taxes for the most recent year due; and

   (g) submission of a listing of the name and address for all contractors and subcontractors and a statement from each representing the entity will comply with all applicable employment rules and regulations.

4. The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code. Projects will be required to elect a project-based allocation. An allocation does not constitute a representation or warranty by the Agency or Committee that the ownership entity or its owners will qualify for the tax credits. The Agency's interpretation of the Code, regulations, notices, or other guidance is not binding on the federal government.

5. Owners must record a thirty (30) year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement) stating that the owner will not apply for relief under Section 42(h)(6)(E)(i)(II) of the Code and will comply with other requirements under the Code, Plan, other relevant statutes and regulations and all representations made in the approved

application. The Extended Use Agreement also may contain other provisions as determined by the Agency. The owner must have good and marketable title and obtain the consent of any prior recorded lienholder (other than for construction financing) to be bound by the Extended Use Agreement terms.

6. The Agency may revoke an allocation if the owner fails to implement all representations in the approved application. In addition to the terms of Section VII(A)(1), owners will acknowledge that the following constitute conditions to their allocation:

   (a) accuracy of all representations made to the Agency, including ~~exhibits and attachments~~ application uploads,

   (b) adherence to the Plan and all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act,

   (c) provision and maintenance of amenities for the benefit of the tenants, and

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

   An owner's or project's failure to comply with all such conditions without written authorization from the Agency will entitle the Agency, in its discretion, to deem the allocation to be cancelled by mutual consent. After any such cancellation, the owner will acknowledge that neither it nor the project will have any right to claim tax credits pursuant to the allocation. The Agency reserves the right, in its discretion, to modify or waive any such failed condition.

~~B. [reserved]~~

~~C~~B. COMPLIANCE MONITORING

1. Owners must comply with Section 42 of the Code, IRS regulations, rulings, procedures, decisions and notices, state statutes, the Fair Housing Act, state laws, local codes, Agency loan documents, **Appendix F** (incorporated herein by reference), and any other legal requirements. The Agency may treat any failure to do so as a violation of the Plan.
2. The Agency will adopt and revise standards, policies, procedures, and other requirements in administering the tax credit program. Examples include training and on-line reporting. Owners must comply with all such requirements regardless of whether or not they expressly appear in the Plan or **Appendix F**. The Agency will have access to any project information, including physical access to the property, all financial records and tenant information.

VIII. DEFINITIONS

The terms listed below will be defined in the Plan as indicated below regardless of capitalization, unless the context clearly indicates otherwise. Terms used in the Plan but not defined below will have the same meaning as under the Code and IRS regulations.

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

9% Tax Credit: Low-income housing tax credits available for allocation under the state's volume cap pursuant to Section 42(h)(3) of the Code.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).

Applicant: The entity considered under Section III(C)(5).

Choice-Limiting Activity: Includes leasing or disposition of real property and any activity that will result in a physical change to the property, including acquisition, demolition, movement, rehabilitation, conversion, repair, or construction.

~~Community Service Facility: Any building or portion of building that qualifies under Section 42(d)(4)(C)(iii) of the Code, Revenue Ruling 2003-77, and any Agency requirements for such facilities (which may be published as part of the Plan, an Appendix or separately).~~

Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.

~~Displacement: The moving of a person or such person's personal property from their current residence.~~

Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.

Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or temporary housing but originally came from places not meant for habitation or emergency shelters.

Management Agent: Individual(s) or Entity responsible for the day to day operations of the project, which may or may not be related to the Owner(s) or ownership entity.

Market-Rate Units: Units that are not subject to tax credit restrictions; does not include manager units.

Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.

~~Net Square Footage: The outside to outside measurements of all finished areas that are heated and cooled (conditioned). Examples include hallways, community and office buildings, dwelling units, meeting rooms, sitting areas, recreation rooms, game rooms, etc. Breezeways, stairwells, gazebos and picnic shelters are examples of unconditioned outside structures that may not be used as net square footage.~~

Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.

Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.

~~Ownership Entity Agreement: A written, legally binding agreement describing the rights, duties and obligations of owners in the ownership entity.~~

Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.

Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a)).

Principal: Principal includes (1) all persons or entities who are or who will become partners or members of the ownership entity, (2) all persons or entities whose affiliates are or who will become partners or members of the ownership entity, (3) all persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services

rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the lesser of twenty-five percent (25%) of the development fee for such project or $100,000, and (4) all affiliates of such persons or entities in clause (3) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the lesser of twenty-five percent 25% of the development fee for such project or $100,000. For purposes of determining Principal status the Agency may disregard multiple layers of pass-through or corporate entities. A partner or member will not be a Principal where its only involvement is that of the tax credit equity investor.

Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).

Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing.

APPENDIX B

Design Quality Standards and Requirements

The terms of this Appendix B are the minimum requirements for any project awarded tax credits in 2016. Required documents must be prepared by an engineer or architect licensed to do business in North Carolina.

Once final plans and specifications have been completed, owners must submit them to the Agency (hard copy and CD in PDF format) and receive written approval before commencing site work or construction.

At all times after award the owner is responsible for promptly informing the Agency of any changes or alterations which deviate from the final plans and specifications approved by the Agency. In particular owners must not take action on any material change in the site layout, floor plan, elevations or amenities without written authorization from the Agency. This includes changes required by local governments to receive building permits.

I. DESIGN DOCUMENT STANDARDS

All required documents must be prepared by an engineer or architect licensed to do business in North Carolina. All drawings should be to scale, using the minimum required scale as detailed below.

A. PRELIMINARY APPLICATION PLAN REQUIREMENTS

Plans must in PDF format for uploading into the application system and indicate the following:

1. Street name(s) where site access is made, site acreage, planned parking areas, layout of building(s) on site to scale, any flood plains that will prohibit development on site, retaining walls where needed, and adjacent properties with descriptions.
2. Floor plans, fFront, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
3. Use a 1/8" or 1/16" scale for each building.

B. FULL APPLICATION PLAN REQUIREMENTS

Site and floor plans must be in PDF format for uploading into the application system and 24" x 36" paper only (stapled together) and indicate the following:

1. Location of, and any proposed changes to, existing buildings, roadways, and parking areas.
2. All existing site and zoning restrictions including setbacks, right of ways, boundary lines, wetlands and any flood plains.
3. Existing topography of site and any proposed changes including retaining walls.
4. Front, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
5. Landscaping and planting areas (a plant list is not necessary). If existing site timber or natural areas are to remain throughout construction, the area must be marked as such on the site plans.
6. Locations of site features such as playground(s), gazebos, walking trails, refuse collection areas, postal facilities, and site entrance signage.
7. The location of units, common use areas and other spaces using a minimum scale of 1/16" = 1'for each building.
8. Dimensioned floor plans for all unit types using a minimum scale of 1/4" = 1'.
9. Net building square footage and heated square footage. See "Definitions" in this Appendix.
10. For projects involving renovation and/or demolition of existing structures, proposed changes to building components and design and also describe removal and new construction methods.

11. For projects involving removal of asbestos and/or lead based paint removal, general notes identifying location and procedures for removal.

II. BUILDING AND UNIT DESIGN PROVISIONS

A. EXTERIOR DESIGN AND MATERIALS

1. Building design must use different roof planes and contours to "break" up roof lines. Wide window and door trim must be used to better accent siding. If horizontal banding is used between floor levels, use separate color tones for upper and lower levels. If possible, use horizontal and vertical siding applications to add detail to dormers, gables, and extended front facade areas.
2. The use of no or very low maintenance materials is required for exterior building coverings on all new construction projects. These include high quality vinyl siding, brick, or fiber cement siding. The use of metal siding is prohibited. Vinyl siding must have a .044" thickness or greater and a limited lifetime warranty. Where band boards attach to and are part of the vinyl siding application, z-flashing must be installed behind, on top of, and below bands.
3. All exterior trim, including fascia and soffits, window and door trim, gable vents, etc. must also be constructed of no or very low maintenance materials.
4. All buildings must include seamless gutters and aluminum drip edge on all gable rakes and fascia boards. Drip edge must extend 2 inches minimum under the shingles.
5. All building foundations must have a minimum of 12 inches exposed brick or masonry veneer above finished grade level (after landscaping).
6. Breezeway and stairwell ceilings must be constructed of materials rated for exterior exposure.
7. Buildings and units must be identified using clearly visible signage and numbers. Building and unit identification signage must be well lit from dusk till dawn.
8. Exterior stairs must have a minimum clear width of 40 inches between handrails and be completely under roof cover.
9. Exterior railings must be made of vinyl, aluminum, or steel (no wood).
10. Anti-fungal dimensional (architectural) shingles with a minimum 30-year warranty are required for all shingle roof applications.
11. Covered drop-offs must have a minimum 13 foot vehicle headroom clearance.
12. In vinyl siding applications, all exterior lights, GFIs, HVAC sub panels, hose bibs, telephone boxes, and cable boxes must be installed in plastic J-boxes.
13. Weep holes must be below finished slab elevation and not covered with sod, mulch, finished grade or landscaping.
~~13.~~14. All property entrances must have a monument sign with brick or stone columns and lighting.

B. DOORS AND WINDOWS

1. All primary unit entries must either be within a breezeway or have a minimum roof covering of 3 feet deep by 5 feet wide, including a corresponding porch or concrete pad.
2. High durability, insulated doors (such as steel and fiberglass) are required at all exterior locations. Single lever deadbolts and eye viewers are required on all main entry doors to residential units.
3. Exterior doors for fully accessible units ("Type A") must include spring hinges.
4. Insulated, double pane, vinyl windows ~~with a U-factor of 0.32 or below and a SHGC of 0.40 or below~~meeting current Model Energy Code are required for new construction and rehabilitation projects (if replacing windows).
5. Windows must not be located over tub or shower units.
6. Install a continuous bead of silicone caulk behind all nail fins before installing new vinyl

windows per manufacturer's specifications.

7. In Type A accessible units, an audible alarm and strobe light must be installed above the entry door.

C. INTERIOR DESIGN AND MATERIALS

1. All residential units must meet minimum unit size requirements. The square footage measurements below will be for heated square feet only, measured interior wall to interior wall, and do not include exterior wall square footage. Unheated areas such as patios, decks, porches, stoops, or storage rooms cannot be included.

Single Room Occupancy ("SRO")	250 square feet
Studio	375 square feet
Efficiency	450 square feet
1 Bedroom	660 square feet
2 Bedroom	900 square feet
3 Bedroom	1,100 square feet
4 Bedroom	1,250 square feet

For additional requirements see the "Definitions" section at the end of this Appendix.

2. All units must have a separate dining area, except for SRO, Studio and Efficiency units (see "Definitions" for description).
3. Newly constructed residential units must have an exterior storage closet (interior for congregate) with a minimum of 16 unobstructed square feet. The square footage utilized by a water heater in the exterior storage closet may not be included in the 16 square foot calculation.
4. Carpet and pad must meet FHA minimum standards. Carpets in Type A units must be glue-down type without padding.
5. Kitchens, dining areas, and entrance areas must have vinyl, VCT or other non-carpet flooring.
6. The minimum width of interior hallways in residential units is 40 inches.
7. For new construction, interior doors must be constructed of six panel hardboard, solid core birch or solid core lauan. Hollow core, flat-panel doors are prohibited.
8. Bi-fold, pocket, louvered, and by-pass doors are prohibited.
9. Fireplaces are prohibited in residential units.
10. Residential floors and common tenant walls must have sound insulation batts.
11. All bedroom closets, interior storage rooms, coat closets and laundry rooms/closets must have a 4 inch tall by 8 inch wide minimum pass-thru grille above doors for air circulation in those areas that do not get conditioned.
12. There must be a minimum of ¾ inch air space under all interior doors measured from finished floor for air circulation.
13. All interior and exterior mechanical and storage closets must have finished floor coverings. Interior closets must have either carpet, sheet vinyl or VCT flooring. Exterior storage closets may have sealed, painted concrete floors.
14. Signage for designated common areas and all apartment units must be in Braille and meet ANSI standards.
15. The following areas must contain moisture resistant drywall: ceilings and walls of bathrooms, laundry rooms, mechanical closets, exterior storage closets, and behind kitchen sink base.
16. One (1) elevator must be provided for every 60 units on a per building basis with a minimum of 48 units a building. The elevator(s) must be centrally located within a given building.

D. BEDROOMS

1. The primary bedroom must have at least 130 square feet, excluding the closet(s).

2. Secondary bedrooms must have at least 110 square feet, excluding the closet(s).
3. Every bedroom must have a closet with a shelf, closet rod and door. The average size of all bedroom closets in each unit type must be at least 7 linear feet.
4. In Type A accessible units, an emergency pull station is required in all master bedrooms.

E. BATHROOMS

1. A recessed medicine cabinet must be installed in every full bathroom in each residential unit.
2. Exclusive of fully accessible units, the average size of all vanities in each unit type must be at least 36 inches.
3. Mirrors in bathrooms must be low enough to reach the counter backsplashes.
4. All full bathrooms must have an overhead ceiling light and exhaust fan on the same switch. Vanity lights (if provided) must be on a separate switch.
5. All bathrooms must include an ~~Energy Star rated~~ exhaust fan rated at 70 CFM (minimum) vented to the exterior of the building using hard ductwork along the shortest run possible.
6. For ceramic tile applications, tile should be applied over cement backer board rather than directly to drywall.
7. All new construction and adaptive re-use projects must comply with QAP Section IV(F)(3) and Appendix B Section VIII(D) regarding additional fully accessible bathrooms, including roll-in showers. All roll-in showers must have a collapsible water dam or beveled threshold that meets code. All roll-in showers must be 36 inches wide and have an adjustable shower rod and weighted curtain installed before occupancy.
8. Approaches to roll-in showers must be level, not sloped.
9. All domestic water line cut off valves must have metal handles, not plastic.
10. In all Type A accessible units, the grab bars must be installed per ANSI A117.1 specifications around toilets and in the tubs/showers. In roll-in showers the shower head with wand must be installed on a sliding bar and within code required reach ranges by the seat. An additional diverter must be installed to provide water to a shower head on the short shower wall in front of the seat, mounted 80 inches above finished floor.
11. In Type A accessible units, an emergency pull station is required in all bathrooms.
12. Offset toilet flanges are prohibited.

F. KITCHENS

1. New cabinets must include dual side tracks on drawers. Door fronts, styles, and drawer fronts must be made with solid wood or wood/plastic veneer products. Particle board or hardboard doors, stiles, and drawer fronts are prohibited.
2. The minimum aisle width between cabinets and/or appliances is 42 inches.
3. A pantry cabinet or closet in or near each kitchen must be provided (does not include SRO, studio or efficiency units). Pantry cabinet or closet door must be 24 inches minimum width.
4. All residential units must have either a dry chemical fire extinguisher mounted and readily visible and accessible in every kitchen, including kitchen in community building if present, or an automatic fire suppression canister mounted in each range hood.
5. Each kitchen must have at the least the following minimum linear footage of countertop, excluding the sink space (only include countertops that are at or below 36 inches in height above finished floor):

SRO	4.5 linear feet
Studio	5.0 linear feet
Efficiency	5.0 linear feet
1 Bedroom	10.0 linear feet

2 Bedroom	12.0 linear feet
3 Bedroom	13.0 linear feet
4 Bedroom	13.0 linear feet

Bar tops may be counted as long as they are 16 inches minimum width and installed no higher than 48 inches above finished floor.

6. All residential units must have a frost-free Energy Star rated refrigerator with a freezer compartment. Water/ice dispenser rough-in boxes must be installed with cold water supply line in the wall. If provided, water/ ice dispenser must be connected and operational. For fully accessible ("Type A") units the refrigerator must be side by side or bottom freezer drawer type. Doors must open beyond 90 degrees to allow bin removal. The following are the minimum sizes:

0-2 Bedroom	14 cubic feet
3 Bedroom	16 cubic feet
4 Bedroom	18 cubic feet

7. All residential units must have an Energy Star rated dishwasher.

~~7.~~8. All residential units must have a double bowl sink.

~~8.~~9. In Type "A" accessible units:

- kitchen sinks must be rear-draining and have sink bottoms insulated if bottom of sink is at or below 29" above finished floor;
- pull-out worktops are prohibited;
- workstations must be installed beside the range;
- the wall cabinet mounted over the work station must be 48 inches maximum above finished floor to the top of the bottom shelf; and
- both the range hood fan and light must have separate remote switches.

~~11. Range hoods must be vented to the outside using hard duct.~~

1~~2~~0. Anti-tip devices must be installed on all kitchen ranges and be securely fastened to the floor. Walls behind or directly beside ranges must be covered with a splash panel. The panel should span from the range to the hood and be plastic, laminate or aluminum. Ranges must be installed to fit flush to the wall.

G. LAUNDRY ROOM CLOSETS

1. If providing laundry hookups, ~~L~~laundry room closets are required and must be 36" minimum depth measured from back wall to back of closet doors.
2. Clothes dryer vent connection must be 2" maximum above finished floor.
3. Washer water shutoff valves must be installed right side up with the hose connection below the shutoff handle.
4. In Type A and Type B units, each clothes washer and dryer must be centered for a side approach only in a four foot clear floor space area. The washer and dryer clear floor space areas may overlap.

H. PROVISIONS FOR ALL ELDERLY HOUSING

1. All elderly residential units must be equipped with emergency pull chains in the master bedroom and full bathroom. The pull chains must be wired to an exterior warning device which consists of a strobe light and an audible alarm.
2. Provide loop or "D" shape handles on cabinet doors and drawers.
3. Exhaust vents and lighting above ranges must be wired to remote switches for both the light and fan near the range in an accessible location.
4. Provide solid blocking at all water closets and tub/shower units for grab bar installation.
5. Provide a minimum 18 inch grab bar in all tub/shower units. The grab bar will be installed centered vertically at 48" A.F.F. on the wall opposite the controls.

6. Corridors in any common areas must have a continuous suitable handrail on both sides mounted 34 inches above finished floor, and be 1 ¼ inches in diameter.
7. All doors leading to habitable rooms must have a minimum 3'-0" door and include lever handle hardware.
8. Hallways must have a minimum width of 42 inches.
9. The maximum threshold height at any entry door is ½ inch.

I. PROVISIONS FOR SIGHT AND HEARING IMPAIRED UNITS

Applies ONLY to projects using Rental Production Program funds. Under Section 504 of the Rehabilitation Act of 1973, two percent of the total number of units constructed, or a minimum of one, must be able to be equipped for residents with sight and hearing impairments. These requirements include the following:

1. The unit(s) must be roughed in to allow for smoke alarms with strobe lights in every bedroom and living area.
2. The units must have a receptacle next to phone jacks in units for future installation of TTY devices.
3. Each overhead light fixture and receptacle must be wired to accommodate a 150 watt load.
4. The unit must also be fully accessible ("Type A").
5. Lighted or contrasting color doorbell button connected to an audible and strobe alarm installed in each bathroom, bedroom and common area is required for each sight and hearing impaired unit.

The requirements of this provision can be satisfied by adding the elements described above to the additional fully accessible units with roll-in showers required by QAP Section IV(F)(3) such that at least two percent (2%) of all units are properly equipped to serve persons with sight and or hearing impairments.

III. MECHANICAL, SITE AND INSULATION PROVISIONS

A. PLUMBING PROVISIONS

1. All rental units require at least one (1) full bathroom.
2. Three bedroom units require at least 1.75 bathrooms (including one bath with upright shower and one bath with full tub).
3. Four bedroom units require at least two (2) full bathrooms.
4. All tubs and showers must have slip resistant floors. For new construction projects, tubs and showers must be one-piece and a minimum of 32" in width.
5. All electric water heaters must have an Energy Factor of at least 0.93. This can be achieved by using an insulated water heater jacket. All natural gas water heaters must have an Energy Factor of at least .61efficiency.
6. In new construction and adaptive re-use projects, all water heater tanks must be placed in an overflow pan piped to the exterior of the building, regardless of location and floor level unless a primed p-trap is installed. The temperature and relief valve must also be piped to the exterior. Water heaters must be placed in closets to allow for their removal and inspection by or through the closet door. Water heaters may not be installed over the clothes washer or dryer space.
7. Whirlpool baths or spas are prohibited.
8. A frost-proof exterior faucet must be installed on an exterior wall of the community/office building.
9. All tub/shower control knobs must be single lever handled and offset towards the front of the tub/shower.
10. Provide lever faucet controls for the kitchen and bathroom sinks.
11. All bathroom faucets, shower heads, and toilets must be EPA "Watersense" rated.

12. When using electric tankless water heaters the electrical panel must be rated at 200 amps or greater.
13. Domestic water lines are not allowed in unconditioned spaces.
~~13.~~14. In all Type A and Type B accessible units, tubs and showers must have wood blocking installed on the bathing fixture.
~~14.~~15. In all Type A accessible units, the toilets, tubs and showers must have ~~all~~ grab bars installed. See ANSI A117.1 for mounting heights and locations.

B. ELECTRICAL PROVISIONS

1. Provide overhead lighting, a ceiling fan, telephone jack and a cable connection in every bedroom and living room. If using ceiling fans with light kits, the fan and light must have separate switches.
2. Any walk-in closets must also have a switched overhead light. A walk in closet is defined as any closet deeper than 36 inches from the back wall to the back of the closet door in the closed position.
3. Switches and thermostats must not be located more than 48 inches above finished floor height.
4. Receptacles, telephone jacks and cable jacks must not be located less than 16 inches above finished floor height.
5. Exterior lighting is required at each unit entry door.
6. Additional exterior light fixtures not specific to a unit will be wired to a "house" panel. The fixtures will be activated by a photo cell placed on the east or north side of the buildings.
7. All exterior stairways must have light fixtures wired to a "house" panel and activated by a photo cell placed on the east or north side of the buildings.
8. Projects with gas heating and/or appliances must provide a hard-wired carbon monoxide detector with a battery back-up in each residential unit.
9. All non-residential and residential spaces must have separate electrical systems.
10. Initially-installed bulbs in residential units and common areas must be compact fluorescent, LED, or pin-based lighting in 80% of all fixtures.
11. All telephone lines must be toned and tagged properly to each unit.

C. HEATING, VENTILATING AND AIR CONDITIONING PROVISIONS

1. All non-residential areas and residential units must have their own separate heating and air conditioning systems.
2. Through the wall HVAC units are prohibited in all but Studio, Efficiency and SRO units. They are allowed in laundry rooms and management offices where provided.
3. HVAC interior air handlers must be enclosed from return air grille to blower motor/filter.
~~3.~~4. The use of duct board is prohibited.
~~4.~~5. Connections in duct system must be sealed with mastic and fiberglass mesh.
~~5.~~6. All openings in duct work at registers and grills must be covered after installation to keep out debris during construction.
~~6.~~7. Fresh air returns must be a minimum of 12" above the floor.
~~7.~~8. Electric mechanical condensate pumps are not allowed.
~~8.~~9. Supply ducts in unconditioned attics must be insulated with an R-8 or greater value.
~~9.~~10. Range hoods and micro-hoods must be vented to the exterior of the building with hard duct, using the shortest possible run. As an alternative to hard ducting the range hood to the exterior, hard wired dehumidifiers must be installed in the mechanical closet.
~~10.~~11. All hub drains serving HVAC condensate lines must be piped to the outside. Piping to the sanitary sewer is not allowed unless a primed p-trap is installed.

~~11.~~12. ____Exterior clothes dryer vents must be mechanically secured to siding and/or brick veneers.

D. BUILDING ENVELOPE AND INSULATION

1. Buildings with residential units must be wrapped with an exterior air and water infiltration barrier.
2. Framing must provide for complete building insulation including the use of insulated headers on all exterior walls, framing roofs and ceilings to allow the full depth of ceiling insulation to extend over the top plate of the exterior walls of the building, and framing all corners and wall intersections to allow for insulation.
3. Seal at doors, windows, plumbing and electrical penetrations to prevent moisture and air leakage.

E. SITEWORK AND LANDSCAPING

1. Provide positive drainage at all driveways, parking areas, ramps, walkways and dumpster pads to prevent standing water.
2. No sidewalks may exceed a 2% cross slope regardless of where located. Provide a non-skid finish to all walkways.
3. All water from roof and gutter system must be piped away from buildings and discharged no less than 6 feet from building foundation.
4. Lots must be graded so as to drain surface water away from foundation walls. The grade away from foundation walls must fall a minimum of 6 inches within the first 10 feet.
5. Burying construction waste on-site is prohibited.
6. No part of the disturbed site may be left uncovered or unstabilized once construction is complete.
7. Minimum landscaping budgets of $300 per residential unit are required. This allowance is for plants and trees only and may not be used for fine grading, seeding and straw or sod.
8. Plant material must be native to the climate and area.

F. RADON VENTILATION

Passive, "stack effect" radon ventilation systems are required for all new construction projects in Zone 1 and 2 counties. For a list of county zones visit http://www.ncradon.org/Data.html
These systems reduce soil gas entry into the buildings by venting the gases to the outdoors and must include the following components.

1. Gas Permeable Layer of Aggregate: This layer is placed beneath the slab or flooring system to allow the soil gas to move freely underneath the house and enter an exhaust pipe. In many cases, the material used is a 4-inch layer of clean gravel.
2. Plastic Sheeting/Soil Gas Retarder: This is the primary soil gas barrier and serves to support any cracks that may form after the basement slab is cured. The retarder is usually made of 6 mil polyethylene sheeting, overlapped 12 inches at the seams, fitted closely around all pipe, wire, or other penetrations, and placed over the gas permeable layer of aggregate.
3. PVC Vent Pipe: A straight (no elbows) vertical PVC vent pipe of 3 inch diameter will be connected to a vent pipe "T" which is installed below the slab in the aggregate. The straight vent pipe runs from the gas permeable layer (where the "T" is) through the apartment to the roof to safely vent radon and other soil gases above the roof. A 12 inch perforated PVC pipe must be attached to the "T" on both ends in the aggregate to allow radon gas to easily enter the piping. The straight vent pipe runs vertically through the building and terminates at least 12 inches above the roof's surface in a location at least 10 feet from windows or other openings and adjoining or adjacent buildings. On each floor of the apartment, the pipe should be labeled as a "**Radon Reduction System**". Sealing and caulking with polyurethane or silicone on all openings in the concrete foundation floor must be used.

Check applicable federal, state and local building codes to see if more stringent codes apply.

IV. ENERGY STAR CERTIFICATION

New construction projects must meet the standards and requirements of ENERGY STAR 2.0 as verified by an independent, third-party expert who assists with project design, verify construction quality, and tests completed units. Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

V. COMMON AREA AND SITE AMENITY PROVISIONS

All common use areas must be fully accessible to those with disabilities in compliance with all applicable State and Federal laws and regulations.

A. REQUIRED SITE AMENITIES

All new construction projects are required to include a minimum of six (6) tenant amenities. There are three (3) amenities that are mandatory and the additional three (3) can be selected from the list below.

The required amenities vary by project type:

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

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

- covered drive-thru or drop-off at entry
- covered patio with seating (150 sq. ft.)
- covered picnic area with two tables and one grille (150 sq. ft.)
- outdoor sitting areas with benches (minimum of 3 locations)
- exercise room (must include new equipment)
- raised bed garden plots (50 sq. ft. per plot, 24 inches deep, one plot per 10 residents, elderly projects only) served by a water stand pipe for watering plants
- gazebo (100 sq. ft.; door must accommodate a 36" minimum clear opening)
- high-speed Internet access (involves both a data connection in the living area of each unit that is separate from the cable/telephone connection and support from a project-wide network or a functional equivalent)
- resident computer center (minimum of 2 computers)
- sunroom with chairs (150 sq. ft.)
- screened porch (150 sq. ft.)
- tot lot (family projects only)
- walking trails (4 ft. wide paved and continuous around property)

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

B. PLAYGROUND AREAS

1. Wherever possible tot lots and playgrounds must be located away from areas of frequent automobile traffic and situated so that the play area is visible from the office and maximum number of residential units.

2. A bench must be provided at playgrounds to allow a child's supervisor to sit. The bench must be anchored permanently, weather resistant and have a back.

C. POSTAL FACILITIES

1. Postal facilities must be located adjacent to available parking and sited such that tenants will not obstruct traffic while collecting mail.
2. On-site postal facilities must have a roof covering which offers residents ample protection from the rain while gathering mail.
3. Postal facilities must include adequate lighting on from dusk to dawn.
4. ~~For Type A and Type B units the~~ M~~m~~ailboxes may not be installed higher than 48" above finished floor.

D. LAUNDRY FACILITIES

1. Laundry facilities are required ~~at~~ for all projects.
2. There must be a minimum of one washer and one dryer per twelve (12) residential units if washer/dryer hookups are not available in each unit. If hookups are available in each unit, there must be a minimum of one washer and one dryer per twenty (20) units.
3. The entrance must have a minimum roof covering of 20 square feet.
4. A "folding" table or countertop must be installed. The working surface must be ~~28~~30 to 34 inches above the floor, and must have a 29 inch high clear knee space below. The working surface must be a minimum 48 inches long, and have a 30 by 48 inch clear floor space around it.
5. The primary entrance door to the laundry must be of solid construction and include a full height tempered glassed panel to allow residents a view of the outside/inside.
6. The laundry room must be positioned on the site to allow for a high level of visibility from residential units or the community building/office.
7. The laundry room must have adequate entrance lighting that is on from dusk to dawn.
8. If the project has only one laundry facility, it must be adjacent to the community building/office (if provided) to allow easy access and provide a handicap parking space(s).
9. One washer and one dryer must be front loading and usable by residents with mobility impairments (front loading), including at least a 30 by 48 inch clear floor space in front of each.

E. COMMUNITY / OFFICE SPACES

1. All projects must have an office on site of at least 200 square feet (inclusive of handicapped toilet facility) and a maintenance room of at least 100 square feet. This includes subsequent phases of a multi-phase development.
2. Projects with twenty four (24) or more units and more than one residential building must have a separate community building.
3. The community building must contain both a handicapped toilet facility and a kitchen area that includes a refrigerator and sink.
4. The community building/space, including toilet facilities and kitchenette but excluding maintenance room and site office, must contain a minimum of seven (7) square feet for each residential unit.
5. The office must be situated as to allow the site manager a prominent view of the residential units, playground, entrances/exits, and vehicular traffic.
6. The community building/office must be clearly marked as such by exterior signs, placed at a visible location close to the building. The signs must use contrasting colors and large letters and numbers.

F. PARKING

1. Two parking spaces per unit are required for family projects.
2. Elderly projects require a minimum of one parking space per unit.
3. If local guidelines ~~require~~mandate less parking, the number of parking spaces required by the Agency may be reduced to meet those standards upon receiving Agency approval prior to the preliminary application deadline.
4. There must be at least one handicap parking space for each designated fully accessible apartment unit and must be the nearest available parking space to the unit.
5. Handicap ramps may not protrude into parking lot. Handicap parking spaces and access isles may not exceed 2% slope in any direction.

G. REFUSE COLLECTION AREAS

1. Fencing consistent with the appearance of the residential buildings must screen the collection area. The fencing must be made of PVC or treated lumber and constructed for permanent use.
2. The pad for the refuse collection area, including the approach area, must be concrete (not asphalt).
3. The refuse collection area(s) may not be at the entrances or exits of the project. All residential buildings must be within 200 feet of a collection area unless the property is being served by a single roll-off dumpster.
4. Signs must be at all refuse collection areas to prohibit parking in front of collection facilities.
5. Pipe bollards or 8 inch x 8 inch treated timber must be installed behind dumpsters.
6. All projects must include a separate pad for tenant recycling receptacles and participate in a recycling program.

VI. ADDITIONAL PROVISIONS FOR REHABILITATION OF EXISTING HOUSING

The following requirements apply to rehabilitation of existing units. Other than as described below, existing apartments do not need to be physically altered to meet new construction standards.

A. Design documents must show all proposed changes to existing and proposed buildings, parking, utilities, and landscaping. An architect or engineer must prepare the design drawings.

B. Any replacement of existing materials or components must comply with the design standards for new construction. In addition to needs identified by the Agency, the rehabilitation scope of work will include/address the following issues:

- All mechanical and storage closets must have finished flooring.
- All water heaters must be in an overflow pan and piped to the outside (where possible).
- If range hoods were previously vented to the outside, the replacement hoods must be similar.
- All bi-fold and accordion doors must be replaced with hinged doors.
- All units must have individual water shut off valves in the unit.
- All units must have looped smoke alarms.
- Water heaters under kitchen countertops must be relocated.
- All polybutylene ("Quest") piping must be replaced.
- All original cast iron p-traps must be replaced.
- Attic insulation must meet R-30 minimum value.
- Tub/shower valves over twenty-five years old must be replaced.
- Hard duct all new and existing bathroom exhaust fans where possible (in attics).
- Shoe molding must be installed in areas where glue down flooring is/was installed.
- Existing HVAC air handlers must have a secondary condensate overflow line or cutoff switch.

C. Applicants must submit the following:

1. For properties built prior to 1978, a hazardous material report that provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect, building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

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

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

D. Show "reserves for replacements" adequate to maintain and replace any existing systems and conditions not being replaced or addressed during rehabilitation.

VII. ADDITIONAL PROVISIONS FOR ADAPTIVE RE-USE OF EXISTING STRUCTURES

A. Mechanical Systems: All mechanical systems (including HVAC, plumbing, electrical, fire suppression, security system, etc.) must be completely enclosed and concealed. This may be achieved by utilizing existing spaces in walls, floors, and ceilings, constructing mechanical chases or soffits, dropping ceilings in portions of units, or other means. Where structural or other significant limitations make complete enclosure and concealment impossible, the applicant must secure approval from the Agency prior to installation of affected systems.

B. Windows: Retain original window sashes, frames, and trim where possible. All original sashes must be repaired and otherwise upgraded to insure that all gaps and spaces are sealed so as to be weather tight. All damaged or broken window panes must be replaced. Where original window sashes cannot be retained, install replacement sashes be installed into existing frames. In all cases, windows must be finished with a complete coating of paint.

C. Floors: All wood flooring is to be restored as closely to original condition as possible. Where repairs are necessary, flooring salvaged from other areas of the building must be utilized as fill material. If salvaged wood is not available, flooring of similar dimension and species must be used. All repairs must be made by feathering in replacement flooring so as to make the repair as discreet as possible. Cutting out and replacing square sections of flooring is prohibited. Where original flooring has gaps in excess of 1/8 inch, the gaps must be filled with an appropriate filler material prior to the application of final finish.

D. Applicants must submit the following:

1. For structures built prior to 1978, a hazardous material report that provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

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

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

VIII. QUALIFIED ALLOCATION PLAN

Five percent (5%) of all units in new construction projects must:

1. be fully accessible according to the standards set forth in Chapter 11 of the North Carolina State Building Code and ANSI A117.1,
2. have at least one bathroom with a toilet located in a five foot by five foot clear floor space (may overlap with the five foot turning diameter described in ANSI A117.1, with no overlapping elements or fixtures; the toilet must be positioned in a corner with the centerline of the toilet bowl 16 to 18 inches from the sidewall, and
3. have at least one bathroom with a 36" x 60" roll-in shower as described in Appendix B. Such showers must also meet the requirements for accessible controls and clear floor spaces as required by ANSI A117.1.

At least one unit in each class of fully accessible units must meet the above requirements. Unit classes are measured by the number of bedrooms. THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. In congregate buildings served by an elevator, these units must be on each residential floor.

DEFINITIONS

Efficiency Apartment: A unit with a minimum of 450 heated square footage (assuming new construction) in which the bedroom and living area are contained in the same room. Each unit has a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, full size refrigerator) that is located in a separate room.

Heated Square Feet: The floor area of an apartment unit, measured interior wall to interior wall, not including exterior wall square footage. Interior walls are not to be deducted, and the area occupied by a staircase may only be counted once.

~~Net Square Feet: Total area, including exterior wall square footage, of all conditioned (heated/cooled) space, including hallways and common areas.~~

One Bedroom Apartment: A unit of at least 660 heated square feet (assuming new construction) containing at least four separate rooms including a living/dining room, full kitchen, a bedroom and full bathroom.

Single Room Occupancy (SRO) Unit: A single room unit with a minimum of 250 heated square feet (assuming new construction) that is the primary residence of its occupant(s). The unit must contain either food preparation or sanitary facilities. At least one component of either a full bathroom (shower, water closet, lavatory) and/or a full kitchen (refrigerator, stove top and oven, sink) is missing. There are shared common areas in each building that contain elements of food preparation and/or sanitary facilities that are missing in the individual units.

Studio Apartment: A unit with a minimum of 375 heated square feet (assuming new construction) in which the bedroom, living area and kitchenette are contained in the same room. Each unit has components of a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven,

sink, refrigerator).

Three Bedroom Apartment: A unit with a minimum of 1,100 heated square feet (assuming new construction) containing at least seven separate rooms including a living/dining room, full kitchen, three bedrooms and 1.75 bathrooms, with each unit including a minimum of one bath with a full tub and one bath with an upright shower stall.

Two Bedroom Apartment: A unit with a minimum of 900 heated square feet (assuming new construction) containing at least five separate rooms including a living/dining room, full kitchen, two bedrooms and full bathroom.

Note from the Codifier: *The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days. Statutory reference: G.S. 150B-21.2.*

TITLE 08 – NORTH CAROLINA STATE BOARD OF ELECTIONS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Elections intends to adopt the rule cited as 08 NCAC 17 .0106.*

Link to agency website pursuant to G.S. 150B-19.1(c): *www.ncsbe.gov (In box in lower left area of page, click on "Rule-making" tab)*

Proposed Effective Date: *February 1, 2016*

Public Hearing:
Date: *November 5, 2015*
Time: *1:00 p.m. to 2:00 p.m.*
Location: *State Board of Elections Boardroom, 441 North Harrington Street, Raleigh, NC 27603*

Reason for Proposed Action: *G.S. 163-227.2(j) mandates rule-making by the State Board of Elections "requiring signage to be displayed until the deadline for submission of requests for absentee ballots provided in G.S. 163-230.1 at all one-stop absentee voting locations notifying voters who do not have eligible photo identification of the option to request an absentee ballot" as allowed in G.S. 163-227.2. See S.L. 2015-103.*

Comments may be submitted to: *George McCue, North Carolina State Board of Elections, PO Box 27255, Raleigh, NC 27811-7255, email rules@ncsbe.gov*

Comment period ends: *December 14, 2015*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

☐ **State funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 17 – PHOTO IDENTIFICATION

08 NCAC 17 .0106 SIGNAGE NOTIFYING ONE-STOP VOTERS OF THE OPTION TO REQUEST AN ABSENTEE BALLOT

(a) At every location offering one-stop voting for an election pursuant to G.S. 163-227.2(b) and (g), the county board of elections shall ensure signage is displayed as specified in this Rule, until the deadline for submission of requests for absentee ballots provided in G.S. 163-230.1.

(b) The County Board of Elections shall provide signage, either designed and authorized by the State Board of Elections, or designed by the County Board of Elections according to the following requirements:

(1) The signage shall include the following language:

(A) The following language in type no smaller than 28-point sans serif type: "NOTICE TO VOTERS: Photo identification is not required to vote a mail-in absentee ballot.* A mail-in absentee ballot can be requested here. For a mail-in absentee ballot request form, or for more information and the deadline to request a mail-in absentee ballot, please ask an election official."

(B) The following language in type no smaller than 14-point sans serif type: "*Although photo identification is not required for mail-in absentee voting generally, some recently-registered voters may be required to provide a copy of document showing proof of residence, or a photo identification, in order to complete verification processes. If such documentation is required, it would be requested in the instructions accompanying the absentee ballot. For more information, please ask an election official."

(2) The dimensions of the signage shall be at least 8.5 inches wide by 11 inches tall.

(c) The signage shall be displayed at each entrance to the voting site and in a location viewable to voters at the time the voter is at or approaching each check-in table of the voting site.

Authority G.S. 163-166.12(b),(b2); 163-227.2(b1),(j); 163-230.1.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Department of Health and Human Services/Director, Division of Health Service Regulation intends to repeal the rules cited as 10A NCAC 14C .1101, .1202, .1204 - .1205, .1302, .1304 - .1305, .1402, .1404 - .1405, .1502, .1504 - .1505, .1602, .1604 - .1605, .1702, .1704 - .1705, .1803, .1805 - .1806, .1902, .1904 - .1905, .2002, .2005, .2102, .2104 - .2106, .2202, .2204 - .2205, .2302, .2304 - .2305, .2402, .2405, .2502, .2505, .2602, .2605, .2702, .2704 - .2705, .2802, .2805, .2902, .2904 - .2905, .3001 - .3009, .3103, .3105 - .3106, .3202, .3204 - .3205, .3402, .3404 - .3405, .3602, .3604 - .3605, .3702, .3704 - .3705, .3802, .3804 - .3805, .3902, .3904 - .3906, .4002, .4004 - .4005, and .4006.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www2.ncdhhs.gov/dhsr/ruleactions.html*

Proposed Effective Date: *February 1, 2016*

Public Hearing:
Date: *November 20, 2015*
Time: *1:00 p.m.*
Location: *Dorothea Dix Campus, Wright Building, Room 131, 1201 Umstead Drive, Raleigh, NC 27603*

Reason for Proposed Action: *The CON application forms authorized by G.S. 131E-182(b) request information from the applicants which is designed to address the review criteria found in G.S. 131E-183(a). It has been determined that rules proposed to be repealed are not needed in order for the agency to determine whether or not an application is conforming to the statutory review criteria. Furthermore, some of the rules proposed to be repealed are too vague and many are outdated. Their effective dates go back as far as 1983. Standards and practices in the health care industry that were appropriate in the 1980's and 90's are not the best, most current practices today. The rules proposed to be repealed also place an unnecessary burden on applicants and increase the complexity of litigation which has a cost to the Department and the applicants.*

Comments may be submitted to: *Nadine Pfeiffer, 2701 Mail Service Center, Raleigh, NC 27699-2701, email DHSR.RulesCoordinator@dhhs.nc.gov*

Comment period ends: *December 14, 2015*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).
☐ **State funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

Note: Pursuant to G.S. 150B-21.17, the Codifier has determined that publication of the complete text of the rules proposed for repeal is impractical. The text of the repealed rules is accessible on the OAH Website: http://www.ncoah.com.

CHAPTER 14 – DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION

SUBCHAPTER 14C – CERTIFICATE OF NEED REGULATIONS

SECTION .1100 – CRITERIA AND STANDARDS FOR NURSING FACILITY OR ADULT CARE HOME SERVICES

10A NCAC 14C .1101 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-175; 131E-176; 131E-177(1); 131E-183(b); S.L. 2001, c. 234.

SECTION .1200 – CRITERIA AND STANDARDS FOR INTENSIVE CARE SERVICES

10A NCAC 14C .1202 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1204 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1205 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183; 131E-183(b).

SECTION .1300 - CRITERIA AND STANDARDS FOR PEDIATRIC INTENSIVE CARE SERVICES

10A NCAC 14C .1302 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1304 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1305 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

SECTION .1400 – CRITERIA AND STANDARDS FOR NEONATAL SERVICES

10A NCAC 14C .1402 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1404 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1405 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .1500 - CRITERIA AND STANDARDS FOR HOSPICES

10A NCAC 14C .1502 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1504 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1505 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

SECTION .1600 – CRITERIA AND STANDARDS FOR CARDIAC CATHETERIZATION EQUIPMENT AND CARDIAC ANGIOPLASTY EQUIPMENT

10A NCAC 14C .1602 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1604 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1605 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .1700 - CRITERIA AND STANDARDS FOR OPEN-HEART SURGERY SERVICES AND HEART-LUNG BYPASS MACHINES

10A NCAC 14C .1702 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1704 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1705 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .1800 - CRITERIA AND STANDARDS FOR DIAGNOSTIC CENTERS

10A NCAC 14C .1803 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .1805 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1806 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .1900 – CRITERIA AND STANDARDS FOR RADIATION THERAPY EQUIPMENT

10A NCAC 14C .1902 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183; NC 2009 State Medical Facilities Plan, Chapter 9: Radiation Therapy Services – Linear Accelerator.

10A NCAC 14C .1904 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .1905 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183; 131E-183(b).

SECTION .2000 – CRITERIA AND STANDARDS FOR HOME HEALTH SERVICES

10A NCAC 14C .2002 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .2005 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

SECTION .2100 – CRITERIA AND STANDARDS FOR SURGICAL SERVICES AND OPERATING ROOMS

10A NCAC 14C .2102 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183(b).

10A NCAC 14C .2104 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .2105 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)
10A NCAC 14C .2106 FACILITY (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183(b).

SECTION .2200 – CRITERIA AND STANDARDS FOR END-STAGE RENAL DISEASE SERVICES

10A NCAC 14C .2202 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .2204 SCOPE OF SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .2205 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .2300 – CRITERIA AND STANDARDS FOR COMPUTED TOMOGRAPHY EQUIPMENT

10A NCAC 14C .2302 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .2304 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .2305 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .2400 – CRITERIA AND STANDARDS FOR INTERMEDIATE CARE FACILITY/MENTALLY RETARDED (ICF/MR)

10A NCAC 14C .2402 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1),(5); 131E-183.

10A NCAC 14C .2405 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1),(5); 131E-183.

SECTION .2500 – CRITERIA AND STANDARDS FOR SUBSTANCE ABUSE/CHEMICAL DEPENDENCY TREATMENT BEDS

10A NCAC 14C .2502 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .2505 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

SECTION .2600 – CRITERIA AND STANDARDS FOR PSYCHIATRIC BEDS

10A NCAC 14C .2602 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .2605 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .2700 - CRITERIA AND STANDARDS FOR MAGNETIC RESONANCE IMAGING SCANNER

10A NCAC 14C .2702 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .2704 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .2705 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .2800 - CRITERIA AND STANDARDS FOR REHABILITATION SERVICES

10A NCAC 14C .2802 INFORMATION REQUIRED BY APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183(b).

10A NCAC 14C .2805 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183.

SECTION .2900 - CRITERIA AND STANDARDS FOR BONE MARROW TRANSPLANTATION SERVICES

10A NCAC 14C .2902 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .2904 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .2905 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3000 - CRITERIA AND STANDARDS FOR SOLID ORGAN TRANSPLANTATION SERVICES

10A NCAC 14C .3001 DEFINITIONS (PROPOSED FOR REPEAL)
10A NCAC 14C .3002 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)
10A NCAC 14C .3003 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3004 ADDITIONAL REQUIREMENTS FOR HEART, HEART/LUNG OR LUNG TRANSPLANTATION SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3005 ADDITIONAL REQUIREMENTS FOR LIVER TRANSPLANTATION SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3006 ADDITIONAL REQUIREMENTS FOR PANCREAS TRANSPLANTATION SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3007 ADDITIONAL REQUIREMENTS FOR KIDNEY TRANSPLANTATION SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3008 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)
10A NCAC 14C .3009 ACCESSIBILITY (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183; 131E-183(b).

SECTION .3100 - CRITERIA AND STANDARDS FOR MAJOR MEDICAL EQUIPMENT

10A NCAC 14C .3103 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3105 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3106 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3200 - CRITERIA AND STANDARDS FOR LITHOTRIPTOR EQUIPMENT

10A NCAC 14C .3202 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .3204 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3205 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3400 - CRITERIA AND STANDARDS FOR BURN INTENSIVE CARE SERVICES

10A NCAC 14C .3402 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .3404 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3405 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3600 - CRITERIA AND STANDARDS FOR GAMMA KNIFE

10A NCAC 14C .3602 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .3604 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3605 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3700 - CRITERIA AND STANDARDS FOR POSITRON EMISSION TOMOGRAPHY SCANNER

10A NCAC 14C .3702 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

10A NCAC 14C .3704 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3705 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183(b).

SECTION .3800 - CRITERIA AND STANDARDS FOR ACUTE CARE BEDS

10A NCAC 14C .3802 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3804 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3805 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

SECTION .3900 - CRITERIA AND STANDARDS FOR GASTROINTESTINAL ENDOSCOPY PROCEDURE ROOMS IN LICENSED HEALTH SERVICE FACILTIES

10A NCAC 14C .3902 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183(b).

10A NCAC 14C .3904 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .3905 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)
10A NCAC 14C .3906 FACILITY (PROPOSED FOR REPEAL)

Authority G.S. 131E-177; 131E-183(b).

SECTION .4000 - CRITERIA AND STANDARDS FOR HOSPICE INPATIENT FACILITIES AND HOSPICE RESIDENTIAL CARE FACILITIES

10A NCAC 14C .4002 INFORMATION REQUIRED OF APPLICANT (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .4004 SUPPORT SERVICES (PROPOSED FOR REPEAL)
10A NCAC 14C .4005 STAFFING AND STAFF TRAINING (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .4006 FACILITY (PROPOSED FOR REPEAL)

Authority G.S. 131E-177(1); 131E-183.

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 rule cited as 12 NCAC 09B .0303.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx*

Proposed Effective Date: *April 1, 2016*

Public Hearing:
Date: *February 11, 2016*
Time: *1:00 p.m.*
Location: *Central Piedmont Community College, 1141 Elizabeth Avenue, Charlotte, NC 28204*

Reason for Proposed Action: *The CJETS Commission voted to amend this rule in order to more specifically define the terms "Commission-accredited" and "Commission-recognized" training courses. These revisions will make this rule consistent with the 12 NCAC 09B .0305 with regard to these definitions.*

Comments may be submitted to: *Trevor Allen, PO Drawer 149, Raleigh, NC 27602, phone (919) 779-8205, fax (919) 779-8210, email tjallen@ncdoj.gov*

Comment period ends: *February 11, 2016*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).
- ☐ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
  Analysis submitted to Board of Transportation
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥$1,000,000)**
- ☐ **Approved by OSBM**
- ☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

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

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 twelve hours in a ~~Commission-certified~~ Commission-accredited basic training 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~~ Commission-accredited basic training ~~course~~ 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 twelve hours in a ~~Commission-certified~~ Commission-accredited basic 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~~Commission-accredited basic or instructor 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 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~~ Commission-accredited basic or instructor 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~~ Commission-accredited basic or instructor training ~~course~~ 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~~ Commission-accredited basic or instructor 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 are not 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 are not 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~~ hours as specified in Paragraph (c) of this Rule 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) All instructors shall have 90 days from the date of expiration of their instructor certification to submit an application for

renewal along with documentation of having met the minimum requirements of Paragraph (c) of this Rule during the previous certification period. The prescribed 90 day period shall not extend the instructor certification period beyond its specified expiration period. If the renewal application is not submitted within 90 days from the expiration of the previous certification, such applicants will be required to meet the minimum requirements for general instructor certification as specified in Rule .0302 of this Section.
(g) 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.
(h) For purposes of this Section, "Commission-recognized in-service training" shall mean any training meeting or exceeding the requirements of 12 NCAC 09E .0105.~~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.

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 13B .0105.*

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

Proposed Effective Date: *Pending Legislative Review*

Public Hearing:
Date: *November 13, 2015*
Time: *1:30 p.m.*
Location: *NC Department of Environmental Quality, 217 West Jones Street, Raleigh, NC 27603, Room 1210*

Reason for Proposed Action: *Legislative requirement per Session Law 2013 (House Bill 74) states: "The Commission shall adopt a rule to replace the Collection and Transport Rule. …The rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Section 59.2 of the act."*

Comments may be submitted to: *Jessica Montie, 1646 Mail Service Center, Raleigh, NC 27699-1646, phone (919) 707-8247, fax (919) 707-8247, email Jessica.montie@ncdenr.gov*

Comment period ends: *December 14, 2015*

Rule is automatically subject to legislative review, Session Law 2013-413: *Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. The rule adopted pursuant to this section shall become effective, as provided in G.S. 150B-21.3(b1), as though 10 or more written objections had been received, as provided by G.S. 150B-21.3(b2).*

Fiscal impact (check all that apply).
- ☐ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
  Analysis submitted to Board of Transportation
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥$1,000,000)**
- ☐ **Approved by OSBM**
- ☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 13 – SOLID WASTE MANAGEMENT

SUBCHAPTER 13B – SOLID WASTE MANAGEMENT

SECTION .0100 – GENERAL PROVISIONS

15A NCAC 13B .0105 COLLECTION AND TRANSPORTATION OF SOLID WASTE

(a) The solid waste collector shall be responsible for the ~~satisfactory~~ collection and transportation of all solid waste to a ~~permitted disposal site or facility.~~ solid waste management facility as defined in G.S. 130A-290 that is permitted by the Division.
(b) The solid waste collector shall transport to a site or facility only those solid wastes ~~which the site or facility is permitted to receive.~~ that are allowed by facility permit.
(c) Vehicles or containers used for the collection of solid waste, and transportation by whatever means, including ~~but not limited to,~~ highway, rail, and navigable waterway, ~~of garbage, or refuse containing garbage, shall be covered, leakproof, durable, and of easily cleanable construction. These shall be cleaned as often as necessary to prevent a nuisance or insect breeding and shall be maintained in good repair.~~ shall be constructed, operated, and maintained to be leak resistant in order to prevent the creation of a nuisance to public health from the escape of solid, semi-solid, or liquid waste. In order to meet the requirement to be leak resistant, the owner and/or operator of the vehicle or container shall adhere to the following standards:

(1) All surfaces that come in contact with waste shall be smooth and non-absorbent.
(2) All drain holes and valves shall be closed, plugged, or sealed.
(3) The vehicle shall be equipped with seals, gaskets, or other devices pursuant to manufacturer specifications in order to prevent the escape of liquids. Such seals, gaskets, and other devices shall be maintained and replaced pursuant to manufacturer specifications.
(4) The truck body, waste holding area, and hopper shall be free of holes, cracks, rusting, corrosion, or other evidence of damage or weakness that

may allow the escape of solid, semi-solid, or liquid waste.

(5) The waste holding area, including the hopper and around the packer blade, if so equipped, shall be clean of debris to prevent vectors or the accumulation of litter.

(6) The vehicle shall be operated and maintained to prevent the escape of waste to the environment.

(7) The vehicle shall be serviced, repaired, and cleaned to maintain sanitary conditions, to preserve the integrity of the door seal, to prevent the accumulation of mechanical fluids, dirt, and filth on the vehicle's exterior, and to prevent contamination of the environment by fluids.

(d) Vehicles or containers used for the collection and transportation of any solid waste shall be loaded and moved in ~~such~~ a manner that the contents will not fall, leak, or spill and shall be covered ~~when necessary~~ in order to keep contents dry and to prevent blowing of material. If spillage ~~should occur~~ occurs, the material shall be picked up ~~immediately~~ by the solid waste collector and returned to the vehicle or container. ~~and the area shall be properly cleaned.~~

Authority G.S. 130A-294(b); S.L. 2013-413.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 02 – BOARD OF ARCHITECTURE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Architecture intends to amend the rule cited as 21 NCAC 02 .0302.*

Link to agency website pursuant to G.S. 150B-19.1(c): *www.ncbarch.org*

Proposed Effective Date: *February 1, 2016*

Public Hearing:
Date: *November 13, 2015*
Time: *10:00 a.m.*
Location: *127 W. Hargett St #304, Raleigh, NC*

Reason for Proposed Action: *Housekeeping, add a newly approved architectural degree program and to remove language that is no longer valid or used.*

Comments may be submitted to: *Cathe Evans, 127 Hargett St #304, Raleigh, NC 27601*

Comment period ends: *December 15, 2015*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

☐ **State funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

SECTION .0300 – EXAMINATION PROCEDURES

21 NCAC 02 .0302 EXAMINATION

(a) Licensure by Examination. ~~All applicants for architectural registration in North Carolina by examination shall pass the Architectural Registration Examination (ARE), prepared by the National Council of Architectural Registration Boards (NCARB). Applicants who have never been registered in any NCARB recognized jurisdiction may transfer credits for portions of the examination previously passed in another jurisdiction if at the time of initial approval to take the exam in said jurisdiction they otherwise qualified for taking the exam under the rules in this Chapter. The qualifications necessary for eligibility to take the ARE are as follows~~ Upon successful completion of all sections of the Architectural Registration Exam (ARE) as prepared by the National Council of Architecture Registration Boards (NCARB), fulfillment of all NCARB Intern Development Program (IDP) requirements and completion of the NAAB (National Architectural Accrediting Board) accredited degree, an individual may submit the application and fee for licensure by exam and may then be granted a license to practice architecture. G.S. 83A-7(a)(1)a. shall be deemed satisfied through completion of the requirements set forth in Subparagraphs (1) through (4) of this Paragraph. The Board shall grant eligibility to take the ARE to those individuals who:

(1) ~~be~~ are of good moral character as defined in G.S. 83A-1(5);

(2) ~~be~~ are at least 18 years of age;

(3) ~~completion of~~ have completed a NAAB ~~(National Architectural Accrediting Board)~~ accredited professional degree in ~~architecture;~~ architecture or who are actively enrolled in a NAAB accredited degree program that is identified by the college or university as an NCARB endorsed Integrated Path To Architectural Licensure Degree Program;

(4) ~~all applicants who apply for architectural registration by exam are required to be~~ are actively enrolled in the ~~Intern Development Program (IDP) through~~ NCARB IDP or a program approved as equivalent by the North Carolina Board of Architecture as set forth in G.S. 83A-7(a)(2).

~~(5) The Board shall grant eligibility to take the exam, to those individuals who have obtained the required NAAB accredited degree and have enrolled in the NCARB IDP. Upon successful completion of all sections of the ARE and fulfillment of all IDP requirements an individual may submit the application and fee for licensure by exam and may then be granted a license to practice architecture. G.S. 83A-7(a)(1)a. shall be deemed satisfied through completion of the requirements set forth in this Paragraph.~~

(b) Retention of credit for purposes of licensure by examination in North Carolina.

(1) Passing scores received after July 1, 2006 on any part of the ARE remain valid for a period of time established by the exam provider, NCARB and found on the web site at www.ncarb.org.

~~(2) As of July 1, 2011, passing scores received on any part of the ARE prior to July 1, 1996 are invalid.~~

~~(3)~~(2) ~~As of July 1, 2014, passing scores~~ Scores received on any part of the ARE ~~after July 1, 1996 and~~ prior to July 1, 2006 are invalid.

(c) Practical training as indicated in G.S. 83A-7(a)(2) means practical experience and diversified training as defined by the Intern Development Program through the NCARB. However, the Board may judge each case on its own merits.

(d) ~~Personal interview.~~ During the application process, the applicant may be interviewed by the Board members. The purpose of the interview is to augment the evidence submitted in an application with regard to qualifications required in Paragraph (a) of this Rule.

(e) The ARE shall be graded in accordance with the methods and procedures recommended by NCARB. An exam candidate shall receive a passing grade in each division of the ~~Architectural Registration Exam.~~ ARE. Information regarding NCARB grading methods and procedures is found on their web site at www.ncarb.org.

(f) A person currently employed under the responsible control of an architect, who holds a Professional Degree from a NAAB accredited program, and who maintains an active NCARB IDP record or has successfully completed the NCARB IDP may use the title "Architectural Intern" or "Intern Architect" in conjunction with his or her current employment.

Authority G.S. 83A-1; 83A-6; 83A-7.

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CHAPTER 16 – BOARD OF DENTAL EXAMINERS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16H .0104; 16T .0101; and 16W .0101.*

Link to agency website pursuant to G.S. 150B-19.1(c): *www.ncdentalboard.org*

Proposed Effective Date: *February 1, 2016*

Public Hearing:
Date: *November 19, 2015*
Time: *5:45 p.m.*
Location: *2000 Perimeter Drive, Ste. 160, Morrisville, NC 27560*

Reason for Proposed Action: *21 NCAC 16H .0104(3) is proposed for amendment to correct a typographical error; 21 NCAC 16T .0101 is proposed for amendment to clarify requirements for inclusion in patient records; 21 NCAC 16W .0101 is proposed for amendment to permit public health hygienists 120 days from the date of a supervising dentist's evaluation in which to complete the delegated procedures.*

Comments may be submitted to: *Bobby D. White, 2000 Perimeter Park Drive, Ste. 160, Morrisville, NC 27560*

Comment period ends: *December 14, 2015*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

☐ **State funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

SUBCHAPTER 16H – DENTAL ASSISTANTS

SECTION .0100 – CLASSIFICATION AND TRAINING

21 NCAC 16H .0104 APPROVED EDUCATION AND TRAINING PROGRAMS

To be classified as a Dental Assistant II, an assistant shall meet one of the following criteria:

(1) completion of:
  (a) an ADA-accredited dental assisting program and current certification in CPR; or
  (b) one academic year or longer in an ADA-accredited dental hygiene program, and current certification in CPR; or
(2) completion of the Dental Assistant certification examination(s) administered by the Dental Assisting National Board and current certification in CPR; or
(3) completion of:
  (a) a 3-hour course in sterilization and infection control;
  (b) a 3-hour course in dental office emergencies; and
  (c) current certification in CPR.
  (d) after completing Sub-Items ~~(3)(b), (c), and (d)~~ 3(a), (b) and (c) of this Rule, dental assistants may be trained in any dental delivery setting and allowed to perform the functions of a Dental Assistant II under the direct control and supervision of a licensed dentist, except as listed in Sub-Item 3(e) of this Rule.
  (e) dental assistants may take radiographs after completing radiology training consistent with G.S. 90-29(c)(12).

Authority G.S. 90-29(c)(9).

SUBCHAPTER 16T – PATIENT RECORDS

SECTION .0100 – PATIENT RECORDS

21 NCAC 16T .0101 RECORD CONTENT

A dentist shall maintain complete treatment records on all patients for a period of at least 10 years. Treatment records may include such information as the dentist deems appropriate but shall include:

~~(a)~~(1) Patient's full name, address and treatment dates;
~~(b)~~(2) Patient's nearest relative or responsible party;
~~(c)~~(3) Current health history;
~~(d)~~(4) Diagnosis of condition;
~~(e)~~(5) Specific treatment rendered and by whom;
~~(f)~~(6) Name and strength of any medications prescribed, dispensed or administered along with the quantity and date~~.~~ provided;
~~(g)~~(7) Work orders issued during the past two years;
~~(h)~~(8) Treatment plans for patients of record, except that treatment plans are not required for patients seen only on an emergency basis;
~~(i)~~(9) Diagnostic radiographs, final study models and other diagnostic aids, if taken; ~~and~~
~~(j)~~(10) Patients' financial records and copies of all insurance claim ~~forms.~~ forms; and
(11) Rationale for prescribing all narcotics.

Authority G.S. 90-28; 90-48.

SUBCHAPTER 16W – PUBLIC HEALTH HYGIENISTS

SECTION .0100 – PUBLIC HEALTH HYGIENISTS

21 NCAC 16W .0101 DIRECTION DEFINED

Pursuant to G.S. 90-233(a), a public health hygienist may perform clinical procedures under the direction of a licensed dentist, as defined by 21 NCAC 16Y .0104(c) of this Chapter, who is employed by a State government dental public health program or a local health department as a public health dentist. The specific clinical procedures delegated to the hygienist must be completed, in accordance with a written order from the dentist, within ~~60~~ 120 days of the dentist's in-person evaluation of the patient. The dentist's evaluation of the patient shall include a complete oral examination, thorough health history and diagnosis of the patient's condition. Direction of a licensed dentist is not required for public health hygienists who provide only educational information, such as instruction in brushing and flossing.

Authority G.S. 90-223; 90-233(a).

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CHAPTER 52 – BOARD OF PODIATRY EXAMINERS

***Notice** is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the Board of Podiatry Examiners intends to readopt with substantive changes the rule cited as 21 NCAC 52 .0208 and readopt without substantive changes the rules cited as 21 NCAC 52 .0201, .0202, .0204, .0205, .0207, .0209-.0212, .0301-.0303, .0402-.0404, .0408, .0601, .0610, .0612, .0613, .0701-.0703, .0804, .1001-.1005, .1202-.1204, .1301, .1302, and .1401.*

Pursuant to G.S. 150B-21.2(c)(1), the text of the rule(s) proposed for readoption without substantive changes are not required to be published. The text of the rules are available on the OAH website: http://reports.oah.nc.us/ncac.asp.

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncbpe.org/content/executive-board*

Proposed Effective Date: *February 1, 2016*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person wishing to request the board to hold a public hearing on these Rules shall address a petition to the office of the Board of Podiatry Examiners in writing within 15 days after the notice of text is published in the North Carolina Register. The caption of the*

petition shall bear the notation: RULEMAKING PUBLIC HEARING PETITION RE: and then the Rule Number.

Reason for Proposed Action:
21 NCAC 52 .0208 *- The Board is amending this Rule with substantive changes from its first publication in the NC Register 29:24 pages 2803-2805 to allow for a Physician Assistant (PA) to submit a letter certifying a medical illness or condition for a continuing education hardship waiver, to allow for acceptance of a year-long fellowship as valid for 25 continuing medical education (CME) hours, and to comply with new State Laws concerning substance abuse continuing education.*
21 NCAC 52 .0201, .0202, .0204, .0205, .0207, .0209-.0212, .0301-.0303, .0402-.0404, .0408, .0601, .0610, .0612, .0613, .0701-.0703, .0804, .1001-.1005, .1202-.1204, .1301, .1302, and .1401 – *The board is readopting the Rules without any changes from the Periodic Review.*

Comments may be submitted to: *Penny De Pas, Rulemaking Coordinator, NC Board of Podiatry Examiners, 1500 Sunday Dr, Suite 102, Raleigh, NC 27607*

Comment period ends: *December 14, 2015*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).
☐ **State funds affected**
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☐ **Approved by OSBM**
☐ **No fiscal note required by G.S. 150B-21.4**
☒ **No fiscal note required by G.S. 150B-21.3A(d)(2)**

SECTION .0200 – EXAMINATION AND LICENSING

21 NCAC 52 .0201 APPLICATION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0202 EXAMININATION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0204 RE-EXAMINANATION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0205 PRACTICE-AND-ETHICS TRAINING (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0207 ANNUAL RENEWAL OF LICENSE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0208 CONTINUING EDUCATION

(a) An additional requirement for issuance of the annual renewal certificate shall be certification to the board of proof of having complied with the continuing education provisions of the General Statutes. The Board shall notify all podiatrists that 25 hours are required ~~annually.~~ annually, including one hour of controlled substances prescribing practices and controlled substance prescribing for chronic pain management.

(b) General CME policy - 25 hours per year as follows:

(1) Completion of 25 hours of Continuing Medical Education (CME) is required per year (July 1-June 30) for renewal of licensure. CME credits shall not be carried over from the previous licensure year.

(2) It shall be the responsibility of the individual podiatrist to ascertain in advance that the courses which he or she attends have received proper approval of the certifying organizations, and comply with the *Standards, Requirements, and Guidelines for Approval of Sponsors of Continuing Education in Podiatric Medicine* of the Council on Podiatric Medical Education (http://www.cpme.org/education/content.cfm?ItemNumber=2440&navItemNumber0=2249), including updates. The website may be accessed at no charge. The Board shall respond in writing within 45 days of receipt by the Board of all needed documentation with approval or denial to individuals requesting approval of CME courses and credit hours. Decisions by the Board are the final agency decision and may be appealed as set out in G.S. 150B-23.

(3) Certificates of completion of courses other than those sponsored by the NC Foot and Ankle Society (NCF&AS) must be submitted to the Board on a form provided by the Board with the podiatrist's annual license renewal documents. Completion certificates must be typed and contain the following information:
(A) Podiatrist's name;
(B) Course name, location, and date;
(C) Number of hours CME completed;
(D) Signature of seminar chairperson; and
(E) Name of certifying or sponsoring agency.

(4) A licensed podiatrist participating in the second or third year of a medical residency or

fellowship may submit a letter signed by the podiatric residency or fellowship director stating the podiatrist's name and dates of residency. This shall substitute for the 25-credit hour requirement and CME certificate required by this Rule.

(5) A podiatrist may submit his or her CME certificate(s) to the Board in facsimile, electronic, or hard copy format at any time during the renewal year.

(6) The Board shall retain CME documentation with the individual podiatrist's license renewal information.

(c) Category 1: Minimum requirement 20 hours per year, as follows:

(1) CME credit shall be granted for attendance at educational seminars offered by the NCF&AS. The number of qualifying hours of continuing education shall be determined and approved by the Board in advance based on the standards in 90-202.11. NCF&AS shall provide the Board directly with a listing of individuals attending its CME events and credits earned.

(2) CME credit shall be granted for attendance at educational seminars or live webinars offered by other national, state and podiatric education providers, as certified by the Council on Podiatric Medical Education (CPME) of the American Podiatric Medical Association (APMA). The number of qualifying hours of continuing education shall be determined and approved by the Board.

(3) Lecturers shall be granted one hour of credit for each hour of CPME- or APMA- approved lectures given, but such credit shall be limited to one hour for each discrete topic. A brief summary of the content of each lecture must be submitted to the Board for approval.

(4) Category 1 is limited to educational seminars either offered by NCF&AS or by sponsors pre-approved by CPME: http://www.cpme.org (CPME 700: "Approved Sponsors of Continuing Education in Podiatry"). (APMA- or CPME- approved online or journal courses are considered Category 2.)

(5) Since CPME evaluates only CME conducted in the United States, North Carolina-licensed podiatrists practicing outside the United States or participating in a foreign fellowship or other short-term residency abroad, may apply to the Board to have their continuing medical education credits from their country of practice considered and evaluated by the Board on an individual basis.

(d) Category 2: A maximum of only 5 of the total 25 CME hours per year shall be allowed as follows:

(1) CME credit shall be allowed for educational programs approved for Category 1 credit by the American Medical Association (AMA) and the American Osteopathic Association (AOA) or their affiliated organizations.

(2) CME credit shall be allowed for courses approved by North Carolina Area Health Education Centers (AHEC).

(3) Online or medical journal courses approved by CPME are permitted.

(4) For courses not pre-approved by AHEC, AOA, or AMA, all requests for CME approval must contain a timeline and course description and be submitted to the Board for approval.

(e) Waiver for Certified Illness, Medical Condition, Natural Disaster, or Undue Hardship. The Board may waive the continuing education requirement for license renewal in the following cases that preclude a licensed podiatrist from completing his or her CME requirement within the 18-month timeframe from July 1 of the year of the last license or renewal issuance through December 31 of the following year:

(1) An unexpected illness or medical condition certified by a letter from a licensed physician or physician assistant (PA) regarding the licensee or the licensee's parents, spouse, children and other persons dependent upon the podiatrist for daily living supports; or

(2) An undue hardship (such as active military service or natural disaster).

In such cases, the Board shall issue a conditional license predicated on the licensee acquiring all of the required continuing education credits in a mutually-agreeable timeframe, but no later than 24 months after December 31 of the year following the latest year of license or renewal issuance. Such requests for CME waiver must be received by the Board before the end of the grace period deadline for license renewal. The Board may require additional information when necessary to confirm the need for exemption to support the licensee's claim. The Board shall notify the licensee of its decision in writing within 45 days of receipt by the Board of all needed documentation.

Authority G.S. 90-202.4(g); 90-202.11; S.L. 2015-241, s. 12F.16(b) and (c).

21 NCAC 52 .0209 APPLICANTS LICENSED IN OTHER STATES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0210 FEE FOR VALIDATION OF LICENSEE LISTS; COMPUTER SERVICES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0211 MILITARY LICENSE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0212 SPECIALTY CREDENTIALING PRIVILEGES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0300 – PROFESSIONAL CORPORATIONS

21 NCAC 52 .0301 REGISTRATION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0302 ANNUAL RENEWAL (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0303 PENALTIES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0400 - REVOCATION OR SUSPENSION OF LICENSE

21 NCAC 52 .0402 HEARINGS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0403 SERVICE OF NOTICE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0404 PLACE OF HEARINGS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0408 APPEAL (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0600 – GENERAL PROVISIONS

21 NCAC 52 .0601 APPLICATION FOR EXAMINATION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0610 APPL/EXAM/PODIATRIST LICENSED/OTHER STATES (RECIPROCITY) (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0612 PAYMENT OF FEES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0613 FEE SCHEDULE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0700 – PETITIONS FOR RULES

21 NCAC 52 .0701 PETITION FOR RULEMAKING HEARINGS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0702 CONTENTS OF PETITION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .0703 DISPOSITION OF PETITIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0800 - NOTICE OF RULEMAKING HEARINGS

21 NCAC 52 .0804 NOTICE MAILING LIST (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .1000 - DECLARATORY RULINGS

21 NCAC 52 .1001 SUBJECTS OF DECLARATORY RULINGS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1002 SUBMISSION OF REQUEST FOR RULING (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1003 DISPOSITION OF REQUESTS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1004 RECORD OF DECISION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1005 DEFINITION (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .1200 - ADMINISTRATIVE HEARINGS: DECISIONS: RELATED RIGHTS AND PROCEDURES

21 NCAC 52 .1202 SIMPLIFICATION OF ISSUES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1203 SUBPOENAS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1204 FINAL DECISIONS IN ADMINISTRATIVE HEARINGS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .1300 - NOMINATIONS FOR PODIATRISTS MEMBERS OF THE BOARD OF PODIATRY EXAMINERS: BOARD OF PODIATRY EXAMINERS CONSTITUTING A BOARD OF PODIATRY ELECTIONS: PROCEDURES FOR HOLDING AN ELECTION

21 NCAC 52 .1301 BOARD OF PODIATRY ELECTIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

21 NCAC 52 .1302 PROCEDURES FOR CONDUCTING ELECTIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .1400 – SCOPE OF PRACTICE

21 NCAC 52 .1401 SOFT TISSUE PROCEDURES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

This Section contains information for the meeting of the Rules Review Commission Septmeber 17, 2015 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate	**Appointed by House**
Jeff Hyde (1st Vice Chair)	Garth Dunklin (Chair)
Margaret Currin	Stephanie Simpson (2nd Vice Chair)
Jay Hemphill	Anna Baird Choi
Faylene Whitaker	Jeanette Doran
	Ralph A. Walker

COMMISSION COUNSEL

Abigail Hammond	(919)431-3076
Amber Cronk May	(919)431-3074
Amanda Reeder	(919)431-3079
Jason Thomas	(919)431-3081

RULES REVIEW COMMISSION MEETING DATES

October 15, 2015	November 19, 2015
December 17, 2015	January 21, 2016

RULES REVIEW COMMISSION MEETING
MINUTES
September 17, 2015

The Rules Review Commission met on Thursday, September 17, 2015, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Garth Dunklin, Jay Hemphill, Jeff Hyde, Stephanie Simpson, and Faylene Whitaker.

Staff members present were Commission Counsels Abigail Hammond, Amber Cronk May, Amanda Reeder, and Jason Thomas; and Julie Brincefield, Alex Burgos, and Dana Vojtko.

The meeting was called to order at 10:03 a.m. with Chairman Dunklin presiding.

Chairman Dunklin read the notice required by G.S. 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts.

Chairman Dunklin announced the retirement of Jim Wellons with the Department of Justice.

APPROVAL OF MINUTES

Chairman Dunklin asked for any discussion, comments, or corrections concerning the minutes of the August 20, 2015 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS

Veterans Affairs Commission

01 NCAC 26B .0104, .0105, and .0106 – All rules were unanimously approved.

Environmental Management Commission

15A NCAC 02B .0295 – There has been no response by the agency, therefore no action was required by the Commission. The review of this Rule will occur at the October meeting.

Board of Electrolysis Examiners

21 NCAC 19 .0501 and .0701 – Both rules were unanimously approved.

Board of Massage and Bodywork Therapy
21 NCAC 30 .0201 and .0701 - Both rules were unanimously approved.

21 NCAC 30 .0702, .1001, .1002, .1003, .1004, .1005, .1006, .1007, .1008, .1009, .1010, .1011, .1012, .1013, .1014, and .1015 - The Commission objected to Rule 21 NCAC 30 .0702, finding the agency failed to comply with the Administrative Procedure Act. Specifically, the Commission found that changing the contact hours' equivalency for a semester credit hour at a post-secondary institution from "21" to "15" in Item (3) after publication constitutes a "substantial change" pursuant to G.S. 150B-21.2(g).

The Commission objected to Rules 21 NCAC 30 .1001 through .1015, finding the Board of Massage and Bodywork Therapy lacks the statutory authority to promulgate these rules regulating establishments.

In addition to the overall objection to Rules 21 NCAC 30 .1001 through .1015 for lack of statutory authority, the Commission issued additional objections to Rules 21 NCAC 30 .1002, .1003, .1004, .1005, .1008, .1013, .1014, and .1015.

The Commission objected to Rule 21 NCAC 30 .1002 for lack of statutory authority to charge "the fee set forth in G.S. 90-628(b)(1) and (2)" contained in Subparagraph (a)(1). The Commission also objected to the requirement that establishments provide "proof of property damage and bodily injury liability insurance coverage" contained in Subparagraph (a)(2) for lack of statutory authority.

The Commission objected to Rule 21 NCAC 30 .1003 for lack of statutory authority to charge "the required fees required in Rule .1013 of this Chapter." The Commission also objected to the requirements contained in Items (2), (3), and (4) for lack of statutory authority. Further, the Commission objected to the requirement in Item (7) as being unclear and ambiguous. Item (7) requires that the applicant has "satisfied G.S. 90-629(3)." G.S. 90-629(3) requires that the applicant be "of good moral character as determined by the Board." As written, the Rule provides no additional information regarding how "good moral character" will be determined by the Board.

The Commission objected to Rule 21 NCAC 30 .1004 for lack of statutory authority as not being "necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board."

The Commission objected to Rule 21 NCAC 30 .1005 for lack of statutory authority as not being "necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board."

The Commission objected to Rule 21 NCAC 30 .1008 for lack of statutory authority to charge the fee contained in Paragraphs (a) and (b).

The Commission objected to Rule 21 NCAC 30 .1013 for lack of statutory authority to charge the fees contained in this Rule. The Commission also objected to this Rule as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments.

The Commission objected to Rule 21 NCAC 30 .1014 for lack of statutory authority to charge the fees contained in Paragraph (a). The Commission also objected to this Rule as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments.

The Commission objected to Rule 21 NCAC 30 .1015 as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments. It also objected to the requirement that "the applicant provide all documentation related to the applicant's compliance with G.S. 90-629(3)." G.S. 90-629(3) requires that the applicant be "of good moral character as determined by the Board." As written, the Rule provides no additional information regarding how "good moral character" will be determined by the Board.

Prior to the discussion of the rules from the Board of Massage and Bodywork Therapy, Commissioner Currin recused herself and did not participate in any discussion or vote concerning these Rules because she has a contract for services with a party opposing these Rules.

Prior to the discussion of the rules from the Board of Massage and Bodywork Therapy, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these Rules because she has a possible conflict with representation of her husband's law firm.

Charles Wilkins with the agency addressed the Commission.

Attorney Mitchell Armbruster representing Massage Envy Spa addressed the Commission.

Dr. Ed Preston with the agency addressed the Commission.

Building Code Council
2011 NC Electrical Code – 300.9 – There has been no response by the agency, therefore no action was required by the Commission.

The Commission took a break at 11:43 a.m., and returned from the break at 11:56 a.m.

LOG OF FILINGS (PERMANENT RULES)
Child Care Commission
All rules were unanimously approved.

The Commission received over 10 letters of objection in accordance with G.S. 150B-21.3(b2), requesting a delayed effective date and legislative review for the approved rules.

DHHS/Division of Health Service Regulation
All rules were unanimously approved.

Radiation Protection Commission
All rules were unanimously approved.

Commission for Public Health
10A NCAC 41A .0101 was unanimously approved.

Private Protective Services Board
All rules were unanimously approved.

Jeff Gray, representing the Board, addressed the Commission.

Wildlife Resources Commission
15A NCAC 10F .0333 was unanimously approved.

Property Tax Commission
The Commission voted to extend the period of review for these Rules in accordance with G.S. 150B-21.10 and G.S. 150B-21.13. The Commission extended the period of review to allow the North Carolina Property Tax Commission additional time to revise the rules in response to the technical change requests and to review the staff opinions.

Board of Architecture
21 NCAC 02 .0703 was unanimously approved.

Prior to the discussion of the rules from the Board of Architecture**,** Commissioner Choi recused herself and did not participate in any discussion or vote concerning these Rules as her law firm provides legal representation to the board.

Board of Examiners for Nursing Home Administrators
All rules were unanimously approved.

Prior to the discussion of the rules from the Board of Examiners for Nursing Home Administrators**,** Commissioner Choi recused herself and did not participate in any discussion or vote concerning these Rules as her law firm provides legal representation to the board.

EXISTING RULES REVIEW

Commission of Navigation Pilotage for the Cape Fear River and Bar
04 NCAC 15 - The Commission unanimously approved the report as submitted by the agency.

DHHS/Commission for the Blind
10A NCAC 63 – The Commission unanimously approved the report as submitted by the agency.

Commission for Public Health
15A NCAC 18C – The Commission unanimously approved the report as submitted by the agency.

COMMISSION BUSINESS

Commissioners and Commission counsel discussed consistency in review of rules.

The meeting adjourned at 1:11 p.m.

The next regularly scheduled meeting of the Commission is Thursday, October 15th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings /Rules Division.

Respectfully Submitted,

_____
Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:

_____
Garth Dunklin, Chair

September 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Nadine Pfeiffer	DHSR
[illegible]	DHSR
Stefany Lewis	DHSR
Wendi Amos	NC Veterans Affairs Commission
Wayne Peedin	DCA/Veterans Affairs
Mitch Armbrustfx	NC Massage Board Rules / Private Attorney
Bethany Burgess	DOJ / DHHS
Jenny Rollins	DHSR - RPS
Jon Granger	DHSR - RPS
Christy	DHSR - RPS
Lee Cox	DHSR - RPS
[illegible]	SOS
Elizabeth Kirk	NCBMBT
Charles Wilkins	NCBMBT
Ed Preston, MD	NCBMBT
Bill Ranslee	DOA - VA
Jessica Godreau	DENR
[illegible]	DHHS
Tracy Hipp	DHHS
Karen Higgins	DENR
Melissa Reed	PPSAT

September 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Susanna Birdsong	ACLU
Kate Pipkin	NCWRC
Jeff Hawk	PPSB
G. Ann Christian	AMTA-NC
Jim Wellons	DOJ
Christina Cress	NCBFS
Jennifer Everett	DENR
Martha Bell	NC Bd. of NHA
Jane Baker	NC Bd of NHA
Bob MARTIN	NC DPM
Janet Shires	NC PTC

LIST OF APPROVED PERMANENT RULES
September 17, 2015 Meeting

VETERAN AFFAIRS COMMISSION

Forms and Instructions	01 NCAC 26B .0104
Where to Obtain Forms	01 NCAC 26B .0105
Delegation of Authority	01 NCAC 26B .0106

CHILD CARE COMMISSION

License	10A NCAC 09 .2902
Staff Qualifications	10A NCAC 09 .2903

HHS - HEALTH SERVICE REGULATION, DIVISION OF

Definitions	10A NCAC 14E .0101
Plans	10A NCAC 14E .0104
Renewal	10A NCAC 14E .0109
Inspections	10A NCAC 14E .0111
Building Code Requirements	10A NCAC 14E .0201
Sanitation	10A NCAC 14E .0202
Elements and Equipment	10A NCAC 14E .0206
Area Requirements	10A NCAC 14E .0207
Governing Authority	10A NCAC 14E .0302
Policies and Procedures and Administrative Records	10A NCAC 14E .0303
Admission and Discharge	10A NCAC 14E .0304
Medical Records	10A NCAC 14E .0305
Personnel Records	10A NCAC 14E .0306
Nursing Service	10A NCAC 14E .0307
Quality Assurance	10A NCAC 14E .0308
Laboratory Services	10A NCAC 14E .0309
Emergency Back-Up Services	10A NCAC 14E .0310
Surgical Services	10A NCAC 14E .0311
Post-Operative Care	10A NCAC 14E .0313
Housekeeping	10A NCAC 14E .0315

RADIATION PROTECTION COMMISSION

Definitions	10A NCAC 15 .0502
Radiation Machines	10A NCAC 15 .0518
Purpose and Scope	10A NCAC 15 .0801
Definitions	10A NCAC 15 .0802
Equipment Requirements	10A NCAC 15 .0803
Area Requirements	10A NCAC 15 .0804
Operating Requirements	10A NCAC 15 .0805
Personnel Requirements	10A NCAC 15 .0806
Permanent Radiographic Installation and Industrial Radiop...	10A NCAC 15 .0807

Applicable Rules for Bomb Detection RGDS	10A	NCAC 15	.0808
PUBLIC HEALTH, COMMISSION FOR			
Reportable Diseases and Conditions	10A	NCAC 41A	.0101
PRIVATE PROTECTIVE SERVICES BOARD			
Purpose	14B	NCAC 16	.0101
Training Requirements for Armed Security Guards	14B	NCAC 16	.0807
Requirements for Firearms Trainer Certificate	14B	NCAC 16	.0901
Renewal of a Firearms Trainer Certificate	14B	NCAC 16	.0904
Unarmed Trainer Certificate	14B	NCAC 16	.0909
Training Requirements for Armed Armored Car Service Guards	14B	NCAC 16	.1407
WILDLIFE RESOURCES COMMISSION			
Mecklenburg and Gaston Counties	15A	NCAC 10F	.0333
ARCHITECTURE, BOARD OF			
Subpoenas	21	NCAC 02	.0703
ELECTROLYSIS EXAMINERS, BOARD OF			
Supervising Physician	21	NCAC 19	.0501
Continuing Education Requirements, License Renewal, Reins...	21	NCAC 19	.0701
MASSAGE AND BODYWORK THERAPY, BOARD OF			
Application and Scope	21	NCAC 30	.0201
Continuing Education Requirements	21	NCAC 30	.0701
NURSING HOME ADMINISTRATORS, BOARD OF EXAMINERS FOR			
Initial Licensure Fee	21	NCAC 37D	.0202
Required Course	21	NCAC 37D	.0303
Application to Become Administrator-In-Training	21	NCAC 37D	.0402
Administrator-In-Training Selection of Preceptor	21	NCAC 37D	.0404
National Exam Application	21	NCAC 37D	.0602
State Examination Administration	21	NCAC 37D	.0703
Application Process	21	NCAC 37E	.0101
Application Contents	21	NCAC 37E	.0102
Issuance of Temporary License	21	NCAC 37F	.0102
Renewal Fee	21	NCAC 37G	.0102
Inactive Requirements	21	NCAC 37G	.0201
Duplicate License Requirements	21	NCAC 37G	.0401
Continuing Education Programs of Study	21	NCAC 37H	.0102

RRC DETERMINATION
PERIODIC RULE REVIEW
September 17, 2015
Necessary with Substantive Public Interest

Navigation and Pilotage for the Cape Fear River and Bar, Commission of
04 NCAC 15 .0119
04 NCAC 15 .0121
04 NCAC 15 .0123
04 NCAC 15 .0124
04 NCAC 15 .0127
04 NCAC 15 .0128

DHHS - Services for the Blind
10A NCAC 63A .0101
10A NCAC 63C .0102
10A NCAC 63C .0202
10A NCAC 63C .0203
10A NCAC 63C .0205
10A NCAC 63C .0206
10A NCAC 63C .0401
10A NCAC 63C .0402
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10A NCAC 63C .0601
10A NCAC 63C .0603
10A NCAC 63C .0604
10A NCAC 63C .0702
10A NCAC 63C .0704
10A NCAC 63F .0101
10A NCAC 63F .0102
10A NCAC 63F .0402

Public Health, Commission for
15A NCAC 18C .0102
15A NCAC 18C .0202
15A NCAC 18C .0203
15A NCAC 18C .0305
15A NCAC 18C .0307
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RRC DETERMINATION
PERIODIC RULE REVIEW
September 17, 2015
Necessary without Substantive Public Interest

Navigation and Pilotage for the Cape Fear River and Bar, Commission of
04 NCAC 15 .0118
04 NCAC 15 .0120
04 NCAC 15 .0122
04 NCAC 15 .0125
04 NCAC 15 .0126

DHHS - Services for the Blind
10A NCAC 63A .0201
10A NCAC 63B .0101
10A NCAC 63B .0102
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10A NCAC 63F .0627
10A NCAC 63G .0101
10A NCAC 63G .0102
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Public Health, Commission for
15A NCAC 18C .0201
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15A NCAC 18C .2104
15A NCAC 18C .2105
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15A NCAC 18C .2202

RRC DETERMINATION
PERIODIC RULE REVIEW
September 17, 2015
Unnecessary

DHHS - Services for the Blind
10A NCAC 63B .0107
10A NCAC 63C .0301
10A NCAC 63C .0303
10A NCAC 63C .0502
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10A NCAC 63C .0602
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Public Health, Commission for
15A NCAC 18C .1211
15A NCAC 18C .1513
15A NCAC 18C .1514
15A NCAC 18C .1517
15A NCAC 18C .1533
15A NCAC 18C .2103

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Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter
Don Overby
J. Randall May
A. B. Elkins II
Selina Brooks
Phil Berger, Jr.
J. Randolph Ward

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FILED
OFFICE OF ADMINISTRATIVE HEARINGS
8/21/2015 11:58 AM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14ABC07103

N C Alcoholic Beverage Control Commission Petitioner, v. Partnership T/A Poor Boys Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward on May 13, 2015, in Fayetteville, North Carolina, upon the Petition of the N.C. Alcoholic Beverage Control Commission, to determine if Respondent has violated the alcoholic beverage control laws, and if so, to impose sanctions pursuant to N.C. Gen. Stat. § 18B-104(a).

APPEARANCES

For Petitioner: Timothy W. Morse, Asst. Counsel
N.C. ABC Commission
Raleigh, N.C.

Respondent: *Pro se*

ISSUE

Whether Permittee's employee sold a malt beverage to a person less than 21 years old, while on licensed premises in violation of N.C. Gen. Stat. §18B-302(a)(1)?

UPON DUE CONSIDERATION of the arguments of counsel; the exhibits admitted; the sworn testimony of each of the witnesses in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they might have, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent holds Off Premises Malt Beverage and Unfortified Wine permits issued by Petitioner N.C. Alcoholic Beverage Control Commission (hereinafter "Petitioner" or "the Commission"). On May 29, 2014, Cumberland County ABC Officers conducted a series

of sale-to-underage compliance checks in Cumberland County. A compliance check was conducted at Respondent's business premises in Wade, North Carolina.

2. During the compliance check, Patrick Ashley, accompanied by ABC Officer R. Skidmore, entered Respondent's business, Poor Boys, to attempt to purchase a malt beverage.

3. Patrick Ashley was born on March 30, 1995, making him 19 years of age on the date of the compliance check. During the compliance check, Mr. Ashley carried his North Carolina "Full Provisional" Driver's License. (P. Exs. 3 and 3B.) In addition to Mr. Ashley's date of birth, the Driver's License contained, next to his photograph, the following statement: "Turns 21 on 3-30-2016."

4. Upon entry into Poor Boys, Mr. Ashley selected a 25-ounce can of Bud Light malt beverage from the refrigerator and proceeded to the checkout counter to make the purchase. The clerk, Nacy Waskas, asked Mr. Ashley for his identification. After looking at Mr. Ashley's driver's license for a moment, Ms. Waskas asked where his birth date was, and Ashley pointed to it at the bottom of the card. Immediately thereafter, Ms. Waskas sold the malt beverage to Mr. Ashley.

5. Mr. Ashley exited the business and gave the malt beverage to Officer K. Whittenton, who bagged, marked, and later photographed the malt beverage for use as evidence. Officer Skidmore cited Ms. Waskas and informed her that the permittee would be issued an ABC violation as well because she had sold alcohol to a person under 21 years of age. Ms. Waskas stated to Officer Skidmore that she had done so by mistake.

6. Respondent was not represented by counsel, but took actions in its own behalf in the litigation. Mr. Robert Bethea, vice president of the firm, notified the Office of Administrative Hearings ("OAH") that due to health problems they each had, neither he nor Ms. Waskas would appear at the scheduled hearing. However, he declined to ask for an additional continuance on those grounds, argued that Officer Skidmore's testimony would be exculpatory, and asked that OAH proceed to decide the case. He was informed that the case would be decided based on the evidence presented at hearing. No one appeared or produced evidence on behalf of Respondent at the hearing.

7. The uncontradicted evidence shows that on May 29, 2014, Ms. Waskas, Respondent's clerk, sold an alcoholic malt beverage to a person less than 21 years old, and consequently, regardless of her intent or comprehension of Mr. Ashley's age, Respondent is subject to sanction for this violation of the alcoholic beverage control laws.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the controversy in this matter pursuant to N.C. Gen. Stat. § 18B-906(a).

2. N.C. Gen. Stat. § 18B-302(a)(1) "Sale to or purchase by underage persons" states that, "It shall be unlawful for any person to: Sell malt beverages to anyone less than 21 years old."

3. The preponderance of the evidence shows that on May 29, 2014, Respondent's employee sold an alcoholic malt beverage to a person less than 21 years old in violation of N.C. Gen. Stat. § 18B-302(a)(1).

NOW THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

Respondent's ABC permits shall be suspended for 15 days, and Respondent shall pay a monetary penalty of $500.00 on dates to be determined by Petitioner.

MEMORANDUM OF DECISION
(26 NCAC 03 .0127(c)(8))

One plausible inference of the evidence adduced at the hearing is that Respondent's clerk, Ms. Waskas, sold the alcoholic beverage to Petitioner's underage buyer mistakenly, without the intent to sell it to a person under 21 years of age. The fact that she asked him to point out his birthday suggests that she was not merely going through the motions of "carding" the youth, just in case others in the store were watching. If she genuinely did not know where to look for the birthday on a provisional driver's license--on which the information is printed vertically--she may have felt flustered and hurried when calculating Mr. Ashley's age and simply erred.

Can the clerk and her employer be found to have violated the statute if she did not know or intend to be selling alcohol to a person under the age of 21? The statute does not specify that a defendant must "knowingly" carry out the transaction to be convicted. However, a recent Court of Appeals case makes clear that under applicable common law, that omission is not necessarily determinative. This case discusses circumstances under which an intent requirement should be understood to be implied. See, *State v. Huckelba*, ___ N.C. App. ___, 771 S.E.2d 809, 2015 WL 1788725 (No. COA14-916, 21 Apr. 2015). In this case, the Court reversed a jury's guilty verdict for "possessing a weapon on educational property" (i.e., the High Point University campus) rendered under the trial judge's instruction that "Defendant was guilty … even if she did not know she was on educational property." *Id.*, 771 S.E.2d at 812 (internal cites omitted throughout).

When this question is raised, the statute should be analyzed under the "following principles of statutory construction: (1) the common law presumption against criminal liability without a showing of *mens rea*; (2) the General Assembly's intent in enacting and amending the statute; and (3) the rule of lenity," i.e., when there is "more than one plausible reading that comports with the legislative purpose in enacting the statute," a criminal statute should be "strictly construed" to require that the State prove a defendant's wrongful intent. *Id.*, 771 S.E.2d at 816 & 823.

It should be acknowledged that the *Huckelba* Court meaningfully observed that, "The first principle of statutory construction articulated by the federal courts is the common law presumption that criminal culpability requires a guilty mind, or some knowledge that the actor is performing a wrongful act" and concluded that the "rule of lenity" was applicable in *Huckelba*. However, the ABC statute involved in this case appears to fit in another part of the Court's analytical framework: "In North Carolina, the 'cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished.' McLeod v. Nationwide Mutual Ins. Co., 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994)." *Id.*, 771 S.E.2d at 816.

> There is, however, an exception to the general presumption favoring a *mens rea* requirement which we must address before we may conclude that the "knowingly" mental state should be read [into the statute] .... The United States Supreme Court has recognized that in certain cases, where the prohibited activity deals with "public welfare" or "regulatory" offenses, Congress may impose a form of strict criminal liability. Typically, these cases "involve statutes that regulate potentially harmful or injurious items."

State v. Huckelba, 771 S.E.2d at 817-18. The leading example in the case law is illegal possession of hand grenades. See *United States v. Freed,* 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), wherein the Court reasoned that a defendant "would hardly be surprised to learn that possession of a hand grenade is not an innocent act." This "public welfare exception" has also been applied to crack cocaine—like alcohol, a legally controlled (albeit, legal) consumable substance. *United States v. Cook*, 76 F.3d 596, 601 (4th Cir.1996). Our Court of Appeals has characterized the penalties in §18B-104 imposed in this case as "administrative." See, *Hall v. Toreros, II, Inc.*, 626 S.E.2d 861, 868, 176 N.C. App. 309 (2006).

In finding that the "public welfare exception" did not apply in their case, the *Huckelba* Court pointed out that "knowingly possessing or carrying . . . a gun is not, on its own, a criminal act.... In fact, the mere act of possessing or carrying a gun accordance with the law is stringently protected by both the United States and North Carolina Constitutions." *Id.*, 771 S.E.2d at 817. While normally less dangerous than hand grenades, mere possession of alcohol by underage drinkers is likewise itself the evil to be avoided, and penalized, given the near certainty that possessors will consume it.

That fact also has implications for another consideration of particular importance in the regulatory scheme for preventing underage drinking. The Legislature will not be presumed to have intended to "saddle[ ] [law enforcement] with an unduly heavy burden of proving a defendant's subjective knowledge." *Huckelba*, at 821. The *Huckelba* Court took note of *United*

States v. Langley, 62 F.3d 602 (4th Cir.1995), wherein the Fourth Circuit considered "a federal statute prohibiting felons from possessing firearms which have been shipped or transported through interstate commerce" and "read a mental state requirement into the 'possession' element, but refused to read a mental state requirement into the other two elements of the crime," status as a felon, and movement of the firearm through interstate commerce. *Id.* at 606. The Court of Appeals contrasted that statute to the one at issue in *Huckelba*, in which a *mens rea* element would require that "the State need only prove a defendant's knowledge of her presence on educational property by reference to the facts and circumstances surrounding the case," such as a "school building … with children," versus "an empty parking lot that is open to the public." *Huckelba*, at 820-21.

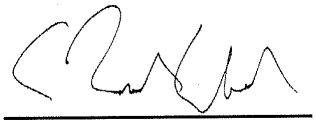
There are no comparable external "facts and circumstances" with which to divine the thoughts of a store clerk. The apparent purpose of §18B-302(a) and the penalties for its violation in §18B-104 are to enforce the permittee alcohol vendor's obligation to see that a conscientious and competent effort is made to prevent sales to persons under 21 years of age (and not primarily to punish scofflaw clerks). Rewarding the permittee with higher revenues, without fines, if it employs ignorant, careless or incompetent clerks who unintentionally make illegal sales is not a reasonable outcome. To err is human and that may very well be all that Ms. Waskas was guilty of on May 29, 2014. The Commission can exercise prosecutorial discretion when it thinks leniency is due or serves its mission. However, it appears that the applicable statute creates a "public welfare or regulatory offense[]" enforced by "a form of strict criminal liability," without regard to intent.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 21st day of August, 2015.



J.Randolph Ward
Administrative Law Judge

NORTH CAROLINA	**OFFICE OF ADMINISTRATIVE HEARINGS**
PENDER COUNTY	**14 CPS 5077**

ANNE MARIE BRANDT

Petitioner

v

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

Respondent

FINAL DECISION

This matter coming on to be heard and being heard on May 14, 2015 in Brunswick County, North Carolina, and the Petitioner appeared pro se, and the Respondent was represented by Assistant Attorney General Yvonne V. Ricci; based upon the evidence presented and the arguments of the parties, the undersigned makes the following findings of fact:

1. Petitioner is a citizen and resident of Pender County, North Carolina.

2. Respondent is the Division of Victim Compensation Services within the North Carolina Department of Public Safety. Respondent is created under Chapter 15B of the North Carolina General Statutes and charged with administering the Crime Victims Compensation Fund in North Carolina.

3. On May 28, 2014, Respondent denied Petitioner's claim for victim's compensation after their investigation concluded that the "victim engaged in misconduct that contributed to the circumstances which resulted in the injury from which this claim for compensation arises," citing N.C. Gen. Stat. § 15B-11(b).

4. Petitioner timely filed her Petition for a contested case hearing on July 7, 2014.

5. Respondent relies on N.C. Gen. Stat. § 15B-11(b) and (b1) as the basis for its denial of Petitioner's claim, which provides:

> (b) A claim may be denied or an award of compensation may be reduced if
> (1) The victim was participating in a non-traffic misdemeanor at or about the time that the victim's injury occurred; or
> (2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct.

> (b1) The Commission or Director [Respondent] . . . shall exercise discretion in determining whether to deny a claim under subsection (b) of this section. In exercising discretion, the Commission or Director shall consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct, when applicable. The Director or Commission shall deny claims when it finds that there was contributory misconduct that is a proximate cause of becoming a victim. However, contributory misconduct that is not a proximate cause of becoming a victim shall not lead to an automatic denial of a claim.

N.C. Gen. Stat. § 15B-11(b)(1), (b)(2), and (b1).

6. On September 21, 2013, Pender County deputies were dispatched to a reported domestic disturbance at Petitioner's residence in Hampstead, North Carolina.

7. Deputy David Stancil testified that the Petitioner came outside the residence and told the law enforcement officers that she and her husband, Winston Brandt, had gotten into an argument about her unplugging the cable to his television.

8. The Petitioner told law enforcement that Mr. Brandt threw the television remote control at her, took her cell from her, grabbed her by the arms, threw her to the ground, banged her head on the floor multiple times, and threatened to kill her. The Petitioner told the deputies that Mr. Brandt was in the back of the residence and had multiple guns. (Resp. Ex. 2; Testimony of Deputy Stancil)

9. Deputy Stancil and Deputy Matthew Sellers went to the back of the residence to locate Mr. Brandt who was standing outside. Deputies Stancil and Sellers testified that they did not locate any weapons during their search of the scene. (Resp. Ex. 2; Testimony of Deputies Stancil and Sellers)

10. There was evidence of some type of struggle in the residence, and Mr. Brandt had two small lacerations to the left side of his forehead, a small laceration to the ring finger of his left hand, and two small lacerations to the shin area of his left leg. According to Deputy Stancil, the injuries sustained by Mr. Brandt were consistent with his version of what had occurred in the residence that evening.

11. While the Petitioner complained of an injury to her head and right thigh Deputies Stancil and Sellers did not see any visible marks on Mrs. Brandt. (Resp. Ex. 2; Testimony of Deputies Stancil and Sellers)

12. EMS was called to the scene to provide medical care to the Petitioner. Mrs. Brandt was evaluated by EMS, but she refused transport to a medical facility.

13. Deputy Stancil, a fifteen year paramedic, spoke with paramedics that reported to the scene, and they told him that they did not find any bruising to the Petitioner's head.

14. The Petitioner was taken into custody and transported to the Pender County jail where she appeared before a magistrate and was charged with simple assault.

15. Following the Petitioner being searched and processed into the custody of the Pender County jail she also was charged with misdemeanor possession of drug paraphernalia. (Resp. Ex. 2; Testimony of Deputies Stancil, Sellers, and Murray)

16. Mr. Brandt was taken into custody and charged with misdemeanor assault on a female, misdemeanor interference with emergency communication, and misdemeanor communicating threats. (Resp. Ex. 2; Testimony of Deputy Stancil)

17. Petitioner failed to cooperate with prosecutors in the charges against Mr. Brandt.

18. All the charges brought against the parties as a result of this incident were voluntarily dismissed.

19. Ms. Liddie Shropshire, a fourteen year Claims Investigator for the N.C. Department of Public Safety, Division of Victim Compensation Services was assigned to investigate and process the claim submitted by the Petitioner

20. Ms. Shropshire recommended that Petitioner's claim be denied due to contributory misconduct and misdemeanor criminal activity. (Resp. Exs. 1, 3 and 4; Testimony of Shropshire)

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. Both parties received proper notice of this hearing.

3. Respondent has the authority and responsibility under Chapter 15B of the North Carolina General Statutes to investigate and award or deny claims for compensation under the Crime Victims Compensation Act.

4. To meet the requirements for an award, Petitioner must show she is a "claimant" and has incurred an "allowable expense" as or on behalf of a "victim" of "criminally injurious conduct." N.C. Gen. Stat. § 15B-2(2), (1), (5), (13).

5. In addition, Petitioner bears the burden of showing none of the disqualifying criteria in N.C. Gen. Stat. § 15B-11 operate to bar his claim. See *Richardson v. N.C. Dep't of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 228, 681 S.E.2d 479, 485 ("It is well-settled that a petitioner has the burden of proof at an administrative hearing to prove that he is entitled to relief from the action of the administrative agency. This burden is on the petitioner even if he must prove a negative." (citing Overcash v. N.C. Dep't of Env't & Natural Res., 179

N.C. App. 697, 635 S.E.2d 442 (2006), disc. rev. denied, 361 N.C. 220, 642 S.E.2d 445 (2007))), disc. rev. denied, 363 N.C. 745, 688 S.E.2d 694 (2009).

6. Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 15B-2(12a).

7. Substantial evidence exists to show that Petitioner properly filed her application as a purported "victim" of "criminally injurious conduct" pursuant to N.C. Gen. Stat. § 15B-2(5) and (13).

8. Pursuant to N.C. Gen. Stat. ' 15B-11(b), "[a] claim may be denied or an award of compensation may be reduced if: (1) The victim was participating in a nontraffic misdemeanor at or about the time that the victim's injury occurred; or (2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct."

9. "The Commission or Director, whichever has the authority to decide a claim under G.S. 15B-10, shall exercise discretion in determining whether to deny a claim under subsection (b) of this section. In exercising its discretion, the Commission or Director shall consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct, when applicable. The Director or Commission shall deny claims when it finds that there was contributory misconduct that is a proximate cause of becoming a victim. However, contributory misconduct that is not a proximate cause of becoming a victim shall not lead to an automatic denial of a claim." N.C. Gen. Stat. § 15B-11(b1).

10. In determining whether Petitioner's claim was properly barred based upon contributory misconduct, "[t]he test . . . is two-pronged, that is, 1) was there misconduct on the part of [the victim] and, if so, 2) was that misconduct a proximate cause of his injury?" *McCrimmon v. Crime Victims Comp. Comm'n*, 121 N.C. App. 144, 148, 465 S.E.2d 28, 31 (1995).

11. "Misconduct is defined as . . . '[a] transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior.' While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste. Misconduct requires some deviation from the accepted norm or standard of proper behavior. Accordingly, the conduct of the claimant is misconduct if it is not within the accepted norm or standard of proper behavior, which includes unlawful conduct. Consistent with principles of tort law, the test for determining accepted norms and proper behavior is best determined by use of a reasonable man standard or what a reasonable person would have done under similar and like circumstances." *Evans v. N.C. Dep't of Crime Control & Pub. Safety*, 101 N.C. App. 108, 117-18, 398 S.E.2d 880, 885 (1990) (quoting Black's Law Dictionary 901 (5th ed. 1979)).

12. For a victim's misconduct to constitute "contributory misconduct" for purposes of N.C. Gen. Stat. § 15B-11(b)(2), the misconduct "must combine with criminal action on the part of another to become a real, efficient and proximate cause of the injury. . . . This Court has defined proximate cause as a cause which in natural and continuous sequence, unbroken by any

new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. The test of foreseeability as an element of proximate cause does not require that the actor should have been able to foresee the injury in the precise manner in which it actually occurred. Neither does the actor need to foresee the events which are merely possible, but only those which are reasonably foreseeable. Therefore, where a claimant's injuries are a direct result of the criminally injurious conduct of another, the claimant's own misconduct must have been a proximate cause of those injuries in order for the Commission to deny or reduce a claim under the statute." *Id.* at 117, 398 S.E.2d at 885.

12. "Accordingly, if there is in the record substantial evidence that a person of ordinary prudence would have reasonably foreseen that the conduct in question would lead to an injurious result, and if this conduct was unlawful or if it breached the standard of conduct acceptable to a reasonable person, the Commission should be affirmed in denying or reducing claimant's benefits. If there is not substantial evidence in the record to support such conclusions, any order of the Commission reducing or barring claimant's recovery under the Act must be reversed." *Id.* at 118, 398 S.E.2d at 885.

13. In this case, the Petitioner voluntarily participated in the dispute, and evidence suggests that she was the aggressor in the altercation.

14. Substantial evidence demonstrates that Petitioner's action resulted in law enforcement arresting her for simple assault and possession of drug paraphernalia that occurred at or about the time of the purported criminally injurious conduct.

15. The fact that she failed to cooperate in the prosecution of Winston Brandt for misdemeanor assault on a female, misdemeanor interference with emergency communication, and misdemeanor communicating threats further suggests that Mr. Brandt was not responsible for the events that transpired that evening.

16. In addition, there is not sufficient evidence in the record that Winston Brandt was the aggressor in the incident that occurred on September 21, 2013.

17. Under these circumstances, "a person of ordinary prudence would have reasonably foreseen that the conduct in question would lead to an injurious result." *Evans*, 101 N.C. App. at 118, 398 S.E.2d 885.

18. The substantial evidence, therefore, shows the victim engaged in contributory misconduct, and accordingly, the evidence supports Respondent's decision to deny Petitioner's claim for compensation based upon N.C. Gen. Stat. § 15B-11(b).

19. Ultimately, Petitioner has not carried her burden in demonstrating that Respondent acted outside its authority, acted arbitrarily and capriciously, used improper procedure, failed to act as required by law or rule, or acted erroneously when it denied Petitioner's claim for crime victim's compensation based upon N.C. Gen. Stat. § 15B-11(b).

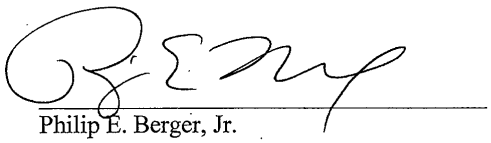
Based upon the foregoing findings of fact and conclusions of law, Petitioner is not entitled to the relief sought, and her claim is denied.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, in the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' Rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, North Carolina General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within thirty (30) days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 18th day of August, 2015.



Philip E. Berger, Jr.
Administrative Law Judge

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR06837

A UNITED COMMUNITY LLC PETITIONER, V. ALLIANCE BEHAVIORAL HEALTHCARE, AS LEGALLY AUTHORIZED CONTRACTOR OF AND AGENT FOR NC DEPARTMENT OF HEALTH AND HUMAN SERVICES RESPONDENT.	**FINAL DECISION**

THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on April 21 – 23, 2015, in Raleigh, North Carolina.

APPEARANCES

For Petitioner A United Community, LLC ("Petitioner" or "AUC"):

Renée J. Montgomery
Varsha D. Gadani
Parker Poe Adams & Bernstein, LLP
301 Fayetteville Street, Suite 1400
Raleigh, North Carolina 27601

For Respondent Alliance Behavioral Healthcare, *as legally authorized contractor and agent for* the North Carolina Department of Health and Human Services ("Respondent" or "Alliance"):

Erica C. Bing
Assistant General Counsel
Alliance Behavioral Healthcare
4600 Emperor Boulevard, Suite 200
Durham, North Carolina 27703

APPLICABLE LAW

The laws and regulations applicable to this contested case are N.C. Gen. Stat. § 108C, Art. 3 of N.C. Gen. Stat. § 150B, and 42 C.F.R. § 438.214.

BURDEN OF PROOF

Petitioner AUC has the burden of proof in this contested case.

ISSUES

Petitioner AUC contends the issues to be resolved in this case are whether Respondent Alliance failed to act as required by law or rule, exceeded its authority, acted erroneously, failed to use proper procedure, or acted arbitrarily or capriciously when it terminated AUC's participation in the 1915 (b)/(c) Medicaid Waiver Program that Alliance operates. AUC also contends that another issue to be determined is its entitlement to reasonable attorneys' fee from Alliance pursuant to the provisions of N.C. Gen. Stat. § 150B-33(b)(11).

In addition to the issues based on the standards of N.C. Gen. Stat. § 150B-23(a) as set forth above, Respondent Alliance also contends the issues in this case are whether the Office of Administrative Hearings has jurisdiction to hear this matter, whether Petitioner provided false information to Alliance during the re-credentialing process and thereby breached its contract with Alliance, and whether Alliance acted reasonably in its decision to deny re-credentialing and terminate the contract between Alliance and Petitioner.

ADMITTED EXHIBITS

The following exhibits were allowed into evidence:

Petitioner's Exhibits: 1-18, 21, 23, 25-29, 31, 35, 36, 38-40

1 July 31, 2014 Notice of Termination (Dep. Ex. 2)

2 AUC's Request for Reconsideration (without exhibits which are listed separately)

3 September 9, 2014 Reconsideration Decision (Dep. Ex. 9)

4 AUC's Request for a Second Level Reconsideration (without exhibits which are listed separately)

5 November 10, 2014 Second Level Reconsideration Decision

6 AUC Re-Credentialing Application (Dep. Ex. 3) (submitted with Reconsideration Requests)

7 April 30, 2014 email from Lisa Bradley to Kimberly Hayes (Dep. Ex. 5)(submitted with Reconsideration Requests)

8 Notice of Change Forms that included new Clinical Director signed and dated April 30, 2014 (submitted with Reconsideration Requests)

9 April 30, 2014 email from Lisa Bradley to Chessina Thigpen attaching signature page (submitted with Reconsideration Requests)

10 May 1, 2014 email from Chessina Thigpen to Matt Kanoy with Notice of Change Form (Dep. Ex. 4)

11 Alliance's Compliance Issues Report dated July 31, 2014

12 Alliance's Compliance Issues Report dated May 22, 2014

13 May 22, 2014 email from Dr. Eric Mizelle to Erica Arrington (Dep. Ex. 7)

14 August 11, 2014 signed statement from Chessina Thigpen (submitted with Reconsideration Requests)

15 Change of Medical Director Form of August 8, 2014 (Dep. Ex. 6) and Medical Director Agreement and Job Description (submitted with Reconsideration Requests)

16 Excerpts of provider Operations Manual (Dep. Ex. 8)

17 Information on Alliance's website regarding Intensive In-Home Services (Dep. Ex. 11)

18 Information on Alliance's website regarding Community Support Teams (Dep. Ex. 12)

21 CABHA position descriptions (Dep. Ex. 15) (submitted with Reconsideration Requests)

23 Notice of 30(b)(6) Deposition (Dep. Ex. 1)

25 Alliance's Response to Petitioner's First Request for Production of Documents (Dep. Ex. 10)

26 Alliance's Response to Petitioner's First Set of Interrogatories and Second and Third Requests for Production of Documents

27 Documents produced by Alliance in response to Interrogatory No. 2 of AUC's First Set of Interrogatories

28 Documents produced by Alliance in response to Document Request No. 5 of AUC's Second Request for Production of Documents

29 Minutes of reconsideration meeting of August 25, 2014 produced by Alliance in discovery

31 Letter of June 19, 2013 from Alliance to AUC reporting the results of Gold Star Initial Monitoring

35 Email from Sandy Valdez to Cathy Estes dated August 12, 2014

36 Email from Lisa Bradley to Cathy Estes on August 12, 2014

38 Contract between Alliance and the N.C. Department of Health and Human Services, Division of Medical Assistance effective on February 1, 2013

39 42 C.F.R. § 438.214

40 Documents submitted with Reconsideration Requests (Duplicate of Exhibits 6, 7, 8, 9, 14 15 and 21)

Respondent's Exhibits: 1-13, 15-20, 22 (partial), 23-25

1 Network Contract and Amendments

2 DMA Clinical Coverage Policy 8A (August 2013)

3 North Carolina Department of Health and Human Services State Plan Amendment Attachment 3.1-A.1

4 Request for Proposal Follow-Up

5 Medical Director Job Posting from A United Community, LLC

6 Re-Credentialing Application for A United Community, LLC

7 May 1, 2014 Email from A United Community, LLC with Notice of Change Forms attached for Nicole Benjamin, Kristen Bird, Murray Dees, Abbe Gorberg, Kennette Hicks, Ra'Necia Rorie, Joyce Chilongo, Melissa, Simpson, Kimberly Cross, Dr. Rohima Miah

8 May 1, 2014 Email from A United Community, LLC with Notice of Change Form attached for Dr. Eric Mizelle

9 May 22, 2014 Email from Dr. Eric Mizelle

10 July 31, 2014 Re-Credentialing Denial Notice

11 Alliance Provider Operations Manual

12 September 9, 2014 Notice of First Level Reconsideration Decision

13 August 14, 2014 Notice of Change Form Regarding Dr. Rohima Miah

15 April 30, 2014 Email from A United Community, LLC

16 Original Provider Application for A United Community, LLC

17 DHHS Webpage on CABHAs

18 Minutes of Reconsideration Meeting – Monday, August 18, 2014

19 Affidavit of Dr. Eric Mizelle and Exhibits

20 August 8, 2014 Notice of Change Form regarding Dr. James A. Smith, III

22 (Partial) Only Exhibit B of the Affidavit of Dr. Rohima Miah admitted - Judgment in Action to Recover Money for Personal Property (the affidavit itself is not admitted)

23 Reconsideration Panel Emails

24 Alliance Operational Procedure 6030 – August 28, 2013

25 Alliance Operational Procedure 6030 – Revised September 17, 2014

DEPOSITIONS

Petitioner also offered into evidence the deposition of Cathy Estes taken pursuant to Rule 30(b)(6) of the North Carolina Rules of Civil Procedure on September 23, 2014 which was allowed.

WITNESSES

Petitioner presented the testimony of:

1. Cathy Estes, Alliance Director of Provider Network Operations (adverse witness)
2. Lisa Bradley, Executive Director of AUC

Respondent presented the testimony of:

1. Eric Mizelle, M.D. psychiatrist for AUC
2. Erica Arrington, M.D., formerly Associate Medical Director of Alliance
3. Kathy Niblock, Alliance Utilization Review Manager
4. Cathy Estes, Alliance Director of Provider Network Operations

PROCEDURAL HISTORY

On September 10, 2014, Petitioner AUC filed a Petition for Contested Case Hearing against Respondent Alliance as legally authorized contractor of an agent for the N.C. Department of Health and Human Services challenging the decision of Alliance to deny AUC's re-credentialing and terminate its participation in the Medicaid Waiver Program operated by Alliance. On that same day, Petitioner also filed a Motion for Temporary Restraining Order and Stay of Contested Actions. A Temporary Restraining Order was entered on September 18, 2014.

On September 26 - 30, 2014, a hearing was held on AUC's Motion for Stay and an Order Granting Injunction Staying Contested Action was entered on October 17, 2014. On November 5, 2014, Respondent Alliance filed a Motion to Amend the Order Granting Injunction Staying Contested Action contending that OAH lacked legal authority to renew or extend the contract between AUC and Alliance beyond the contract term ending December 31, 2014. An Order denying Alliance's Motion was entered on December 11, 2014.

The contested case hearing was originally scheduled before the Honorable Donald W. Overby for February 26–27, 2015. However, due to inclement weather, the Office of Administrative Hearings was closed and the contested case hearing was not able to be heard on those dates. This case was then reassigned to the undersigned and the parties jointly moved to have the contested case hearing rescheduled for the week of April 20, 2015.

This matter was heard before the undersigned on April 21–23, 2015. The parties agreed to submit Proposed Findings of Fact and Conclusions of Law by June 17, 2015 and agreed that the Final Decision could be rendered by September 1, 2015.

N.C. Gen. Stat. § 108C-12 requires this tribunal to issue a final agency decision within 180 days of the date of filing of the contested case petition, which shall be extended in the event of delays caused or requested by Respondent. Because the parties jointly moved for a rescheduling of the contested case hearing and agreed to the time periods as set forth above, the Final Decision is timely.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding the undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to, the demeanor of each witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other creditable evidence in the case.

FINDINGS OF FACT

The Parties

1. Petitioner AUC is a provider of mental health and behavioral health services and has attained the status of a Critical Access Behavioral Health Care Agency ("CABHA"). AUC has its principal place of business in Raleigh, North Carolina. Lisa Bradley is AUC's Executive Director. (Bradley, Vol. 1, p. 81).

2. AUC was founded in 2007 and is a provider of Medicaid Intensive In-Home ("IIH') services, Community Support Team ("CST"), Medication Management, outpatient therapy, and Comprehensive Clinical Assessments. (Bradley, Vol. 1, pp. 181 and 183). AUC has a special focus on treating children and adolescents and receives referrals from multiple

sources, including Holly Hill Hospital, school systems, the physicians' network known as CCNC, and the justice system. (Bradley, Vol. 1, pp. 182-183).

3. AUC is distinguished from other providers by having a bilingual staff and offering one of the few evidence-based substance abuse programs for teens and youth. (Bradley, Vol. 1, p. 182). AUC also focuses on cognitive behavioral therapy and dialectical behavioral therapy. (*Id.*).

4. Under federal and State law, the North Carolina Department of Health and Human Services ("DHHS") is the single State agency authorized by the federal government to administer the Medicaid program in North Carolina. *See* 42 U.S.C. § 1396a(a)(5); N.C. Gen. Stat. § 108A-54. Under the law, DHHS is the only agency that is authorized to manage the Medicaid program, unless a waiver is granted by the federal government.

5. DHHS received approval from the federal government to operate a Medicaid waiver program under Sections 1915(b) and 1915(c) of the Social Security Act ("the 1915(b)/(c) Medicaid Program"). (Pet. Ex. 38). As a part of the 1915 (b)/(c) Medicaid Program, DHHS is permitted to enter into contracts with managed care organizations ("MCO") to operate prepaid inpatient health plans ("PIHP") pursuant to 42 C.F.R. § 438.2.

6. In February 2013, Alliance entered into a contract with DHHS allowing it to serve as a managed care organization ("MCO") under the 1915(b)/(c) Medicaid Program. Alliance manages Medicaid mental health, developmental disability, and substance abuse services provided in Cumberland, Durham, Johnston, and Wake Counties. (Pet. Ex. 38). Alliance's duties include authorizing and paying for recipient services, contracting with providers, and monitoring providers for compliance with regulatory and quality standards. (*Id.*, at Attachment B).

Federal, State, and Alliance Policy Requirements Regarding Re-credentialing

7. The federal government has promulgated regulations that apply when states receive a waiver to operate Medicaid MCOs and PIHPs. One of these regulations is 42 C.F.R. § 438.214(a) entitled, "*Provider Selection.*" This regulation requires the State to ensure, through a contract, that each MCO/PIHP "implements written policies and procedures for selection and retention of providers." (Pet. Ex. 39) (Emphasis added).

8. 42 C.F.R. § 438.214(e) requires MCO/PIHPs to "comply with any additional requirements established by the State." (Pet. Ex. 39).

9. Pursuant to 42 C.F.R. § 438.214, Alliance has executed a contract with DHHS, division of Medical Assistance ("DMA"). Under Section 7.6 of this contract, which Alliance has stipulated is relevant to the issues in this contested case (Jt. Stip. 2), Alliance is required to consider seven different categories of information in deciding whether to re-credential a network provider such as AUC. (Estes, Vol. 1, pp. 69-70). The required information to be considered is as follows:

a) Data collected through Alliance's Utilization Management Program;

b) Data collected through Alliance's Quality Management Program;

c) Accreditation outcomes;

d) Grievances procedure outcomes;

e) Complaint logs;

f) Enrollee satisfaction survey results; and

g) Results from other quality improvement activities.

(Pet. Ex. 38, p. 32).

10. Alliance's Provider Operations Manual states that re-credentialing of providers must be done in accordance with federal and state laws, rules and regulations, and DHHS contract requirements. (Pet. Ex. 16, p. 21).

11. Alliance also stipulated that Section 7.8 of the DHHS contract is relevant to the issues in this contested case. (Jt. Stip. 3). Section 7.8 of the DHHS contract specifically requires that Alliance develop a provider manual that provides information and education to providers about Alliance which must include, among other topics, the provider appeals process. (Pet. Ex. 38, § 7.8, pp. 33-34).

12. AUC's contract with Alliance that is at issue in this case commenced on January 1, 2014 was set to expire by its own terms on December 31, 2014. AUC's contract with Alliance contained no right to renewal or extension. That contract also included a termination clause which either party could exercise without cause upon 30 days' notice.

13. Alliance began the process of re-credentialing AUC in February 2014 by notifying AUC in writing that Alliance was responsible for the credentialing and re-credentialing of all providers in the Alliance network. The letter, dated February 28, 2014, stated that AUC had been identified by Alliance at that time to begin the re-credentialing process. Application forms, and instructions for their completion, were attached to that correspondence to AUC. Alliance identified a Credentialing Specialist, Matt Kanoy, who was assigned to AUC as Petitioner's contact throughout the re-credentialing process. Thus, Alliance did not act without substantial justification in beginning the re-credentialing process. (N.C. Gen. Stat. § 150-33(b)(11))

Resignation of AUC's Medical Director and Submission of Change Forms

14. Rohima Miah, M.D., AUC's Medical Director, resigned on April 26, 2014 with no prior notice. (Pet. Ex. 7). On April 30, 2014, Lisa Bradley communicated by telephone with the network specialist assigned to AUC by Alliance, Kimberly Hayes, and informed Ms. Hayes about Dr. Miah's resignation and that AUC was presently interviewing for a Medical Director. (*Id.*; Bradley, Vol. 1, pp. 194-195). Lisa Bradley informed Ms. Hayes that Dr. Eric Mizelle continued to provide direct care to consumers including medication management. (*Id.*).

15. When Kimberly Hayes was assigned to be AUC's network specialist, AUC was informed that she was the person at Alliance to contact with any questions, concerns, and to communicate any information that AUC needed to share. (Bradley, Vol. 1, pp. 193-194).

16. After Lisa Bradley's conversation with Kimberly Hayes, she followed up that same day with an email to Ms. Hayes at 10:53 p.m. on April 30, 2014 confirming the information that she had communicated during the telephone conversation with Kimberly Hayes. (Pet. Ex. 7).

17. After emailing Ms. Hayes to conform their conversation, Lisa Bradley then sent an email to Chessina Thigpen, AUC's Office manager, at 11:16 p.m. attaching one signature page to be submitted with the change forms indicating that Dr. Rohima Miah had resigned and that AUC had a new Clinical Director. (Pet. Ex. 9; Bradley, Vol. 1, p. 200). The submission of these change forms was consistent with what Ms. Bradley informed Kimberly Hayes she would do. (Bradley, Vol. 1, p. 198).

18. In response to a question directed to Ms. Thigpen by Matt Kanoy with Alliance regarding AUC's Medical Director on May 1, 2014, Chessina Thigpen submitted a change form that identified Dr. Eric Mizelle as the Acting Medical Director of AUC. (Pet. Ex. 10). Attached to the change form was a copy of a signature page dated April 30, 2014 that Lisa Bradley had transmitted to Chessina Thigpen the evening of April 30, 2014 to be used with the notices of change forms submitted to notify Alliance that Dr. Miah had resigned and that AUC had a new Clinical Director. (Pet. Ex. 8; Bradley, Vol. 1, pp.202 and 206).

19. Lisa Bradley was not aware that Ms. Thigpen had sent the form involving Dr. Mizelle and only learned about the erroneously submitted form after she received notification on July 31, 2014 that AUC's re-credentialing was being denied and its contract was being terminated. (Bradley, Vol. 1, pp.202 and 206; Pet. Exs. 2 and 36). During Lisa Bradley's investigation, Chessina Thigpen explained that she had submitted the form at the request of an Alliance employee, copying the signature page that Lisa Bradley had signed for the forms that Ms. Bradley had authorized. (Bradley, Vol. 1, pp. 202 and 206). She explained that it was an honest mistake. (*Id.*).

20. Although the credibility of Chessina Thigpen's testimony could not be observed by the undersigned, there was no indication that the misrepresentation transmitted by her was deceitful, with guile, malice or anything other than a mistake. It is clear to the undersigned that this statement was contrary to the other representations made by AUC.

The Re-credentialing Committee's Decision

21. As set forth in Finding 9 above, Alliance is required to consider certain information about a provider in deciding whether the provider should be re-credentialed.

22. Alliance's Credentialing Committee made the decision that AUC would not be re-credentialed. (Estes Dep., pp. 14 and 15) However, members of the Credentialing Committee were not provided any data collected on Alliance's Utilization Management Program, any data collected through Alliance's Quality Management Program, any information on grievance

procedure outcomes or complaint logs, the results of any enrollee satisfaction surveys, nor the results from other quality improvement activities. (Pet. Exs. 26 Interrogatory No. 2 response and 27)

23. Instead of considering the factors that the Credentialing Committee was required to consider, the Credentialing Committee based its decision based on the one notice of change form mistakenly submitted by Chessina Thigpen without the knowledge of Lisa Bradley, AUC's Executive Director. (Estes, Vol. 1, p. 44; Bradley, Vol. 1, p. 202). The Credentialing Committee never saw a copy of Lisa Bradley's email to AUC's assigned network specialist, Kimberly Hayes that accurately informs Alliance about the circumstances of its Medical Director. (Estes, Vol. 1, p. 47; Pet. Ex. 7).

24. Members of the Credentialing Committee received only a checklist completed by Matt Kanoy. (Pet. Ex. 27). Matt Kanoy was not a member of the Credentialing Committee and none of the information by Mr. Kanoy reviews was provided to the Credentialing Committee. (Pet. Exs. 26 and 27; Estes, Dep., pp. 14 and 15; Estes, Vol. 3, pp. 591-592).

25. The checklist that was completed by Mr. Kanoy includes no details or analysis of the subjects that Alliance is required to consider in re-credentialing. The form simply indicates that there were "no issues noted" for quality management and compliance sanctions database. (Pet. Ex. 27, p. 2). The form makes no mention of any of the data collected through Alliance's Utilization Management Program, grievances procedure outcomes, complaint logs, generally satisfaction survey results, or the result of other AUC quality improvement activity. (*Id.*). The checklist nowhere mentions that AUC received a score of 99% on the Gold Star initial monitoring conducted by Alliance. (Pet. Exs. 27 and 34).

Notification to AUC of Alliance's Denial of Its Credentialing

26. On July 31, 2014, AUC's Executive Director, Lisa Bradley, was notified through a telephone call and letter that was emailed to her on that same day that its re-credentialing had been denied and that its contract would be terminated effective August 30, 2014. (Bradley, Vol. 1, pp. 203-204; Pet. Ex. 1).

27. Ms. Bradley was on vacation when she received a message asking her to call Cathy Estes. During the conversation which lasted approximately five minutes, Cathy Estes informed Lisa Bradley that AUC's re-credentialing was being denied and its contract terminated. (Bradley, Vol. 1, pp. 203-204 and 210). Lisa Bradley was stunned and surprised and asked questions regarding appeal rights and what would happen to AUC's consumers. (*Id.* at 204). Ms. Estes told Ms. Bradley that the information would be provided in a letter and mentioned false information was presented in the credentialing application. (*Id.*).

28. Following the telephone call, Lisa Bradley received a letter from Alliance informing AUC about Alliance's decision. (Pet. Ex. 1). The letter cited the Notice of Change Form identifying Dr. Eric Mizelle as an Acting Medical Director, which was the first time Lisa Bradley heard about the erroneous form. (Bradley, Vol. 1, pp. 210-211).

29. Cathy Estes testified for Alliance in response to a Rule 30(b)(6) Notice of Deposition to Alliance (Pet. Ex. 23; Estes Dep., p. 7). Ms. Estes testified that the sole reason for the denial of re-credentialing and the termination of AUC's contract was a Notice of Change Form erroneously submitted by Chessina Thigpen on May 1, 2014. (Estes, Vol. 1, pp. 44-45; Pet. Ex. 10).

30. Following receipt of the July 31st letter, Lisa Bradley did an investigation regarding the change form described in the letter and discovered that Chessina Thigpen had mistakenly submitted a change form that identified Dr. Eric Mizelle as the Acting Medical Director of AUC. Lisa Bradley did not know that the form had been submitted by Chessina Thigpen and did not authorize her to submit the form to Alliance. (Bradley, Vol. 1, pp. 202 and 206).

31. Ms. Bradley discovered that the signature page that Ms. Thigpen had attached to the form indicating that Dr. Mizelle was Acting Medical Director was the same signature page that she had sent to Ms. Thigpen on April 30, 2014 at 11:16 p.m. which was to be submitted with the change forms indicating that Dr. Rohima Miah had resigned and that AUC had a new Clinical Director. (Pet. Ex. 9; Bradley, Vol. 1, pp. 202 and 206).

32. As Ms. Bradley explained in an email to Cathy Estes on August 12, 2014 and in AUC's Request for Reconsideration submitted to Alliance on August 11, 2014, the Office Manager, Ms. Thigpen, was not instructed to submit a change for Acting Medical Director and just assumed in error she should complete a Notice of Change Form and provide his name to Alliance since he was the only medical doctor on staff at the time. (Pet. Exs. 2 and 36; Bradley, Vol. 1, pp. 202 and 206).

Other Admissions of Alliance Regarding the Decision to Terminate AUC

33. In her deposition, Cathy Estes admitted that Alliance had notice on April 30, 2014 that AUC did not have a medical director and was searching for a new medical director. (Estes Dep, p. 31) Notwithstanding the admission that Alliance had notification that AUC had no medical director on April 30, 2014, Alliance nevertheless, used as the reason for terminating AUC's participation in its network a form mistakenly submitted the following day that included a signature of Lisa Bradley dated April 30, 2014. (Pet. Ex. 1).

34. Prior to deciding to deny AUC's re-credentialing and terminate its participation in Alliance's network, no one with Alliance called Lisa Bradley or anyone else at AUC to discuss the change form submitted by Chessina Thigpen that directly conflicted with Lisa Bradley's email to her assigned network development specialist, Kimberly Hayes. (Bradley, Vol. 1 pp. 64-65; Bradley, Vol. 1, pp. 207-208).

35. On May 22, 2014, Erica Arrington, M.D., Alliance's Associate Medical Director, sent an email to Dr. Mizelle asking if he was the Medical Director or general employee with AUC. (Pet. Ex. 13). Dr. Mizelle responded that he was providing medication management and reviewed some of their person-centered plans and assessments and signed medical necessity orders, but he was not the Medical Director. (*Id.*).

36. In his email response, Dr. Mizelle did not mention the clinical supervision he was providing and the monthly supervision meetings that he was attending. (Mizelle, Vol. 1, pp. 143-144). Dr. Mizelle testified that it was plausible for someone in a position like Chessina Thigpen to confuse medical doctor and medical director given the fact that he was working with AUC, providing clinical supervision, and clinical direction to its provisionally licensed clinicians. (Mizelle, Vol. 1, pp. 147-148).

37. Dr. Mizelle was led to believe that Lisa Bradley had represented that Dr. Mizelle was AUC's Medical Director and was not told that the reason for the request was a change form submitted by Chessina Thigpen. (Mizelle, Vol. 1, p. 144). Ms. Bradley was not informed about this communication with Dr. Mizelle until it was shown to her by Dr. Arrington at the reconsideration hearing which was held on August 25, 2014, after the notice to AUC denying re-credentialing and terminating its contract. (Bradley, Vol. 1, pp. 223-224).

38. Alliance contends that it did not need to consider the information and email to Cathy Estes because Ms. Estes was not involved in the credentialing or re-credentialing. However, Ms. Estes was AUC's assigned network specialist and she had reached out to Lisa Bradley at AUC to discuss the abrupt departure of Dr. Miah. (Bradley, Vol. 1, pp. 194-195).

39. Cathy Estes admitted that the change forms are not specific to the re-credentialing process. (Estes Dep., pp. 41-42). Ms. Thigpen did not voluntarily submit the form but was requested to do so by Matt Kanoy with Alliance. (Pet. Ex. 10). Ms. Thigpen's email references "information requested about medical director." (*Id.*).

40. In communicating with Ms. Thigpen about the Medical Director, Matt Kanoy was ignoring the fact that the credentialing application listed Lisa Bradley as the primary contact person. (Pet. Ex. 6). Ms. Estes admitted that if there had been any questions about the forms that had been submitted or questions about AUC's Medical Director, the application that AUC submitted named Lisa Bradley as the primary contact person. (Estes, Vol. 1, pp. 170-171). This position left question for the finder of fact.

41. AUC followed the required procedures regarding notice of change forms involving its medical director and followed the process that she had discussed with Ms. Hayes. (Bradley, Vol. 1, p. 198). After Dr. Miah resigned, AUC submitted the required change form notifying Alliance about Dr. Miah's abrupt resignation. (Pet. Ex. 8) When AUC was able to secure a new medical director, James Smith, M.D., AUC submitted the required change form. (Pet. Ex. 15; Bradley Dep. Vol. 1, pp. 208-209).

42. Cathy Estes, who testified as Alliance's 30(b)(6) designee, admitted that she had not even seen Lisa Bradley's email to Kimberly Hayes, AUC's assigned network specialist, until immediately prior to her deposition several weeks after the termination letter was sent to AUC. (Estes Vol. 1, pp. 47 and 49; Estes Dep., pp. 29-30). Ms. Estes testified that neither she nor the Credentialing Committee saw this email prior to making a decision to deny re-credentialing and terminate AUC's contract. (Estes, Vol. 1, pp. 47 and 49). Ms. Estes also admitted that she was not aware of anything inaccurate in this email reporting the circumstances of AUC's Medical Director. (Estes, Vol. 1, p. 49).

43. In its termination letter, Alliance cites its provider manual as support for its decision citing the language that "providing false information or failing to disclose information in response to a question in the application will result in a denial of the providers application or result in termination of the contract." (Pet. Ex. 1; Pet. Ex. 16, p.35; Estes Dep. p. 75) However, Alliance admitted in Cathy Estes' deposition that there was no false information in AUC's credentialing application, that the information was correct when it was submitted, and that AUC had no obligation to amend the application. (Estes Dep. pp. 22-23).

44. In submitting this form, Ms. Thigpen made an honest mistake. Since Dr. Mizelle was a medical doctor for AUC at the time, she assumed that Dr. Mizelle could be called an acting medical director. (Pet. Exs. 2, 14, 36). His contractual duties included clinical leadership and ongoing clinical supervision. (Res. Ex. 19; Mizelle, Vol. 1, pp. 142-143).

45. Ms. Estes contends she made an "honest mistake" by signing the denial of re-credentialing letter to AUC as the "Credentialing Manager" when it was no longer her title. (Estes, Vol. 1, pp. 37-38).

The Reconsideration Process

46. The letter sent to AUC informing AUC that the Credentialing Committee made a determination to deny its re-credentialing which would result in termination of its contract informed AUC that it could request a reconsideration of the decision within 21 calendar days. (Pet. Ex. 1). Although Cathy Estes testified that the Provider Operations Manual does not provide reconsideration of a decision made by the Credentialing Committee, the letter sent to AUC specifically referenced Alliance's Provider Operations Manual as the document that set forth AUC's reconsideration rights. (Pet. Ex. 1; Estes, Vol. 1, p. 99).

47. Although the Provider Operations Manual says that a decision does not become final if a reconsideration request is submitted, the letter sent to AUC failed to include that language. (Pet. Ex. 1; Pet. Ex. 16, p. 110).

48. Alliance treated the decision as final by instructing AUC to begin transferring its consumers. (Pet. Ex. 1; Bradley, Vol. 1, pp. 237 and 240). This caused considerable harm to AUC because some AUC employees became very concerned and some began finding other employment. (Bradley, Vol. 1, pp. 240-241).

49. On or around August 11, 2014, AUC submitted its Request for Reconsideration of the decision. (Pet. Ex. 2). As stated in Alliance's letter notifying AUC of its decision, AUC was instructed that it "must provide any additional information at the time the Request for Reconsideration was filed" in a specific format. (Pet. Ex. 1, p. 2).

50. In its Reconsideration Request, AUC provided supporting documents which included Lisa Bradley's email to Kimberly Hayes on April 30, 2014 informing Alliance that the position of Medical Director was vacant and an Attestation from the Office Manager, Chessina Thigpen, stating that the Provider Change Form for Mr. Mizelle had been submitted in error with no false intent. (Pet. Exs. 7 and 14).

51. Notwithstanding the instructions to AUC that all documents should be submitted with the Reconsideration Request, Cathy Estes testified that she expected Lisa Bradley to bring documents concerning Dr. Mizelle to the reconsideration hearing. (Estes, Vol. 3, pp. 625-626). After Lisa Bradley's discovery that the basis for determination was the form submitted in error by Chessina Thigpen, she determined that it was not necessary to submit any documents concerning Dr. Mizelle nor bring Dr. Mizelle to the reconsideration hearing. (Pet. Ex. 29).

52. Although an issue has been raised by Alliance that Ms. Bradley erroneously stated that she had contacted Dr. Mizelle before the hearing, she explained at the hearing that her contact was with Dr. Mizelle's wife who is his administrative assistant and deals with all administrative matters. (Bradley, Vol. 1, pp. 226-227).

53. A panel of three members was assembled to consider and decide AUC's Reconsideration Request. These individuals were Kathy Niblock, an employee of Alliance, Erica Arrington, M.D., an Associate Medical Director of Alliance, and Timothy Brooks, an individual who owns and operates a behavioral healthcare agency. (Pet. Ex. 29).

54. None of the individuals on the reconsideration panel were to have any prior knowledge or involvement in the matter. (Estes, Vol. 1, p.223). This was not the case with Dr. Arrington. Dr. Arrington had sent the email to Dr. Mizelle on May 22, 2014 asking if he was the Medical Director or a general employee with AUC which was used by the Credentialing Committee to make its decision. (Pet. Ex. 13).

55. The reconsideration hearing was held on August 25, 2014. (Pet. Ex. 29). Minutes of the meeting were taken and produced by Alliance in discovery. (*Id.*). Although the stated reason for the termination decision was the erroneous form, after Ms. Bradley explained to the panel members how the form was erroneously submitted, the minutes do not reflect any questions of Ms. Bradley or discussion regarding the erroneous form. (*Id.*; Estes, Vol. 1, p. 84). Instead, most of the meeting involved discussing AUC's Medical Director vacancy after Ms. Estes stated that there could be no vacancy. (Bradley, Vol. 1, pp. 230-231).

56. Cathy Estes attended the meeting although she was not a member of the panel. The minutes show that Cathy Estes was very involved in the meeting by asking questions and making comments. (Pet. Ex. 29).

57. During the reconsideration hearing, Ms. Estes stated that AUC was required to have a Medical Director and could not have a vacancy. (Pet. Ex. 29, p. 2; Estes, Vol. 1, p. 87). This is the first time that Lisa Bradley was informed that Alliance, through Ms. Estes, was taking the position that there could be no vacancy in the Medical Director position. (Bradley, Vol. 1, pp. 234 and 236). This statement is contradicted by the CABHA position description of Medical Director, which can be found on Alliance's website. (Bradley, Vol. 1, pp. 231-232; Pet. Ex. 21).

58. Alliance's website includes a link to Implementation Update 71 issued by the N.C. Department of Health and Human Services, which attaches a document entitled "CABHA Position Descriptions." (Pet. Exs. 20 and 21; Estes Dep., p. 69). The description of the Medical Director position states that the loss of the Medical Director position for more than 90 days will require a review of the agency's CABHA certification and the loss of this position for 180 days

will result in losing CABHA certification. (Pet. Ex. 21, p. 2). When Lisa Bradley researched the issue of how long her agency could have a vacancy in its Medical Director position, this is the only information that she could find. (Bradley, Vol. 1, pp. 231-232).

59. Cathy Estes admitted that Alliance's Provider Operations Manual instructs providers that they are required to follow state updates, which would include information on Medical Director vacancies, allowing up to 180 days for a vacancy before it will result in losing CABHA certification. (Pet. Ex. 21, p. 2; Estes, Vol. 1, p. 93).

60. Ms. Estes made the statement to the Reconsideration Panel that there could be no vacancy in the Medical Director position even though she had previously received a communication from the office of Alliance's General Counsel indicating that the Compliance Committee had considered whether there could be a vacancy in a Medical Director position and determined that there was not a firm policy on the issue. (Pet. Ex. 35; Estes, Vol. 1, pp. 91 and 92).

61. Cathy Estes admitted that there is no written policy or statement available to providers stating that a provider can never have a vacancy in its Medical Director position. (Estes, Vol. 1, p. 94; Estes Dep., pp. 72, 65, 70, 72, 90).

62. Cathy Estes admitted that it is difficult to fill the position of Medical Director. (Estes Dep., p. 81). Dr. Eric Mizelle who has served as the Medical Director for CABHA confirmed the difficulty of filling this position. (Mizelle, Vol. 1, p. 142). It takes some time to find the right individual to fill the position of Medical Director. (Bradley, Vol. 1, pp.232).

63. Alliance's position on whether the Medical Director vacancy was another reason for the denial of re-credentialing and termination of AUC's contract has been contradictory. At the 30(b)(6) deposition, Cathy Estes testified that this was a second reason for the denial of the re-credentialing. (Estes, Dep., p. 57). At the hearing, however, Dr. Arrington testified that this was not a basis for the denial of the re-credentialing, even though the letter communicating reconsideration decision stated the Medical Director vacancy from April 26, 2014 through July 27, 2014 as a basis for the decision. (Arrington, Vol. 2, pp. 429-430). Cathy Estes also testified the vacancy was not a basis for the reconsideration decision, contradicting her deposition testimony and the language in the letter. (Estes, Vol. 3, pp. 603-604).

64. As shown by the minutes of the meeting held to consider AUC's Reconsideration Request, there was considerable discussion of the vacancy and then Cathy Estes stated to the members of the Panel and to Ms. Bradley that there could be no vacancy in the Medical Director position. (Pet. Ex. 29).

65. Although Ms. Estes and some Panel members testified that Lisa Bradley told the Reconsideration Panel that Dr. Mizelle was Acting Medical Director, there is nothing in the Minutes of the meeting that includes that statement from Lisa Bradley. (Pet. Ex. 29; Estes, Vol. 1, p. 176). Instead, after being faced with the accusation that AUC could not have any vacancy in the Medical Director position, Lisa Bradley stated that if AUC had issues, Dr. Mizelle would be there to support AUC. (Pet. Ex. 29 at p. 1).

The Reconsideration Decision

66. By letter of September 9, 2014, Alliance informed AUC that the Reconsideration Panel decided to uphold the Credentialing Committee's original decision to deny re-credentialing and terminate AUC's contract. The letter cites as an additional basis for the decision that AUC failed to fill the vacated position of Medical Director from April 26, 2014 to July 27, 2014. (Pet. Ex. 3).

67. Dr. Arrington, a member of the Reconsideration Panel, admitted that none of the documents reviewed and considered by Alliance in making the decision to terminate AUC involved any of the criteria that Alliance was required to consider in making its re-credentialing decision. (Arrington, Vol. 2, pp. 422-424; Pet. Ex. 25; Pet. Ex. 38, Section 7.6, p. 32).

68. The letter denying AUC's reconsideration also mentioned there was an alleged second occasion on which AUC was alleged to have reported "false information." (Pet. Ex. 3). The letter cites the telephone conference between Cathy Estes and Lisa Bradley on July 31, 2014 and indicates that Ms. Bradley gave "false information reporting that Dr. Mizelle was the Acting Medical Director from April 26, 2014 until his separation from the agency in late May, 2014." (*Id.*).

69. The allegedly false information during the call on July 31, 2014 was not mentioned in the denial letter that was sent following the call. (Pet. Ex. 1). Ms. Bradley was not aware of this alleged statement by her until she received the reconsideration decision on September 9, 2014. (Pet. Ex. 3).

70. Before the reconsideration hearing on August 25, 2014 and without Ms. Bradley being present, Ms. Estes spoke with the Panel members about this communication that she alleges occurred between herself and Ms. Bradley. (Arrington, Vol. 2, pp. 439-440). Ms. Bradley was not provided any prior notice of this allegation and it was not the subject of the reconsideration hearing or the request for reconsideration. Nevertheless, it is included as a grounds for affirming the Credentialing Committee's decision. (Pet. Ex. 3).

71. If Ms. Bradley had told Ms. Estes during their short conversation on July 31, 2014 that Dr. Mizelle was the Acting Medical Director, this would have been inconsistent with her communication with Kimberly Hayes, the assigned network specialist, her email to Cathy Estes on August 12, 2014 explaining the circumstances of the erroneous change form, and the statements set forth in AUC's Reconsideration Request submitted to Alliance on August 11, 2014. (Pet. Exs. 2, 7, and 36).

72. Under Alliance's Provider Operations Manual, a provider is entitled to know the basis of the decision that is the subject of a reconsideration request. (Pet. Ex. 16, pp. 109-110). Alliance has failed to follow its own procedures in rendering a reconsideration decision citing additional bases for the decision to deny AUC's re-credentialing.

73. Alliance also takes a position that it was not required to provide any reconsideration to AUC because re-credentialing was not subject to Alliance's reconsideration process at the time of the termination decision. (Estes, Vol. 1, pp. 97-98). This position directly

contradicts Alliance's notice to AUC of the denial of re-credentialing which specifically states that AUC was entitled to the reconsideration process set forth in the Provider Operations Manual. (Pet. Ex. 1).

74. At her deposition, Cathy Estes admitted that the sanction being imposed on AUC was termination from the network. (Estes Dep., p. 45). However, she also testified that because the termination was communicated by the Credentialing Committee and not the Corporate Compliance Committee, it was not subject to the provision that allowed an informal meeting with the Chief Executive Officer prior to the sanction becoming final. (Estes Dep., p. 51).

75. Alliance never explained why a termination decision made by the Corporate Compliance Committee was subject to reconsideration while at the same time a termination decision from the Credentialing Committee has no reconsideration rights. Ms. Estes contended that Alliance was providing a reconsideration for AUC even though it was not required by Alliance's policies. (Estes, Vol. 1, pp. 97-98). This directly contradicts Section 7.8 of Alliances contract with DHHS which requires that the Provider Manual cover several areas, including provider appeals process. (Pet. Ex. 38, p. 34).

76. Ms. Estes admitted that an appeals process also was required for Alliance's own accreditation. (Estes, Vol. 1, p. 95). Although Ms. Estes contended that the action should not be viewed as a "sanction," she could not explain why the Minutes of the Reconsideration Panel's hearing referred to the action as a "sanction." (Estes, Vol. 1, p. 96).

77. As allowed under Alliance's procedures, AUC requested a second-level reconsideration. The letter of September 9, 2014 informing AUC that the Reconsideration Panel decided to uphold the Credentialing Committee's original decision specifically referenced the Alliance Provider Operations Manual as providing the right to a second-level reconsideration, which is a desk review. (Pet. Ex. 3).

78. Under the procedures outlined in Alliance's Provider Manual, Alliance should have rendered a decision on the second-level reconsideration within 21 days of the request that was submitted on or around September 10, 2014. (Pet. Exs. 4 and 16, pp. 111-112). The decision on the second-level reconsideration was not issued until November 10, 2014 and upheld the original decision to deny re-credentialing and terminate AUC's participation in Alliance's network. (Pet. Ex. 5).

CONCLUSIONS OF LAW

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 as Conclusions of Law. Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law:

1. As previously determined in the Order Granting Injunction Staying Contested Action and Order Denying Alliance's Motion to Amend the Order Granting Injunction Staying the Contested Action entered by the Honorable Craig Croom, all parties are properly before the

Office of Administrative Hearings, and this tribunal has jurisdiction of the parties and subject matter.

2. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. In the legal issues that Alliance contends should be considered in its decision, Alliance is characterizing the relationship between AUC and Alliance as merely contractual. This argument already has been considered and rejected in the Orders entered by the Honorable Craig Croom. In its Order Granting Injunctive Relief to Petitioner, Judge Croom cited the decision of Senior Resident Superior Court Judge Donald W. Stephens in *Yelverton's Enrichment Services, Inc. v. PBH*, 13 CVS 11337 (Wake County Superior Court, March 11, 2014). As Judge Croom recited: "In the *Yelverton's* decision, Senior Resident Superior Court Judge Donald W. Stephens concluded that 'contract provisions cannot override or negate the protections provided under North Carolina law, specifically the appeal rights set forth in N.C. Gen. Stat. Chapter 108C.' " This contested case is not a breach of contract case. Instead, it involves AUC's claims that Alliance has violated the standards of N.C. Gen. Stat. § 150B-23(a).

4. Alliance also raises as an issue whether OAH has jurisdiction to hear this matter because it was filed prior to Petitioner's exhaustion of administrative remedies. This argument also was rejected when Judge Croom entered his Order Granting Injunctive Relief before the second-level reconsideration had been completed. After finding that Petitioner showed a likelihood of success on the merits and would be irreparably harmed without the entry of an injunction prior to the completion of the second-level reconsideration, Judge Croom enjoined Alliance from terminating AUC's involvement in Alliance's network, but also ordered that Alliance and AUC shall complete the reconsideration process in good faith. (Paragraph 7 of Order entered on October 17, 2014).

5. Based upon the above Findings of Fact, Alliance has exceeded its authority, has acted erroneously, has failed to act as required by law or rule, has failed to use proper procedure, and has acted arbitrarily and capriciously. N.C. Gen. Stat. § 150B-23(a). The actions of Alliance have substantially prejudiced AUC.

6. 42 C.F.R. § 438.214 entitled "*Provider Selection*" requires the State to ensure, through a contract, that each MCO/PIHP "implements written policies and procedures for selection and retention of providers." (Emphasis added).

7. In its contract with Alliance, DHHS has set forth criteria that must be considered in deciding whether or not to re-credential a provider. 42 C.F.R. § 438.214(e) requires that Alliance "comply with any additional requirements established by the State." Alliance's Provider Operations Manual acknowledges that it is required to comply with the provisions of its contract with DHHS.

8. Alliance failed to follow federal and State requirements in the re-credentialing of AUC. In making the re-credentialing decision on AUC, Alliance was required to consider a list of criteria set forth in Alliance's contract with DHHS. These criteria were not considered and

the Credentialing Committee was given no documents concerning the criteria. As set forth in the Findings, the Credentialing Committee was provided only a summary checklist form completed by a non-member of the Committee.

9. Alliance also failed to follow its own policies and procedures by failing to follow the reconsideration process set forth in its Provider Operations Manual. Although Alliance contends that it was not required to provide any reconsideration to AUC because it was a termination decision made by the Credentialing Committee and not the Corporate Compliance Committee, this justification is lacking in merit and is a denial of due process.

10. Alliance failed to follow the reconsideration process set forth in its Provider Operations Manual by: (a) instructing AUC to begin transferring consumers even though the decision should not have been treated as final; (b) by failing to provide AUC with an informal meeting with Alliance's CEO before the decision became final; (c) by setting forth new reasons for the denial of AUC's re-credentialing and termination of its participation when Alliance's policies and due process require that Alliance provide the basis for its decision prior to reconsideration; and (d) by failing to provide the second-level of reconsideration within 21 days as set forth in Alliance's Manual.

11. Through its representative, Cathy Estes, Alliance also prejudiced the considerations of the Reconsideration Panel by falsely stating that there could be **no Medical Director vacancy** which was contrary to the information on Alliance's own website. Ms. Estes already had been told by the office of Alliance's General Counsel that the policy on Medical Director vacancies was not firm. (Emphasis added)

12. Under relevant North Carolina case law, decisions are arbitrary or capricious if they are "patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment" *Lewis v. N.C. Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

13. The evidence in this case include that Alliance's decisions and actions taken against AUC were arbitrary and capricious because they indicate a clear lack of fair and careful consideration. Alliance's failure to follow its own policies and procedures as set forth above was arbitrary and capricious.

14. The Findings of Fact demonstrate many additional examples of a decision that indicates a clear lack of fair and careful consideration, including: (a) a failure to consider information that was required to be considered during the re-credentialing process; (b) basing the credentialing decision on an erroneously submitted form and coming up with new reasons for denying AUC's re-credentialing when it was explained that the form was submitted in error; (c) providing contradictory testimony concerning the basis for Alliance's decision; and (d) adding new reasons to the reconsideration decision with no prior notice to AUC and beyond the stated basis for the original decision.

15. The re-credentialing process that Alliance followed did not require perfect vision; however, a broader approach, following a more inclusionary process would have prevented this system from failing to see "the forest for the trees". This case clearly demonstrates a failure to

communicate, which has led the parties to a very costly and unnecessary hearing. Reasonable minds are required to produce reasonable results - - this should have been the purpose of the reconsideration process.

16. Reasonable attorneys' fees may be assessed against a respondent when that respondent has substantially prejudiced petitioner's rights and has acted arbitrarily or capriciously. N.C. Gen. Stat. § 150B-33(b)(11). However, because of the facts of this case and in the discretion of the undersigned, an award of attorneys' fees is denied.

DECISION

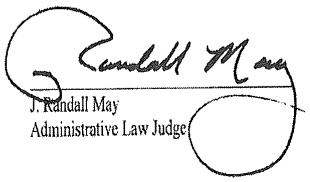
NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent prejudiced Petitioner's rights, acted outside of its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, and failed to act as required by law or rule in its decision to terminate AUC as a provider in the Alliance service area. Respondent's decision is hereby **REVERSED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court where the person aggrieved resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' Rule, 26 N.C. Admin. Code 03.01 and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 20th day of July, 2015.



J. Randall May
Administrative Law Judge

20

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**14 DHR 09906**
MR. IMAD SIDER, EMSS INC. d/b/a NEW BERN MINI MART, Petitioners, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC HEALTH, Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before the undersigned administrative law judge on April 28, 2015, in Raleigh, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further arguments and proposals. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner requested a copy of the tape recording of the hearing on April 28, 2015 which was received by him no later than May 12, 2015. Respondent requested a copy of the tape recording on June 5, 2015 which was received on June 8, 2015.

The Respondent submitted proposals and argument to the Clerk's Office of the Office of Administrative Hearings (OAH) on May 29, 2014 which was received by the Undersigned on June 2, 2015. Based on Petitioner's receipt of the tape recording, the Undersigned set submissions from Petitioner at June 15, 2015. Receiving nothing further beyond the hearing and holding the record open for seven additional business days, the record was closed on June 24, 2015.

APPEARANCES

For Petitioners: Mr. Imad Sider, *pro se*
1601 New Bern Avenue
Raleigh, North Carolina, 27610

For Respondent: Donna D. Smith, Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina, 27602

ISSUE

Whether the Respondent was correct in issuing its intent to disqualify EMSS Inc. d/b/a New Bern Mini Mart from participating as an authorized vendor in the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC Program") for three years for the following violations: Vendor overcharging for WIC supplemental foods provided on November 14, 2013, December 12, 2013 and December 23, 2013, in violation of 7 C.F.R. § 246.12(l)(1)(iii)(C), 10A N.C.A.C. 43D.0708(3), .0708(4), .0708(5) and .0710(a)(2) and the WIC Vendor Agreement.

STATUTES, RULES and REGULATIONS

42 U.S.C. § 1786
7 C.F.R. §§ 246.2, 246.12, 246.18
N.C.G.S. § 130A-361
10A N.C.A.C. 43D.0202, .0708, .0710

WITNESSES and EVIDENCE

The Respondent presented three witnesses, Gerell Smith, NC DHHS Vendor Compliance Officer, Laura Romera, NC DHHS Compliance Investigator and Carolyn Wynns, Wake County Vendor Coordinator. Petitioner Imad Sider testified on his own behalf.

Admitted into evidence was Respondents Exhibits 1 – 12.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the evidence presented, the undersigned makes the following Findings of Fact.

FINDINGS OF FACT

1. The WIC Program is the federally funded Special Supplemental Nutrition Program for Women, Infants and Children, which is administered in North Carolina by the Department of Health and Human Services. The purpose of the WIC Program is to provide supplemental foods

to pregnant women, infants and children up to age five (called "participants") who have a nutritional risk.

2. WIC supplemental foods are provided to participants through the retail grocery system via food instruments that list the authorized foods a participant may obtain. The WIC Program contracts with retail grocery stores to serve as authorized WIC vendors. As an authorized WIC vendor, the vendor agrees to accept food instruments in exchange for WIC supplemental foods provided to participants. The WIC vendor deposits the food instrument in its bank account and is paid by the WIC Program the dollar amount entered by the vendor on the food instrument for the supplemental foods provided. The WIC Vendor Agreement is the contract between the vendor and the State and local agencies through which the vendor agrees to comply with the terms of the Agreement and State and Federal WIC Program rules, regulations and laws.

3. Petitioner Imad Sider is Vice President and owner of a 100% business interest in EMSS Inc. d/b/a New Bern Mini Mart, a store located at 1601 New Bern Avenue, Raleigh, North Carolina. New Bern Mini Mart has been an authorized vendor in the WIC Program since 2009, stamp number 0026.

4. Petitioner Sider signed a WIC Vendor Agreement on behalf of New Bern Mini Mart on May 8, 2013. This Agreement is effective from June 13, 2013 through September 30, 2015, which includes the time period of the charged violations.

5. The Wake County Human Services WIC Program provides annual training to authorized WIC vendors on WIC Program procedures, rules and regulations for operating as a WIC vendor. The Wake County Human Services WIC Program provided annual training to authorized WIC vendors on June 28, 2013. Copies of the North Carolina WIC Program Vendor Manual and training materials were distributed to the vendor representatives attending this training session. The training materials and Manual contain requirements for operating as an authorized WIC vendor, including guidance on how to properly conduct a WIC transaction and information on violations and sanctions.

6. A store representative of Petitioner attended the June 28, 2013 annual vendor training session on behalf of New Bern Mini Mart. Petitioner Sider or a store representative has attended annual training each year since the store was authorized as a WIC vendor.

7. The proper procedure for transacting a WIC food instrument by a vendor includes totaling the price of the supplemental foods provided to the WIC customer, entering the total price for the supplemental foods provided in the "Pay Exactly" box on the food instrument, filling in the date of the transaction on the food instrument, and then obtaining the signature of the WIC customer on the food instrument. The price entered by the vendor on the food instrument cannot exceed the total amount of the current shelf prices for the supplemental foods provided. In addition to covering these requirements at annual training, these requirements are also included in the WIC Vendor Agreement signed by Petitioner Sider on May 8, 2013.

8. The Respondent is required by federal regulation to conduct compliance investigations of its authorized WIC vendors. These investigations may be conducted through

compliance buys. A compliance buy is a covert, on-site investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or a proxy, transacts one or more food instruments, and does not reveal during the visit that he or she is a Program representative.

9. Laura Romero works for the North Carolina Department of Health and Human Services as a compliance buy investigator for the WIC Program. Ms. Romero conducts compliance buys at authorized WIC vendors to determine compliance with the laws, rules and regulations governing the WIC Program. Ms. Romero conducted compliance buys at New Bern Mini Mart on November 14, 2013, December 12, 2013, and December 23, 2013. On each of these dates Romero posed as a WIC customer and obtained WIC supplemental foods using a WIC food instrument.

10. During each compliance buy, Romero contemporaneously recorded the price marked for each food item as she selected the items in the store. Immediately following each compliance buy, Romero went to a separate location with her food items and recorded in her report the supplemental foods obtained with the food instrument and the prices marked for each food item. Again, Romero contemporaneously viewed the food items that she obtained at the store and their prices as she completed her report. Therefore, for each of the compliance buys conducted by Romero, the WIC Program was able to determine the actual total price of the supplemental foods provided to Romero in exchange for the WIC food instrument.

11. Each food instrument used by Romero was marked with a unique identifying serial number so that Romero could retrieve the food instrument after it came through the banking system for payment and compare the price entered by the vendor on the food instrument to the actual total price of the supplemental foods provided to Romero with each food instrument.

12. Following the November 14, 2013 compliance buy, Respondent notified Petitioners by Notice of Violation(s) dated November 22, 2013, that a recent compliance buy at New Bern Mini Mart had revealed the violation of vendor overcharging. The Notice advised Petitioners that additional compliance buys would be conducted at the store and that another occurrence of vendor overcharging required a three-year disqualification of New Bern Mini Mart from the WIC Program. The Notice also recommended that Petitioners request additional vendor training from their local WIC agency.

13. Petitioners did not request additional vendor training and the Respondent resumed its investigation of New Bern Mini Mart in December, 2013, following the November 22, 2013, Notice of Violation(s).

14. When investigator Romero entered New Bern Mini Mart on November 14, 2013, she used food instrument #00280839 to obtain WIC supplemental foods listed on the food instrument.

15. Romero selected two gallons of Maola 2% milk marked at $6.25 per gallon, one dozen Simpson eggs marked at $2.99, one 64-oz. container of Everfresh apple juice marked at $6.49, three 12-oz. boxes of General Mills Kix cereal marked at $0.45 per ounce, one 16-oz.

package of Mahatma brown rice marked at $3.91, and one 16-oz. bag of Great Value pinto beans marked at $2.43.

16. The actual total price of the supplemental foods obtained by Romero with food instrument #00280839 was $44.52. The amount entered in the "Pay Exactly" box of the redeemed food instrument was $52.30. The amount entered in the "Pay Exactly" box of redeemed food instrument #00280839 exceeded the actual total price of the supplemental foods provided to Romero by $7.78.

17. When investigator Romero returned to New Bern Mini Mart on December 12, 2013, she used food instrument #00281320 to obtain WIC supplemental foods listed on the food instrument.

18. Romero selected two gallons of Maola 2% milk marked at $6.25 per gallon, one dozen Simpson eggs marked at $2.99, one 64-oz. container of Everfresh apple juice marked at $6.49, three 12-oz. boxes of Kellogg's Rice Krispies Gluten-Free marked at $0.45 per ounce, one 16-oz. package of Mahatma brown rice marked at $3.91, and one 16-oz. bag of Goya black beans marked at $2.43.

19. The actual total price of the supplemental foods obtained by Romero with food instrument #00281320 was $44.52. The amount entered in the "Pay Exactly" box of the redeemed food instrument was $52.30. The amount entered in the "Pay Exactly" box of redeemed food instrument #00281320 exceeded the actual total price of the supplemental foods provided to Romero by $7.78.

20. When investigator Romero returned to New Bern Mini Mart on December 23, 2013, she used food instrument #00281321 to obtain WIC supplemental foods listed on the food instrument.

21. Romero selected two gallons of Maola 2% milk marked at $6.25 per gallon, one 64-oz. container of Everfresh apple juice marked at $6.49, and one 16-oz. package of Mahatma brown rice marked at $3.91.

22. The actual total price of the supplemental foods obtained by Romero with food instrument #00281321 was $22.90. The amount entered in the "Pay Exactly" box of the redeemed food instrument was $22.98. The amount entered in the "Pay Exactly" box of redeemed food instrument #00281321 exceeded the actual total price of the supplemental foods provided to Romero by $0.08.

23. Based on the findings of the compliance buys conducted on November 14, 2013, December 12, 2013 and December 23, 2013, Respondent notified Petitioners by letter dated November 12, 2014, of its intent to disqualify New Bern Mini Mart from the WIC Program for three years and advised Petitioners of the right to appeal to the Office of Administrative Hearings.

24. Prior to issuing the November 12, 2014 Notice of Intent to Disqualify from WIC Program, the Respondent complied with 7 C.F.R. § 246.12(l)(1)(ix) and 7 C.F.R. § 246.12(l)(8)

by considering participant access to other authorized WIC vendors and determined there was adequate access in accordance with 10A N.C.A.C. 43D.0710(e) and .0710(f)(3).

25. Petitioner testified that he had been in the store since approximately 2003 and became an authorized vendor in the WIC Program because many in the neighborhood had asked. He stated that he believed the errors made involved small amounts and were honest mistakes.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. The Undersigned need not make findings as to every fact which arises from the evidence and need only find those facts which are material to resolution of the dispute. *Flanders v. Gabriel,* 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. The North Carolina WIC Program is vested with the authority to authorize and disqualify WIC vendors pursuant to N.C. Gen. Stat. § 130A-361, 10A N.C.A.C. 43D Section .0700 and 7 C.F.R. Part 246.

4. As an authorized WIC vendor, Petitioners are bound by the terms of the WIC Vendor Agreement and the administrative rules, regulations and laws governing the WIC Program. Pursuant to 10A N.C.A.C. 43D.0708(27) and the WIC Vendor Agreement, a vendor representative is required to attend vendor training annually.

5. Pursuant to 10A N.C.A.C. 43D.0708(28) and (29) and the WIC Vendor Agreement, vendors are responsible for informing and training their cashiers and other staff on WIC Program requirements. Vendors are also accountable for the actions of their owners, officers, managers, agents and employees who commit vendor violations.

6. "Vendor violation," as defined by 7 C.F.R. § 246.2, includes both intentional and unintentional actions of the vendor's current owners, officers, managers, agents or employees that violate the vendor agreement or Federal or State statutes, regulations, policies or procedures governing the WIC Program.

7. Title 10A N.C.A.C. 43D.0708(3), .0708(4) and .0708(5) and the WIC Vendor Agreement require a vendor to accurately determine the charges for the supplemental food provided to a WIC customer and to charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no more than the current shelf price, whichever is less.

8. Title 10A N.C.A.C. 43D.0202(20) states that "[a] 'vendor overcharge' is intentionally or unintentionally charging more for supplemental food provided to a WIC customer than to a non-WIC customer or charging more than the current shelf price for supplemental food provided to a WIC customer."

9. Title 7 C.F.R. § 246.12(l)(1)(iii)(C), incorporated by reference at 10A N.C.A.C. 43D.0710(a), provides that the State agency must disqualify a vendor for three years for a pattern of vendor overcharges. Title 10A N.C.A.C. 43D.0710(a)(2) specifies that a pattern shall be established when there are two occurrences of vendor overcharging within a 12-month period.

10. In accordance with 7 C.F.R. § 246.12(l)(1)(iii)(C) and 10A N.C.A.C. 43D.0710(a)(2), a pattern of vendor overcharges has been established at New Bern Mini Mart by the three occurrences of vendor overcharging within a 12-month period in violation of 10A N.C.A.C. 43D.0708(3), .0708(4) and .0708(5) and the WIC Vendor Agreement.

11. Pursuant to the regulatory scheme set forth in federal and State rules, the Respondent correctly issued its Notice of Intent to Disqualify New Bern Mini Mart from participating as a WIC vendor for a period of three years. The Respondent did not act in an arbitrary and capricious manner in administering the WIC Program rules, regulations and law, did not fail to act as required by law or rule, did not fail to use proper procedure, did not act erroneously, and did not it exceed its authority or jurisdiction.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that the greater weight of the evidence regarding the issues presented in this contested case lies with Respondent. As such, Respondent's decision to disqualify New Bern Mini Mart as an authorized WIC vendor for three years is **AFFIRMED**.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

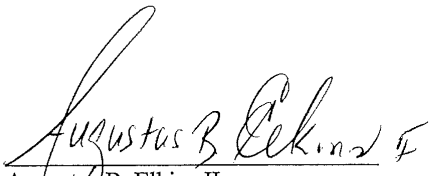
Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 28th day of July, 2015.



Augustus B. Elkins II
Administrative Law Judge

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STATE OF NORTH CAROLINA

COUNTY OF SWAIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ07718

Billy Vance Waldroup Petitioner, v. N C Sheriffs' Education And Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward, on April 9, 2015 in Waynesville, North Carolina, upon Respondent's request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at the hearing of this contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: David A. Sawyer
Attorney at Law
Bryson City, North Carolina

Respondent: Matthew L. Boyatt, Assistant Attorney General
N.C. Department of Justice
Raleigh, North Carolina

ISSUES

Did Petitioner commit the acts constituting the offense of obtaining/attempting to obtain property by false pretenses, within the meaning of N.C. Gen. Stat. § 14-100, a felony, evidencing a lack of the good moral character that is required of sworn justice officers, and justifying the denial of Petitioner's application to Respondent for justice officer certification?

STATUTES AND RULES CITED

N.C. Gen. Stat. § 14-100, 150B-23(a), 150B-29(a), 150B-34(a), and 150B-40(e); and 12 NCAC 10B .0204(a)(1), 12 NCAC 10B .0204(b)(2), 12 NCAC 10B .0205, and 12 NCAC 10B .0301(a)(8).

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits ("P. Exs.") 1 - 6.

Respondent's Exhibits ("R. Exs.") 1 - 10.

WITNESSES

For Petitioner:	Ms. Jeana Hardin, Interim Supt., Cherokee County Schools Sgt. Billy V. Waldroup, Swain Co. Sheriff's Office, Petitioner Capt. Brian Aker Kirkland, Swain Co. Sheriff's Office Sheriff Curtis Cochran, Swain Co. Sheriff's Office
For Respondent:	Mr. Jeremy Scott Milman, Walt's Electric Motors, Hayesville Ms. A. Haley Evans, Head Cashier, Lowes Home Improvement Mr. S.P. ("Skip") Laszlo, Head Cashier, Lowes Home Improvement Chief Justin Jeffrey Jacobs, Murphy Police Department

UPON DUE CONSIDERATION of the arguments of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses, in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter, "Commission" or "Respondent") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12, Chapter 10B of the North Carolina Administrative Code to certify justice officers and to deny, revoke, or suspend such certifications.

2. On the date of the hearing, Petitioner Billy Vance Waldroup was employed with the Swain County Sheriff's Office as a detention officer, holding the rank of Sergeant. He applied to Respondent for justice officer certification through this employer on February 22, 2014.

3. Petitioner has extensive training and experience in law enforcement, having served as a sworn officer for approximately 20 years. Petitioner had previously held law enforcement certifications from both the North Carolina Criminal Justice Education and Training Standards Commission and Respondent. He began his law enforcement career with the Andrews Police Department, serving as a patrol officer. He was then a road deputy and detention officer with the Cherokee County Sheriff's Office before returning to the

Andrews Police Department as Assistant Chief of Police. On the date of the incident in controversy, March 19, 2013, he was in his eighth year as a School Resource Officer ("SRO") with the Cherokee County School System Police Department, serving as that organization's Assistant Chief of Police.

4. On March 19, 2013, Petitioner went to the Lowes Home Improvement Store in Murphy, North Carolina ("Lowes") to obtain a power cord for a clothes dryer he had recently purchased. His initial visit to the store was late in the workday, after he had completed his usual duties, but before the release from after-school detention of a student that he had agreed to drive home, and he was wearing his SRO uniform at the store.

5. Petitioner was unable to find a cord of the length he needed on the shelves at Lowes. When he inquired about longer ones, he was directed to Jeremy Milman, manager of the store's electrical department. There was no cord of the needed length in stock, but Mr. Milman agreed to fabricate a longer cord from materials on hand. They discussed that the cord was for a new clothes dryer that Petitioner was installing at his home and looked at the machine online with Mr. Milman's computer. Petitioner did not tell Mr. Milman that the cord was for the Cherokee County schools. Petitioner left the store to take the student home from detention, and then returned to get the cord and picked up a few other items. Mr. Milman gave Petitioner a note on scrap paper with the information the cashier needed to ring up the fabricated cord. The note did not indicate that Petitioner was due a discount, and Mr. Milman did not discuss the possibility of Petitioner getting a discount with him. Mr. Milman's recall was inexact on the date of the hearing. His best account of his interaction with Petitioner was elicited by Murphy Police Department Chief Justin J. Jacobs on April 5, 2013 for his "Incident/Investigation Report," and recorded at pages 6-8 of its "Investigation Narrative" section. (See R. Ex. 6)

6. Petitioner took the power cord and other items to a register operated by Haley Evans. Petitioner made statements to Ms. Evans representing that he was purchasing the power cord for the use and benefit of the Cherokee County school where he worked as an SRO and, as a consequence, that Mr. Milman had told him there would be a 50% discount on the purchase of the cord. Ms. Evans began ringing up the purchase accordingly. Lowes had a special relationship with the schools, encouraged by its location adjacent to school property, and routinely gave the schools discounts that varied according the store's markup on the items. Fifty percent was an unusual amount, but Ms. Evans did not realize that because she was in her first month working at the store.

7. Ms. Evans needed her supervisor's assistance to override the cash register's programed price and give Petitioner the discount he sought. Mr. Skip Laszlo was the head cashier/front end manager on duly. When he heard that the alleged discount was 50%, he picked up the phone to question Mr. Milman, and specifically asked Petitioner whether the power cord was for the school. Petitioner shrugged. Mr. Laszlo and Ms. Evans understood Petitioner's response to mean that he was affirming his statement to Ms. Evans that the cord was being purchased for the school. Consequently, the Lowes employees proceeded to ring up the charge for the drier cord with the 50% discount. (See R. Ex. 7)

8. Shortly thereafter, Mr. Milman arrived at the checkout area. When asked, Mr. Milman denied in front of Petitioner and Mr. Laszlo that he had authorized any discount, and said that he was told the electrical cord was for Petitioner's personal use, not for the school. Mr. Laszlo took the transaction paperwork and Petitioner to the customer service counter to reverse out the discounted payment, and rebilled Petitioner for the full price, which he paid. The difference was $13.83. Petitioner took Mr. Laszlo aside and stated that what he did was wrong and apologized, and said that he would like to speak with the store manager about it. Mr. Laszlo responded that this would be fine, but that he had already reported the incident to the store's assistant manager. After leaving the store, Petitioner unsuccessfully tried to call his direct supervisor, the Chief of the Cherokee County School Police. With his second call, he did reach Chief Jacobs, in whose jurisdiction the store was located, and told him that the incident arose from a misunderstood joke he made about getting a discount.

9. Petitioner contends that when he approached Ms. Evans, he handed her the note that Mr. Milman gave him, and jokingly said, "This is my 50% coupon." He testified that he was so shocked and worried when he realized that the Lowes employees perceived him as dishonest, that he "froze" and could not respond properly when asked by Mr. Laszlo whether his purchase was for the school. Petitioner provided the Commission with a written statement dated July 9, 2014, wherein he states that when Ms. Evans asked Mr. Lazlo to override the register to allow the discount, he was so shaken that, "My knees were shaking and I was unable to speak," and, "I was frozen, so to speak, and could not express my thoughts ……. [Mr. Laszlo] attempted to ask me if it was for the school and I could not respond verbally, I shrugged my shoulders." (See P. Ex. 4)

10. Mr. Laszlo and Ms. Evans denied being told by Petitioner, at any point on March 19, 2013, that his statement about a discount to Ms. Evans was a joke. Ms. Evans, who had been promoted by Lowes to head cashier/front end manager by the date of the hearing, testified that Petitioner specifically explained to her that the 50% discount was due to the cord being purchased for the school. When Mr. Laszlo directly sought confirmation from Petitioner that the purchase was for the school, it is undisputed that Petitioner shrugged, and the result was that Mr. Laszlo gave him the discount. As Petitioner re-enacted the shrug on the witness stand, it could be interpreted as communicating acquiescence, or mild surprise at being questioned. The register tapes make plain that the Lowes employees understood that Petitioner, when directly asked, claimed the purchase was for the school.

11. In Petitioner's account of the incident, he makes no mention to Ms. Evans of either Mr. Milman or the schools. Petitioner does not dispute that Mr. Laszlo asked him if he was purchasing the power cord *for the school*. That information came to Mr. Laszlo from Ms. Evans, who testified that Petitioner told her Mr. Milman authorized the discount because he was buying the cord for the school. The only apparent alternative explanation for how Ms. Evans came to believe this, which might be inferred from the evidence, is that she simply assumed that because she knew Petitioner to be an SRO officer and that Mr. Milman was working in the electrical department. Within two weeks after the incident,

Chief Jacobs obtained Ms. Evans' hand written statement about the incident that Lowes management asked her to prepare immediately after the event. It reads:

> Bill Waldroup brought item to register. Told me that he was purchasing the items for the schools and that the dept. manager (Jeremy Millman [*sic*]) offered him 50% off since it was for schools. I called Skip [Lazlo] because I required an override. He lied to both our faces and said it was for schools. Skip went and got Jeremy who then told us that the customer was lying. It was for personal use and he had not authorized discount.

Ms. Evans' more contemporaneous recollection supports her testimony that Petitioner *stated* to her that the cord was *discounted by Mr. Milman* because it was being purchased *for the schools*.

12. The preponderance of the competent and credible evidence of record shows that on March 19, 2013, Petitioner made false representations of subsisting facts to employees of Lowes Home Improvement of Murphy which were calculated to, and did in fact deceive them, in an attempt to obtain something of value; and, that these acts constituted a violation of N.C. Gen. Stat. § 14-100, a felony.

13. Lowes did not seek criminal charges against Petitioner. Mr. Laszlo testified that this was Lowes' position in other incidents he regarded as thefts, and that he had never been to court during his eight years with the company for such a prosecution. Chief Jacobs closed his investigation for the Murphy Police Department when Lowes' manager notified him that, "Lowes will not pursue further legal action." The Swain County Sheriff's Department did not do an independent investigation of the matter at the time Petitioner was hired because no charges were brought.

14. Prior to her employment with Lowes, Ms. Evans managed a service station, and was aware that Petitioner used a school gas card there to fuel his personal vehicle on a couple of occasions. Ms. Jeana Hardin, Interim Superintendent of the Cherokee County Schools, testified that it was not unusual for employees, including Petitioner, to utilize their personal vehicles for the schools' benefit when school vehicles were unavailable, and that they were authorized to purchase gasoline for their vehicles at school expense on such occasions. The preponderance of the evidence of record tends to show that Petitioner's purchase of gasoline at school expense for his personal vehicle was authorized.

15. The parties stipulated that there is no competent evidence in the record that Petitioner deceptively obtained a discount from Lowes on a mower purchased for his personal use.

16. Petitioner received Respondent's *Proposed Denial of Correctional Officer Certification*, which included due notice of his right to appeal, on September 19, 2014. Petitioner timely requested a contested case hearing by a letter received by the Commission on or before October 8, 2014. The parties were timely served with notice of this hearing on March 11, 2015.

17. Extenuating circumstances were brought out in the course of this administrative hearing that the Commission may consider in determining an appropriate disposition, particularly in the testimony of Chief Jacobs (Tr. Pgs. 69-70), Interim Supt. Hardin (73-82), Capt. Kirkland (161-63), and Sheriff Cochran (167-70). Sgt. Waldroup has established an admirable reputation of service to law enforcement and the community, and particularly to the schools due to his interpersonal skills. The letter from the Superintendent accepting his resignation invited Sgt. Waldroup to reapply. (See P. Ex. 1, R. Ex. 4) He appeared truly remorseful about the situation he caused, and apologetic towards the Lowes employees, although his inability to admit he truly tried to deceive them is disconcerting. The trivial amount involved ($13.83) suggests that he acted on a juvenile impulse rather than out of greed or a purpose to harm others. The consequences he has experienced make a recurrence unlikely.

Upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties and the subject matter of this hearing are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §150B-40(e).

2. Pursuant to 12 NCAC 10B .0204(a)(1), the "Commission shall … deny the certification of a justice officer when the Commission finds that the applicant for certification … has *committed* or been convicted of a felony[.]" In addition, 12 NCAC 10B .0204(b)(2) provides that the "Commission shall … deny … the certification of a justice officer when the Commission finds that the applicant fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300[.]" Among the "Minimum Standards for Justice Officers" set out in that section is the requirement at 12 NCAC 10B .0301(a)(8) that, "Every Justice Officer employed or certified in North Carolina shall be of good moral character," as defined by specified North Carolina case law. Among the offenses identified in those cases as exemplifying lack of good moral character is "obtaining goods by false pretense." *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924).

3. "Obtaining property by false pretenses," as prohibited by N.C. Gen. Stat. § 14-100, is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person. *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988). The preponderance of the evidence shows that Petitioner committed the offense of "Obtaining property by false pretenses," a felony, on or about March 19, 2013.

4. The party with the burden of proof in a contested case must establish the facts required by G.S. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-29(a); 150B-34. A disappointed applicant for justice officer certification bears the burden of proving that the Commission erred in denying certification. Petitioner failed to show that

the Commission erred in denying his February 2014 application for justice officer certification on September 12, 2014.

5. The Commission may substitute a period of probation in lieu of denial following this administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension. 12 NCAC 10B .0205.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law and pursuant to 12 NCAC 10B .0204(a)(1) & (b)(2), the decision of the Commission to sanction Petitioner is found to be substantiated by the evidence and AFFIRMED.

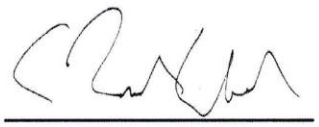
In light of the petty value involved and the extenuating circumstances noted in Finding of Fact 17, the undersigned respectfully recommends the Commission consider substituting a period of probation in lieu of denial.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 24th day of August, 2015.



J.Randolph Ward
Administrative Law Judge