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## Advisory Rulings by Administrative Agencies

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## ADVISORY RULINGS BY ADMINISTRATIVE AGENCIES: THEIR BENEFITS AND DANGERS

BY DAVID L. DICKSON\*

I.	INTRODUCTION .....	1
II.	INFORMAL REQUESTS FOR ADVICE .....	4
III.	REQUESTS FOR DECLARATORY RULINGS .....	8
	A. <i>North Carolina Statute Governing Declaratory         Rulings by Agencies</i> .....	8
	B. <i>Primary Jurisdiction and Exhaustion of Adminis-         trative Remedies</i> .....	11
	C. <i>Subject Matter of Declaratory Rulings</i> .....	13
	D. <i>Standing of Petitioner Before the Agency and the         Courts</i> .....	21
	E. <i>In What Circumstances Rulings Should or Should         Not Be Issued</i> .....	23
	F. <i>Binding Effect of Declaratory Rulings</i> .....	27
	G. <i>Availability and Scope of Judicial Review</i> .....	29
IV.	PETITIONS FOR PROMULGATION, AMENDMENT OR REPEAL OF RULES .....	38
V.	CONCLUSION .....	42
Appendix A.	CLASSIFICATION SYSTEM OF THE NORTH CAROLINA ADMINISTRATIVE CODE .....	45
Appendix B.	AGENCY RULES UNDER N.C. Gen. Stat. § 150A- 17 (1978) .....	81

### I. INTRODUCTION

In an age of omnipresent government, state and federal, seek-

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ing guidance from an administrative agency before acting has often come to be unavoidable. This article will explore some of the benefits and risks of seeking such guidance, with particular reference to the law of North Carolina.

Since it is now unsafe to assume that any activity is free from government control, the questions presented for agency ruling are as varied as the activities of man. Must I comply with environmental regulations or other regulatory laws before constructing a new plant? Do I have to get a license before engaging in a proposed activity, and if so, how do I qualify? If I already have a license, does it authorize me to broaden my activities to a related field? How broad are the disciplinary powers of the licensing agency? Can I get a favorable interpretation of the tax laws before I commit myself to a proposed transaction? Are the working conditions in my place of business subject to both federal and state regulation, and if so, are they reconcilable? How does the Federal Trade Commission interpret its powers over my little dry goods store under the numerous statutes that it administers? Has an agency adopted new regulations which require me to change my present activities? Can I get a government grant, and if so, how? The list could go on and on.

Answers to these questions and thousands of others like them may be necessary before action is taken. When a client consults his lawyer about a proposed business or professional activity, it is essential that the lawyer anticipate questions about government regulations and benefits and know where to get the answers. Sometimes all that the client wants is to remove uncertainty; he is willing to do whatever the agency may require of him, provided that he can find out what the agency does require and that he can rely on what it tells him. More often he hopes for a particular answer that will excuse him from complying with a regulation, dispense with the necessity of a license, interpret an existing license favorably, minimize his taxes, keep the government inspectors away from his door or get him a government grant. In a doubtful case, where he seeks an agency's advice and the answer disappoints him, he may choose to disregard the advice and hope that unpleasant consequences do not follow, or he may modify or abandon the project or he may attempt to overturn the agency's answer in the courts. In each such case, counsel must be prepared to advise him on the risks and chances of success.

Under the law and practice of North Carolina, as well as that of other states and the United States, there are basically two ap-

proaches which an attorney can take in seeking guidance from an administrative agency. The first is the informal approach, which may consist of telephoning someone in the agency or writing a letter to the agency and asking for advice on the facts presented, which may be existing or hypothetical. The answer, if any, will probably come from a subordinate employee of the agency and very likely will contain a reservation to the effect that it shall not be binding on the agency in the event of subsequent litigation. This informal procedure is the one generally followed by those seeking advice.<sup>1</sup> However, it has grave risks to the advice-seeker, as we shall see hereafter. The second approach is more formal and consists of a petition to the agency for a declaratory ruling on a statement of facts submitted. The administrative procedure acts of North Carolina and many other jurisdictions now provide for the issuance of such declaratory rulings and the effect to be given to them.<sup>2</sup> This approach avoids most of the risks of the informal one but has serious problems of its own.

If the foregoing approaches have been exhausted without success, or if statutes or regulations are so clearly contrary to the client's wishes that it seems useless to pursue them, the possibility

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1. M. AZIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* 141 (1973), reported that all twenty-six federal agencies studied regularly gave informal advice in large volume. Information collected by the present author from a number of North Carolina agencies indicates that all give informal advice but that only the Department of Human Resources has had any substantial number of requests for formal declaratory rulings. 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 239 (1965), reports that informal inquiry is "the method by far most commonly employed" to obtain advisory opinions from state administrative agencies.

2. ARK. STAT. ANN. § 5-706 (1976); CONN. GEN. STAT. ANN. § 4-176 (West 1958); D.C. CODE ANN. § 1-1508 (1973); FLA. STAT. ANN. § 120.565 (West Supp. 1974-75); GA. CODE ANN. § 3A-112 (1975); HAW. REV. STAT. § 91-8 (1976); IDAHO CODE § 67-5208 (1979); ILL. ANN. STAT. ch. 127, § 1009 (Smith-Hurd Supp. 1978); IOWA CODE ANN. § 17A-9 (West 1978); LA. REV. STAT. ANN. § 49:962 (West Supp. 1979); ME. REV. STAT. tit. 5, § 9001 (1979); MD. CODE ANN. art. 41, § 250 (1978); MASS. ANN. LAWS ch. 30A, § 8 (Michie/Law. Co-op 1973); MICH. STAT. ANN. § 3-560(163) (1978); MONT. REV. CODES ANN. § 82-4218 (Supp. 1977); NEB. REV. STAT. § 84-912 (1976); NEV. REV. STAT. § 233B-120 (1977); N.H. REV. STAT. ANN. § 541-A-8 (1974); N.J. STAT. ANN. § 52:14B-8 (West 1970); N.M. STAT. ANN. § 12-8-9 (1978); N.Y. [A.P.A.] LAW 56A, § 204 (McKinney 1979); N.C. GEN. STAT. § 150A-17 (1978); OKLA. STAT. ANN. tit. 75, § 307 (West 1965); OR. REV. STAT. § 183.410 (1977); R.I. GEN. LAWS § 42-35-8 (1956); S.D. COMPILED LAWS ANN. § 1-26-15 (1967); TENN. CODE ANN. § 4-513 (1955); VT. STAT. ANN. tit. 3, § 808 (1972); WASH. REV. CODE ANN. § 34.04-080 (1962); W. VA. CODE § 29A-4-1 (1976); WIS. STAT. ANN. § 227.06 (West 1957).

remains of attempting to get the legislature to change the statute or attempting to get the agency to change its regulations. The former lies wholly within the political field and is beyond the scope of this article. However, if it is not the statute itself but an agency regulation that stands in the way, the North Carolina Administrative Procedure Act has provided a means of compelling the agency either to change the regulation or to give reasons why it refuses to do so.<sup>3</sup>

We shall therefore discuss in the subsequent sections (1) informal requests to the agency for advice, (2) petitions to the agency for declaratory rulings and (3) petitions to the agency for the promulgation, amendment or repeal of rules.

## II. INFORMAL REQUESTS FOR ADVICE

In order to illustrate in a concrete way the problems which may arise in seeking agency advice, let us take a rather simple set of facts. Assume that your client is licensed as a hearing aid salesman by the North Carolina Hearing Aid Dealers and Fitters Board and must retain his license in order to continue his occupation.<sup>4</sup> Confident of the virtues of the products that he sells, he has told three recent purchasers that, if the hearing aids they purchased from him did not improve their hearing within sixty days, they could return the aids for full refund. The three customers have now tendered back the aids and demanded refunds. He believes that their claims of lack of improvement of hearing are unfounded but is fearful that, if he refuses the refunds, his license may be revoked.<sup>5</sup> Your examination of the statute discloses that the only arguably relevant ground for revocation is "gross incompetence."<sup>6</sup> You telephone the agency, furnish the facts and inquire whether refusal of the refunds could be considered "gross incompetence." After an appropriate interval, an attorney on the agency's staff writes you a letter giving his opinion.

The facts assumed in the preceding paragraph can be used to illustrate the following dangers of asking agency advice:

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3. N.C. GEN. STAT. § 150A-16 (1978).

4. *Id.* ch. 93D (1975).

5. The illustrative case is adapted with changes from *Faulkner v. North Carolina State Hearing Aid Dealers and Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978), which involved a licensee of the North Carolina Hearing Aid Dealers and Fitters Board.

6. N.C. GEN. STAT. § 93D-13(a)(2) (1975).

(1) *If the advice is favorable, the agency cannot be compelled to adhere to it.* Advice from the staff attorney that refusal of refunds does not represent "gross incompetence," because those words refer only to technical expertise in practicing the profession of hearing aid salesman, would not be binding on the agency in subsequent proceedings to revoke the salesman's license. In most cases, of course, the agency will not overrule the advice of its staff, so far as it applies to the person to whom the advice was given.<sup>7</sup> Nevertheless, the duty of the agency to follow the law as declared in statutes, regulations and court decisions might influence it to disregard erroneous advice. Furthermore, it is well settled in North Carolina that the state, unlike a private individual, cannot be estopped from disputing erroneous statements made by one of its employees, even though the advisee was intended to and did rely on them.<sup>8</sup> The United States Supreme Court has taken the same position, so far as advice from a subordinate employee is concerned.<sup>9</sup> Therefore, the salesman in our illustration can refuse to

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7. M. AZIMOW, *supra* note 1, at § 13.02. Most federal agencies will not, as a matter of policy, retroactively change advice to the detriment of the person receiving it, but the policy has not been spelled out. The North Carolina Department of Human Resources, which gives a large volume of advice by both telephone and letter, has informed the author that it has no rule on the matter but that it has a policy of not changing such advice retroactively. This situation seems to be typical of state agencies. See 1 F. COOPER, *supra* note 1, at 244.

8. Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961) (illegal issuance of building permit by city official does not estop city from enforcing zoning ordinance after reliance by permittee); City of Raleigh v. Fisher, 232 N.C. 629, 61 S.E.2d 897 (1950) (collection by city of privilege tax for conducting a business on certain premises did not estop city from contending that use of premises for that purpose was illegal); Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948) (advice by state auditor that certain items were not subject to sales tax did not estop state from collecting tax on said items for the same years); Mecklenberg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977) (city was not estopped from denying the validity of a building permit).

However, where a zoning ordinance authorizes a zoning officer to exercise discretion in classifying a permitted use, his lawful exercise of that discretion binds the city and the question of estoppel does not arise. City of Winston-Salem v. Hoots Concrete Co., 37 N.C. App. 186, 245 S.E.2d 536, *pet. for disc. review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978).

9. Dixon v. United States, 381 U.S. 68 (1965) (reliance on acquiescence of Commissioner of Internal Revenue in Tax Court decisions does not estop government from retroactive taxation); Automobile Club v. Commissioner, 353 U.S. 180 (1957) (ruling that organization was exempt from income tax does not prevent retroactive imposition of tax); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (advice from subordinate employee that crop was insurable does not re-

make the refunds only at the risk of subsequent proceedings to revoke his license for such refusal. Of course, he may succeed in overturning the revocation in court, but even then he may have to endure a temporary suspension of his license pending judicial review<sup>10</sup> and will always incur a substantial period of uncertainty and considerable litigation expense.

(2) *If the advice is unfavorable, it cannot be challenged on judicial review.* An important circumstance bearing on the correctness of agency advice is the tendency of agency personnel to believe that they should have power to deal with any wrong in the field subject to their control and that therefore their statutory powers must necessarily be construed to cover all such wrongs, even if the statutory language must be stretched to cover them. Such was the attitude of the Hearing Aid Dealers and Fitters Board, which construed "gross incompetence" to include alleged failure to honor a warranty to customers that the aids would improve their hearing.<sup>11</sup> Therefore, unless the person to whom the advice is given can obtain judicial review at this stage, he may have to live with a statutory interpretation that claims for the agency far more power than the legislature intended it to have.

It is clear that he cannot obtain judicial review of such agency staff advice. Courts in North Carolina and elsewhere have uniformly required that administrative remedies be exhausted and that the issue presented to the court be ripe for judicial review. The exhaustion doctrine requires that the decision appealed from

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quire payment of loss where lawful regulations forbade coverage). See collection of cases in M. AZIMOW, *supra* note 1, ch. 3 at 31 (where it is stated that federal agency policy is often in favor of not imposing retroactive penalties where advice has been relied on, but "the larger agencies typically would be reluctant to consider themselves bound by reliance interests created by informal advice given by low-level employees, especially if it was egregiously in error,") and ch. 8 (discussing policies of the individual agencies on this point).

10. N.C. GEN. STAT. § 150A-48 (1978) does not authorize the Superior Court to stay the effectiveness of a termination order until the termination becomes final, even though the terminated employee alleges that he has no income to support his family pending the completion of the administrative proceedings. *Stevenson v. North Carolina Dept. of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209 (1976), *cert. denied*, 291 N.C. 450, 230 S.E.2d 767 (1977). N.C. GEN. STAT. § 150A-44 (1978) permits judicial intervention before the completion of the administrative process only in case of "unreasonable delay" by the agency. *Davis v. North Carolina Dept. of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978).

11. *Faulkner v. North Carolina State Hearing Aid Dealers and Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978).

represent the agency's final action, which means that the Board itself, rather than a member of the staff, must issue a final ruling on the matter.<sup>12</sup> The ripeness doctrine requires that a concrete justiciable controversy be presented to the court, which can be disposed of by the court's decision, and it therefore precludes judicial consideration of advice which does not present the elements of such a controversy.<sup>13</sup>

The consequence is that, unless the person inquiring of the agency is prepared to live with the agency's advice, whichever way it goes, he may be better off not to seek it. If the advice in a doubtful case is unfavorable, and he proceeds contrary to it, he has been put on notice of the agency's position and may be subject to penalties for wilful violation of law.<sup>14</sup> If he does not seek the advice, he can plausibly assert that he proceeded in good faith and, even if mistaken, may at least escape the charge of wilfulness. Since the agency cannot be compelled to adhere to favorable advice (al-

12. U.S.: *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (regulation prescribing change in labeling of drugs held immediately reviewable because it was "promulgated in a formal manner," was "definitive" was not "the ruling of a subordinate official . . . or tentative" and "compliance was expected"). Compare *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (refusing to review validity of statute on basis of informal ruling given over the telephone by subordinate agency) with *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954) (refusing to enjoin Immigration Service from departing from ruling made by District Director).

N.C.: *Cameron v. Wake County Bd. of Educ.*, 36 N.C. App. 547, 244 S.E.2d 497 (1978); *Freeland v. Greene*, 33 N.C. App. 537, 235 S.E.2d 852 (1977); N.C. GEN. STAT. § 150A-43 (1978) ("Any person . . . who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review").

13. Discussed in III.G., *infra*.

14. U.S.: Statutes frequently empower the agency to fix civil penalties in substantial amounts. *E.g.*, 15 U.S.C. § 45(m)(1)(A) (1976) (authorized the Federal Trade Commission to recover a civil penalty up to \$10,000 for violation of one of its rules respecting unfair or deceptive acts or practices with actual knowledge that the act is prohibited by the rule, and the following paragraph (C) makes each day of failure to comply a separate offense). The fine continues to accumulate even during a good faith contest in court. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).

N.C.: Regulatory statutes generally provide that violation of any provision shall be a misdemeanor. *E.g.*, N.C. GEN. STAT. § 93D-15 (1975). Statutes authorizing an agency to impose civil penalties are subject to the requirement of N.C. CONST. art. IV, § 3 that penalties be "reasonably necessary" to the agency's purposes. *State ex rel Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968) (statute authorizing agency to fix penalty held invalid).



though it may voluntarily do so) and cannot be challenged in court on unfavorable advice, an attorney who has sought such advice must still face the responsibility of determining the law for himself.

The North Carolina legislature has sought to resolve this problem by a provision for declaratory rulings by agencies, which we shall now discuss.

### III. REQUESTS FOR DECLARATORY RULINGS

#### A. NORTH CAROLINA STATUTES GOVERNING DECLARATORY RULINGS BY AGENCIES

North Carolina's Administrative Procedure Act, effective February 1, 1976 (hereinafter "the Act" or "NCAPA"), is contained in chapter 150A of the General Statutes.<sup>15</sup> It attempts to provide machinery whereby "any person aggrieved" may obtain from an agency a declaratory ruling which will overcome the two basic inadequacies of informal advice, viz, that such advice is probably not binding on the agency even though relied upon and that such advice probably does not present a justiciable controversy subject to judicial review. Whether the Act accomplishes these purposes can only be determined by detailed consideration of its provisions.

Agency activity subject to the Act is generally divided into two mutually exclusive categories: (1) "rules" are defined as "each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure or practice requirements of any agency."<sup>16</sup> Excluded from the definition of rules are declaratory rulings, statements of policy or interpretations that are made in the decision of a contested case and some other categories of lesser public importance. (2) "Contested cases" are defined as "any agency proceeding . . . wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing."<sup>17</sup> Included in this definition are rate-making, price-fixing and licensing. Excluded are rulemaking, declaratory rulings or the award or denial of a scholarship or grant.

Corresponding to this dichotomy are the procedures pre-

15. N.C. GEN. STAT. §§ 150A-1 to -63 (1978) (& Supp. 1979). The Act was adapted from the MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 13 U.L.A. §§ 1-15 (Supp. 1979).

16. N.C. GEN. STAT. § 150A-10 (1978).

17. *Id.* § 150A-2(2).

scribed by the Act. Minimum procedural requirements for "rulemaking" are notice by publication and by mailing to all persons who have requested notice, and a public hearing pursuant to the notice at which the agency shall "consider fully all oral and written submissions respecting the proposed rule."<sup>18</sup> The Act specifically provides that the public hearing is not subject to the provisions of the Act on contested cases, *i.e.*, it is not a trial. The Act provides for filing of rules with the Attorney General and publication of rules by him.<sup>19</sup> Rules have been filed with the Attorney General, but they have not yet been published, due to the failure of the legislature to provide funds for this purpose.<sup>20</sup> Minimum procedural requirements for a "contested case" include notice to the parties of the time and place of hearing, opportunity to present evidence and arguments, cross-examination, right to subpoena witnesses and take depositions, observance of court rules of evidence except where evidence is "not reasonably available under such rules," designation of a hearing officer with powers substantially equivalent to those of a trial judge, proposal for decision by the hearing officer, final decision by the agency and an official record of the proceedings as a basis for review.<sup>21</sup>

The judicial review created by the Act is limited by section 150A-43 to review of "a final agency decision in a contested case," after the person aggrieved by the decision "has exhausted all administrative remedies made available to him by statute or agency rule." Although the declaratory ruling is not a "contested case," section 150A-17 provides that it "is subject to judicial review in the same manner as an agency final decision in a contested case." There is no express provision in the Act for review of an agency rule. However, the same section 150A-43 that creates a right of review under the Act also states that, if some other statute provides "adequate procedure for judicial review," such other statute governs. The final sentence of this section preserves "any judicial remedy available . . . under the law to test the validity of any admin-

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18. *Id.* § 150A-12(e).

19. *Id.* §§ 150A-58 to -64.

20. Copies of rules may be obtained either from the agency issuing them or from the Administrative Procedure Section of the Attorney General's Office in Raleigh. Rules are identified by (1) a title number assigned to the particular agency, (2) the letters N.C.A.C., designating North Carolina Administrative Code, (3) a chapter or subchapter number and (4) the rule number. For further details see Appendix A, *infra*.

21. N.C. GEN. STAT. §§ 150A-23 to -37 (1978).

istrative action not made reviewable under this Article," a provision which may be applicable to rules. It appears, therefore, that an "adequate" judicial remedy under another statute, the judicial remedy created by the Act and the other judicial remedies "available under the law" represent three mutually exclusive categories, so that a given agency action is reviewable under only one of them.<sup>22</sup>

As the above summary of the NCAPA indicates, declaratory rulings by agencies are neither "rules" nor "contested cases," although they are "subject to judicial review in the same manner" as decisions in contested cases. What they are, and the procedures applicable to their issuance, must be determined from the only section of the Act expressly dealing with such rulings, which reads in its entirety:<sup>23</sup>

*150A-17. Declaratory rulings.* On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except where the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this sec-

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22. Such was the interpretation of comparable language in the former statute, *Judicial Review of Decisions of Certain Administrative Agencies*, 1973 N.C. Sess. Laws ch. 1331, § 2, as amended by 1975 N.C. Sess. Laws ch. 69, § 3. The statute did not apply to revocation of a real estate broker's license where the law regulating brokers provided "adequate procedure" for judicial review. *In re Dillingham*, 257 N.C. 684, 127 S.E.2d 584 (1962). The statute applied exclusively to an order forfeiting a bid bond, which was within its coverage. *Metric Constructors, Inc. v. Lentz*, 31 N.C. App. 88, 228 S.E.2d 516 (1976). Certiorari will not lie where a statute provides an orderly procedure for appeal available to the party; in absence of statute, courts have inherent power to review by certiorari upon showing that the agency has acted "arbitrarily, capriciously or in disregard of law." *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963).

23. N.C. GEN. STAT. § 150A-17 (1978). For comparative purposes, the corresponding section of the REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 13 U.L.A. § 8 (Supp. 1979), reads as follows:

§ 8. Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

tion prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

Pursuant to the requirements of this section, most state agencies have adopted and filed with the Attorney General rules governing the issuance of declaratory rulings. Since these rules can be inspected only in the Attorney General's Office in Raleigh, basic information concerning the classification system and representative samples of the rules adopted pursuant to section 150A-17 have been gathered in appendices to this article for the convenience of the reader.<sup>24</sup> Particular provisions of the rules will be referred to in the discussion which follows.

Administrative practice under section 150A-17 has just begun to develop. Many of the questions raised by this section, and by the necessity of attempting to fit it into the statutory scheme, therefore remain unanswered, either at the agency level or the judicial level. In the following discussion of these questions, we shall refer to North Carolina authority where it is available; but, where it is unavailable or inconclusive, we shall cite cases dealing with similar questions under the Federal Administrative Procedure Act (hereinafter "Federal APA"),<sup>25</sup> and cases from other states having comparable statutes, as guides to the probable development of the law under the North Carolina Act.

## B. PRIMARY JURISDICTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The first and most fundamental question is whether the declaratory remedy provided by section 150A-17 must be invoked prior to seeking judicial interpretation of an ambiguous statute or an invalid or ambiguous agency rule, or whether a petitioner may proceed directly to court when only a question of law is presented. Here we encounter two fundamental principles of administrative law, which will compel him in almost all cases to seek the agency remedy first. One principle is that of "primary jurisdiction," based on the fact that the agency is not part of the judicial system but is

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24. See appendices A and B, *infra*.

25. 5 U.S.C. §§ 551-559, 701-706 (1976).

an independent body deriving its powers from the legislature. This principle declares that, where the agency has jurisdiction and is able to grant a remedy, the petitioner must first resort to the agency and give it an opportunity to afford that remedy. The other principle is that of "exhaustion of administrative remedies," which declares that, once having invoked the agency's jurisdiction, a petitioner must proceed to a final decision by the agency before seeking relief in the courts. This requirement has been established not only out of respect for the independence of the agency, and the desirability of a uniform course of decision in matters within the agency's powers, but also to insure that the case ultimately presented to the court will be fully developed and will carry with it the agency's judgment on the issues. Both principles were well established by judicial decision in North Carolina prior to the adoption of the NCPA.<sup>26</sup> The exhaustion principle has been expressly adopted by section 150A-43, which provides that judicial review shall be of "a final agency decision" and that the petitioner must have "exhausted all administrative remedies made available to him by statute or agency rule." One of these remedies is, of course, the new declaratory proceeding provided in section 150A-17.

Analysis of the language of section 150A-17 supports the conclusion that the remedy under that section must be invoked and exhausted before appealing to the courts. This section, unlike the comparable provisions of the Federal APA and the administrative procedure acts of many other states, provides that an agency "shall issue a declaratory ruling . . . , except where the agency for good cause finds issuance of a ruling undesirable" (emphasis added).<sup>27</sup> The mandatory language, coupled with the requirement

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26. *King v. Baldwin*, 276 N.C. 316, 172 S.E.2d 12 (1970); *Elmore v. Lanier*, 270 N.C. 674, 155 S.E.2d 114 (1967); *Garner v. Weston*, 263 N.C. 487, 139 S.E.2d 642 (1965); *Sinodis v. State Bd. of Alcoholic Control*, 258 N.C. 282, 128 S.E.2d 587 (1962); *Employment Sec. Comm'n v. Kermon*, 232 N.C. 342, 60 S.E.2d 580 (1950); *In re Wright*, 228 N.C. 301, 45 S.E.2d 370 (1947); *Davis v. North Carolina Dep't of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978); *Cameron v. Wake County Bd. of Educ.*, 36 N.C. App. 547, 244 S.E.2d 497 (1978); *Freeland v. Greene*, 33 N.C. App. 537, 235 S.E.2d 852 (1977); *Church v. Madison County Bd. of Educ.*, 31 N.C. App. 641, 230 S.E.2d 769 (1976), *cert. denied*, 292 N.C. 264, 233 S.E.2d 391 (1977); *Stevenson v. North Carolina Dep't of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209 (1976).

27. The administrative procedure acts of other states, with the exception of New Mexico, provide that the agency "may issue" declaratory rulings or contain other language which is clearly permissive, thus vesting nonreviewable discretion in the agency. See *supra* note 2. The Federal APA provides that the agency "in

that refusal must be based on a finding of "good cause," seems to make clear that the agency carries the burden of showing good cause for failure to act. The further provision that failure to issue the ruling for sixty days "shall constitute a *denial of the request* as well as a *denial of the merits* of the request and shall be *subject to judicial review*" (emphasis added) apparently authorizes the reviewing court to substitute its judgment for that of the agency on the merits whenever the agency fails or refuses to issue a declaratory ruling *for any reason*. This unique provision, depriving the agency of its jurisdiction over the subject matter unless it promptly issues the requested ruling, should provide a powerful sanction to create hospitality towards the granting of declaratory rulings. Thus the prompt and adequate agency remedy provided by section 150A-17 supports the conclusion that it grants primary jurisdiction to the agency on all matters coming within its coverage.<sup>28</sup>

### C. SUBJECT MATTER OF DECLARATORY RULINGS

Obviously section 150A-17 should require prior resort to the agency only in those cases where the section empowers the agency to grant an adequate remedy.<sup>29</sup> Determination of the agency's pow-

its sound discretion, may issue a declaratory order." 5 U.S.C. § 554(e) (1976). Furthermore, the Revised Model State Administrative Procedure Act grants concurrent jurisdiction to the courts to issue declaratory judgments on the validity or applicability of a rule, a provision which would clearly negative primary jurisdiction in the agency over those subjects. 13 U.L.A. § 7 (Supp. 1979).

28. Such have been the holdings in the only North Carolina cases which have so far passed on the question. *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44 (1979) (licensee who claimed that agency rule did not apply to him or was invalid must first seek its amendment under N.C. GEN. STAT. § 150A-16 (1978) or a declaratory ruling under N.C. GEN. STAT. § 150A-17 (1978)); *High Rock Lake Assn. v. Environmental Mgt. Comm'n.*, 39 N.C. App. 699, 252 S.E.2d 109 (1979) (objectors to a rule allowing substantial use of water under the Water Use Act must first seek a declaratory ruling from the agency pursuant to N.C. GEN. STAT. § 150A-17 (1978)).

29. *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (remedy held not adequate where plaintiff alleged continuing failure by board of elections to require students to prove residence as condition of voting, and only administrative remedy was by individual challenge to 6,000 to 10,000 voters); *Williams v. Greene*, 36 N.C. App. 80, 243 S.E.2d 156 (1978) (remedy for alleged wrongful discharge held adequate where plaintiff would be compensated by back pay and reinstatement). To the same effect are cases from the United States courts, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (semble as to Civil Aeronautics Board's power to protect airlines against common-law liability by awarding pas-

ers under that section therefore involves the following inquiries: (1) What questions of law may the agency decide by declaratory ruling? (2) In determining those questions of law, is the agency limited to the "given state of facts" presented to it by the petitioner, or may it develop additional facts or resolve disputed issues of fact to arrive at the "given" facts? (3) Must the "given state of facts" on which the agency bases its decision be sufficiently concrete to authorize a court to render a declaratory judgment on them, or may they be hypothetical?

(1) *What questions of law may the agency decide by declaratory ruling?* This question appears to be susceptible of a fairly definitive answer. Clearly omitted from the authority delegated is the power to pass upon the validity of any statute, including the statute creating the agency and defining its powers. This omission comports with the rule often stated in the cases, which reserves such constitutional questions to the courts.<sup>30</sup> Section 150A-17 limits the agency to "the validity of a rule" or "the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." Thus rulings are authorized on two basic types of issues: (a) the validity of a rule, which may be a purely legal question involving the issues of whether the rule was within the power delegated to the agency by the legislature, whether it was adopted pursuant to lawful procedure and whether it is rational or arbitrary;<sup>31</sup> (b) the application to the "given" facts

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senger penalty provided by regulations); *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324 (1969) (National Labor Relations Board had no power to grant relief, so court could take jurisdiction). As to the federal law, see generally B. MEZINES, J. STEIN & J. GRUFF, *ADMINISTRATIVE LAW*, § 49.02 (1979).

30. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (exhaustion was not required where the only issue raised was the constitutionality of the agency's denial of a pretermination hearing on benefits); K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 20.00-1 (1976); 2 F. COOPER, *supra* note 1, at 579.

31. "Rule" is used in the sense defined in the NCPA, N.C. GEN. STAT. § 150A-10 (1978). The tests for validity of a rule stated in the text are supported by text writers, 1 F. COOPER, *supra* note 1, at 250-65; K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5.03 (1958); 2 AM. JUR. 2d *Administrative Law* §§ 296-304 (1962). An agency rule within statutory and constitutional powers has the force and effect of law, *Lutz Indus., Inc. v. Dixie Home Stores*, 242 N.C. 332, 342-43, 88 S.E.2d 333, 340-41 (1955); but a rule imposing requirements additional to those authorized by statute is invalid and cannot be saved by striking from it the invalid portion, *States' Rights Democratic Party v. North Carolina State Bd. of Elections*, 229 N.C. 179, 49 S.E.2d 379 (1948). The agency power to make rules "carries with it the responsibility not only to remain consistent with the governing legislation, . . . but also to employ procedures that conform to the law." *Morton v. Ruiz*, 415

of a statute, rule or agency order. This second category appears broad enough to permit the agency to pass on almost any legal question which may arise from the "given" facts, if the facts are or may be covered by an existing statute, rule or order. The contrary would be true if the statute cannot be applied until the agency adopts an implementing rule.<sup>32</sup>

(2) *Is the agency limited to facts "given" to it by the petitioner, or may it develop additional facts or resolve disputed issues of fact?* It has been argued in the officially published *North Carolina Administrative Procedure Act Manual* that the agency may give notice to additional parties if it decides that "additional public participation would be required by the Act, . . . or would aid the agency in making a decision."<sup>33</sup> Nevertheless, it is submitted that analysis of the applicable sections of the NCPA will demonstrate that the intention of the statute is to limit the agency to the facts "given" by the petitioner and that no contribution to the "given" facts by other parties is contemplated.

While section 150A-17 entitles a "person aggrieved" to have his claim determined by a declaratory ruling, within the limits stated above, the Act provides no machinery for settling disputed issues of fact in such a proceeding. A declaratory ruling on the validity of a rule might itself be considered to be "rulemaking," since a declaration of invalidity would obviously lead to the repeal of the rule, and repeal is included within the definition of "rulemaking" under section 150A-10, were it not for the fact that the same section expressly declares that a declaratory ruling is not a "rule." Thus the provisions of section 150A-12 for a "public hearing" in rulemaking do not apply. A declaratory ruling on the "applicability to a given state of facts" of a statute, rule or order of the agency might be considered to be an agency decision in a contested case, were it not for the fact that section 150A-2(2) expressly declares

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U.S. 199, 232 (1974).

32. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (statute authorizing the Bureau of Indian Affairs to expend funds for the benefit, care and assistance of Indians "throughout the United States" cannot lawfully be limited to Indians who live on reservations without "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). A North Carolina example of mandatory rulemaking is N.C. GEN. STAT. § 150A-11 (1978), which states that each agency shall "adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available."

33. C. DAY, *NORTH CAROLINA ADMINISTRATIVE PROCEDURE ACT MANUAL* § 3.07 (1975) (published by Department of Administration, State of North Carolina).



that "contested cases" do not include declaratory rulings. Since section 150A-2(2) also provides that "[c]ontested case' means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing," it is apparent that any "proceeding" in which the law gives a right to an "adjudicatory hearing" or trial must be a "contested case" and cannot be one leading to a declaratory ruling. A party is entitled by law to an adjudicatory hearing when a claim of right or even of an "expectancy" will be determined on contested facts.<sup>34</sup> Since a "person aggrieved" under section 150A-17 would in most instances have such a claim, adjudication must be via a "contested case" if the facts were disputed and via a declaratory ruling only if they were undisputed or "given." This conclusion clearly comports with the summary nature of the proceeding contemplated by section 150A-17, which the agency is obligated by statute to complete within sixty days of the request for ruling.

Thus the remedy under section 150A-17 is much more limited than the remedy available in a suit for declaratory judgment. In the latter case a party is entitled by the Declaratory Judgment Act to a trial on issues of disputed fact, as a prelude to the court's declaration of the rights of the parties.<sup>35</sup> A plaintiff may therefore file a suit for declaratory judgment based on his own version of the facts, leaving the defendants to develop opposing or additional facts if they see fit. On the other hand, a petitioner for a declara-

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34. In *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908), a proceeding involving the levying of a tax by a board of equalization, the Supreme Court said that "due process of law requires that . . . the taxpayer shall have an opportunity to be heard" and that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Perry v. Sindermann*, 408 U.S. 593 (1972), held that an "expectancy" of continued employment after a one-year contract was a sufficient property interest to entitle a teacher to an adjudicatory hearing before his discharge. *Goss v. Lopez*, 419 U.S. 565 (1975), held that suspension from school for ten days must be preceded by a summary fact-finding hearing on the alleged grounds. *Bishop v. Wood*, 426 U.S. 341 (1976), *Nantz v. Employment Sec. Comm'n.*, 290 N.C. 473, 226 S.E.2d 340 (1976), and *Darnell v. North Carolina Dep't of Transp.*, 30 N.C. App. 328, 226 S.E.2d 879 (1976), are distinguishable because in each case the terminated employment was found to create no expectancy, and therefore the law did not require a hearing or entitle the discharged employee to judicial review under 1973 N.C. Sess. Laws ch. 1331, § 2, as amended by 1975 N.C. Sess. Laws ch. 69, § 4.

35. N.C. GEN. STAT. § 1-261 (1969).

tory ruling by an agency must be sure that his presentation of the facts is complete and accurate as to all relevant facts, both favorable and unfavorable, otherwise the ruling will give him little or no protection. If relevant facts are omitted or misstated, the ruling would clearly not be "binding" on the agency when applied to the true facts. If counsel is in doubt as to whether he has obtained from his investigation a complete and accurate statement of the relevant facts, he will probably be well advised not to seek a declaratory ruling until the facts are clarified, or even to await action by the agency in a "contested case."

(3) *Must the "given state of facts" be sufficiently concrete to authorize a court to render a declaratory judgment on them, or may they be hypothetical?* The problem is a difficult one. Arguments of practical convenience pull both ways. Persons subject to agency jurisdiction would certainly find it convenient to be able to submit to the agency a contemplated transaction and to obtain advice on the law concerning it. On the other hand, the mandatory provisions of section 150A-17 might then cause the agency to be inundated with requests which it would be obligated to act on, even though the law might not yet be settled and the petitioners might be testing the agency to see how far they could go without being subject to governmental sanctions. The limited time of agency personnel should be reserved for live controversies involving substantial urgency.

The language of the Act does not definitively settle the question. There is certainly no explicit requirement in section 150A-17 that a question presented for declaratory ruling on a "given state of facts" must be justiciable. Agencies often do give informal advice on hypothetical facts submitted by an inquirer, and there is some authority from other states that statutes authorizing (but not requiring) declaratory rulings by agencies include rulings on such "facts."<sup>36</sup> The exclusion of declaratory rulings from "contested cases," which of course must be based on concrete facts, may imply that there is no such limit in declaratory proceedings. The agencies themselves appear to have accepted hypothetical facts as a proper basis for declaratory rulings, since the rules adopted under section

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36. Iowa is the only state found in which a court has expressly approved such rulings. "Section 17A.9 [declaratory ruling section of the 1978 IOWA CODE ANN.] contemplates declaratory rulings by administrative agencies on purely hypothetical sets of facts." *City of Des Moines v. Public Emp. Rel. Bd.*, 275 N.W.2d 753, 758 (Iowa 1979).

150A-17 do not distinguish hypothetical from actual facts.<sup>37</sup> It can therefore be plausibly argued that both actual and hypothetical facts are appropriate for declaratory rulings.

Nevertheless, the contrary arguments appear more persuasive. These arguments are based on the unusual combination of requirements in section 150A-17 that the agency "shall" issue declaratory rulings unless it makes a finding of good cause to the contrary, that the ruling "is binding on the agency and on the person requesting it" and may not be "retroactively" changed, that the ruling "is subject to judicial review in the same manner as an agency final decision in a contested case" and that, in case of the agency's failure to issue a ruling within sixty days of a request, both the "denial of the request" and "the merits of the request . . . shall be subject to judicial review," *i.e.*, the court may substitute its judgment for that of the agency on the facts presented to the agency. No other administrative procedure act has been found which combines so many provisions indicating that a declaratory ruling must be based on facts ripe for judicial decision.

The requirement of section 150A-17 that the agency "shall" issue a declaratory ruling, unless it finds good cause to the contrary, appears to be unique. Other statutes use "may" or other permissive language.<sup>38</sup> Mandatory ruling on hypothetical facts, absent a showing of necessity and probable irreparable injury, is uniformly denied.<sup>39</sup> The reasons seem obvious. With a limited budget,

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37. See rules collected in Appendix B *infra*.

38. A survey under the author's direction of the statutes of all states disclosed that only New Mexico's declaratory ruling section contained mandatory language. N.M. STAT. ANN. § 12-8-9 (1979) states that each agency "shall" establish a system for declaratory rulings and that "such rulings shall be issued upon petition by one whose interests, rights or privileges are immediately at stake, except when the agency for good cause finds issuance of such a ruling undesirable." However, the force of the language quoted is substantially diminished by the facts that the standing requirement clearly excludes hypothetical cases, and N.M. STAT. ANN. § 12-8-8 (1979) gives jurisdiction to the state courts to issue declaratory judgments on "the validity or applicability of a rule" without exhausting the agency remedy.

39. U.S.: 5 U.S.C. § 554(e) (1976) provides that an agency "in its sound discretion, may issue a declaratory order to terminate controversy or remove uncertainty."

Model State Administrative Procedure Act: 13 U.L.A. § 8 (Supp. 1979) states: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings." The draftsmen of the Revised Model Act gave careful consideration to "the suggestion that agencies be required to furnish declaratory rulings" and concluded that "this proposal went too far" and that agencies

an agency cannot reasonably be subjected to unlimited claims for rulings on situations that may or may not arise, absent an unavoidable dilemma which presents a substantial likelihood of irreparable injury if the ruling is not obtained.

Section 150A-17 makes every declaratory ruling "binding on the agency and on the person requesting it unless it is altered or set aside by the court" and provides that the agency may not "retroactively" change it. Such a provision might appropriately be adopted as a matter of policy when an agency gives advice and the recipient of the advice relies on it to his detriment, although similar policies have given the federal agencies considerable trouble.<sup>40</sup> It is inappropriate as part of a statute which would compel a binding ruling on hypothetical facts. As pointed out below, a ruling on such facts would probably not be subject to judicial review, and thus the agency might be locked into taking a definitive position on a question which it had not had a full opportunity to consider,

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would be permitted to decline to resolve any particular question. 1 F. COOPER, *supra* note 1, at 242-43.

State Administrative Procedure Acts: With the exception of New Mexico (*see supra* note 38), all such state statutes are in substantially one of the following forms: (1) Arkansas: ARK. STAT. ANN. § 5-705 (1976) (substantial adoption of the Model Act), (2) Connecticut: CONN. GEN. STAT. ANN. § 4-176 (West Supp. 1979) (each agency "may, in its discretion, issue declaratory rulings"), (3) Illinois: ILL. ANN. STAT. ch. 127, § 1009 (Smith-Hurd Supp. 1978) (each agency "may in its discretion provide by rule for the filing and prompt disposition of petitions for declaratory rulings"), (4) Maine: ME. REV. STAT. tit. 5, § 9001 (1979) ("an agency may make an advisory ruling" and "shall prescribe by rule . . . the procedure"), (5) Maryland: MD. ANN. CODE art 41, § 250 (1978) ("any agency may issue a declaratory ruling" and "shall prescribe by rule" the form for petitions and the procedure). 1 K. DAVIS, *supra* note 31, § 4.10 at 276, states that, from the agencies' point of view, any requirement that they rule on the merits of every proper petition would be "unthinkable."

40. Statutory enactments protecting parties who rely in good faith on advisory opinions from federal agencies involve the "grave risk" that agencies will simply stop issuing such opinions. Such a change occurred in the Wage Hour and Public Contracts Division of the Department of Labor after enactment of 29 U.S.C. § 259 (1976). 1 F. COOPER, *supra* note 1, at 245. In 1962, the Federal Trade Commission adopted rules making advisory opinions binding (16 C.F.R. §§ 1.1 - .4 (1977)). Its report of that year described the response as "overwhelming"; but in later years the number of advisory opinions declined to almost zero, and in 1971, the practice of reporting them was discontinued. The 1967 F.T.C. ADMINISTRATIVE MANUAL ch. 6-132, threw many safeguards around the giving of advice. There was a controversy concerning the binding effect of advice given to Cowles Communications, Inc., M. AZIMOW, *supra* note 1, at § 8.11. *See* Dixon, *Federal Trade Commission Advisory Opinions*, 18 AD. LAW REV. 65 (1965).

which might often be erroneous in the light of future real controversies, which might affect persons not before the agency and which would be binding on the petitioner and the agency in subsequent judicial proceedings. Furthermore, since there is no requirement that the person obtaining such a ruling must rely on it in order to make it binding, it would be quite possible to submit a series of hypothetical fact statements for rulings, and yet the person requesting them could act only on the one deemed most advantageous to him. An interpretation of the statute permitting such a result would impose an intolerable burden on the agency. The most reasonable interpretation of the statute, therefore, is one that would confine declaratory rulings to judicially reviewable facts.

The provision of section 150A-17 dealing with the reviewability of declaratory rulings makes *all* such rulings subject to judicial review "in the same manner as an agency final decision or order in a contested case." This is an additional reason why such rulings should be justiciable and not merely advisory opinions. The North Carolina courts refuse to give advisory opinions and the position of the federal courts is the same.<sup>41</sup> This position, based on constitutional grounds, does not exclude judicial ruling on facts which are either existing or certain to arise in the future, provided that the facts are concrete and adversary interests are represented. It does exclude a judicial ruling on a legal question arising from facts not yet in being and subject to contingencies, unless the person seeking the ruling can show that he has gone as far as he can go without irreparable injury and that the relevant facts presented to the court are sufficiently concrete so that the court's ruling will dispose of the issue presented. For example, a declaratory ruling on a license not yet applied for or a contract not yet signed could not appropriately be issued by the agency because it could not be judicially reviewed.<sup>42</sup>

This conclusion is reinforced by the power granted the court in section 150A-17 to decide the merits of a request for declaratory ruling if the agency fails to do so within sixty days. The court is granted jurisdiction to substitute its judgment for that of the agency in the absence of any decision by the latter. Since this judi-

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41. See discussion *infra* III.G. Availability and Scope of Judicial Review.

42. North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974) (contract); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966) (license).

cial power extends to all requests for agency rulings, subject only to possible exclusion of certain classes of rulings for "good cause," it seems to follow that all such requests should present justiciable controversies, and the statute should be so interpreted to preserve its validity under the doctrine of separation of powers.

What are the practical consequences of these considerations? On the one hand, the statute appears to require that agency declaratory rulings must be based on justiciable controversies. On the other hand, agency rules and practice, so far as they have yet developed, indicate that the agencies will entertain requests for declaratory rulings on facts submitted by petitioners without distinguishing between justiciable and non-justiciable questions.<sup>43</sup> In these circumstances, the prospective petitioner faces a choice that may be irreversible. Hence he should probably not file a petition for a ruling unless either (a) he is certain that an adverse ruling will give rise to a justiciable controversy so that he can obtain judicial review, or (b) he is willing to run the risk that an adverse ruling will be non-reviewable and binding on him until such time as the agency may choose to change it voluntarily. Unless he fits one or the other of those categories, he should seriously consider not requesting a declaratory ruling. A better decision might be to reach his own conclusion on the question involved or to request from the agency informal advice which he could use as guidance but which would not be binding on him or on the agency.

#### D. STANDING OF PETITIONER BEFORE THE AGENCY AND THE COURTS

NCAPA 150A-17 permits a petition for a declaratory ruling by an agency to be made by a "person aggrieved." Who is a "person aggrieved" within the meaning of the statute must initially be determined by the agency but obviously presents a question of law for ultimate determination by the court. Similar language in the prior North Carolina statute has been given a broad interpretation, so that the grievance need not be monetary.<sup>44</sup> The present North Carolina statute will presumably be similarly construed. A strong sanction favoring hospitality in the granting of declaratory rulings

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43. See Appendix B *infra*, Agency Rules Under N.C. GEN. STAT. § 150A-17 (1978).

44. *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963) (under 1973 N.C. Sess. Laws ch. 1331, § 2, the Commissioner of Revenue is a "person aggrieved" entitled to judicial review, even though he has no personal interest in the tax and tax law does not expressly give him a right of review).

arises from the fact that failure to act causes the agency to lose its jurisdiction to a reviewing court. This should enable any interested petitioner to secure a declaratory ruling whenever the agency can reasonably give one.

A more serious problem is presented by standing before the court to question an agency's declaratory ruling after its issuance. Unlike standing before the agency, standing before the court may be of constitutional dimension. NCAPA 150A-43, applicable to both contested cases and declaratory rulings, gives a right of review to "any person who is aggrieved." The words seem to mean that such a person need not have been the petitioner before the agency but may be anyone "aggrieved" by the precedential effect of the ruling. Such has been the interpretation of the words "adversely affected or aggrieved by agency action within the meaning of a relevant statute" in the judicial review provisions of the Federal APA.<sup>45</sup> However, the state and federal constitutions require that the grievance of a plaintiff be personal, actual and concrete, not hypothetical, remote or common to the public at large.<sup>46</sup> It is difficult to see how a person could be "aggrieved" in this sense by hypothetical facts which are neither in existence nor imminently threatened. Thus the constitutional standing requirement reinforces the conclusion stated above that the subject matter contemplated by both sections 150A-17 and 150A-43 must be such as to present a concrete and existing controversy.<sup>47</sup> Unless the petitioner before the agency is willing to abide by its decision, however erroneous, he would do well to assure himself before he files his petition that he has statutory and constitutional standing sufficient to

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45. 5 U.S.C. § 702 (1976). In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), petitioner was entitled to judicial review of declaratory order of the I.C.C. even though it was not a party to the proceeding before the Commission, where the Commission's order gave notice that its operations might be unlawful.

46. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (a general interest in protecting the environment is not sufficient injury in fact to give standing to enjoin alleged illegal building, but allegation of prior use of the area by the Club's members would be sufficient); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (biology teacher had standing to challenge a state statute forbidding the teaching of the doctrine of evolution); *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971) (a mere fear that a claim will be asserted is not enough to justify a declaratory judgment, but the court has jurisdiction where a claim has been made and the court is convinced that litigation, sooner or later, is unavoidable).

47. As to the elements of such a controversy, see *infra* III.G. Availability and Scope of Judicial Review.

entitle him to judicial review.

#### E. IN WHAT CIRCUMSTANCES RULINGS SHOULD OR SHOULD NOT BE ISSUED

In the light of the foregoing discussion of the primary jurisdiction of the agency, the obligation to exhaust administrative remedies, the appropriate subject matter of declaratory rulings and the requirement of standing to obtain a ruling, we may now attempt a discussion of when a declaratory ruling may lawfully and appropriately be issued or denied.

NCAPA section 150A-17 states: "On request of a person aggrieved, an agency *shall issue* a declaratory ruling . . . except where the agency for *good cause* finds issuance of a ruling *undesirable*. The agency *shall prescribe in its rules* the circumstances in which rulings shall or shall not be issued" (emphasis added). This provision is a rather clear directive that "good cause" shall be formulated by the agency so far as practicable in rules particularizing the circumstances which the agency considers controlling in granting or denying requests. We may justly conclude that the draftsmen of this language were seeking to put all petitioners on notice of the agency's grounds for issuance or refusal of rulings and to require that petitioners' denied rulings be treated in a consistent manner. It also seems likely that the agency has been granted broad discretion to particularize the "circumstances" making rulings "undesirable."

Most of the rules adopted by the agencies up to the present time do not carry out this statutory mandate in any complete or consistent way. Some contain no statement of the relevant "circumstances" beyond the language of the statute. Others specify only circumstances bearing on the issuance of a ruling on the validity of a rule. The rules of the Alcoholic Beverage Control Board cover the circumstances bearing on the denial of a ruling on the validity of a rule or the denial of a ruling on the applicability of a statute or rule to a given state of facts but do not deal with denial of a ruling on the applicability of a previous order of the agency.

It is submitted that those agencies which have adopted rules under section 150A-17 merely repeating the language of the statute, or dealing with only one of the statutory grounds for issuance of a declaratory ruling, have not obeyed the legislative command. Such failure might be attacked by filing a petition under NCAPA



105A-16 requesting the agency to adopt legally sufficient rules.<sup>48</sup> Another approach would be to contest the denial of *any* declaratory ruling on the ground that, until the agency had adopted legal rules, it had no power to refuse to issue a ruling on *any* petition. Since the court on review could decide both the validity of the denial and the merits of the petition, this approach should bring relief, although it might involve repeated appearances before the agency and the courts.

Even those rules which do evidence an attempt to comply with the statutory mandate to "prescribe . . . the circumstances in which rulings shall or shall not be issued" do not do so in any complete or satisfactory way. The rules of the North Carolina Board of Architecture go as far as any in this direction.<sup>49</sup> They state the following reasons which will "ordinarily" cause the Board to *refuse* a declaratory ruling on the statutory subjects: (1) *Validity of a rule*—failure of petitioner to show such change of circumstances since the adoption of the rule that a ruling would be warranted, or to show that factors specified in the request were not given full consideration at the time the rule was issued; or where the "factual content" in the request was specifically considered when the rule was adopted. (2) *Applicability of a statute, rule or order to given facts*—where there has been a "similar controlling factual determination in a contested case," or where "the subject matter of the request is involved in pending litigation." The Board's rules require it to notify the petitioner of its refusal, "stating the reasons for the denial of the declaratory ruling," which presumably will include specific reference to one of the specified grounds and citation to any prior controlling decision. How the petitioner is to find out what facts or factors were previously considered by the agency at the time of adoption of a rule, or whether given facts are similar to those presented in an unpublished contested case or pending litigation, so that he can properly prepare his petition, is nowhere explained and is not readily apparent. No attempt is made to "prescribe . . . the circumstances in which rulings shall . . . be issued," except as they may be inferred from the reasons for refusal. Nor is any attempt made to deal with the troublesome problems of the appropriate subject matter for declaratory rulings which have been

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48. See *infra*, IV. Petitions for Promulgation, Amendment or Repeal of Rules.

49. See Appendix B *infra*, Rules of the North Carolina Board of Architecture, Rule .0503(d).

discussed above.

Adoption of uniform rules specifying "the circumstances in which rulings shall or shall not be issued" would seem appropriate and practical, and should be undertaken by the Attorney General or under his supervision. In view of the wide discretion given the agencies to refuse rulings when they are found for good cause to be "undesirable," many of the defects in NCAPA section 150A-17 could be corrected by agency rules specifying the relevant "circumstances." The rules should at least cover the following points which are presently not covered in any of the rules examined:

(1) *Encouragement of informal advice.* Since the North Carolina Administrative Code has not yet been published and distributed, and declaratory rulings will not be published until they are appealed to the Courts of Appeal, it is quite probable that an agency will have already adopted a relevant rule or issued a relevant decision of which a petitioner will know nothing. If the rules were to provide for a preliminary sifting of all inquiries, formal and informal, and all petitions for declaratory rulings, to determine whether the question submitted was already covered, the time of both the agency and the petitioner would be saved. The rules could then provide for written notice to the petitioner (oral notice is too susceptible to misunderstanding) that the agency considered a specified rule or decision, set forth in the notice, to be an answer to his inquiry. If the petitioner then believed that his question was not covered by the particular rule or decision, or that the rule or decision was invalid, he could present a better drafted petition for declaratory ruling. Such a rule should specifically designate by title the person or persons within the agency who would deal with all such inquiries so that the time of both the inquirer and the agency might be saved. In many cases, the answer to this preliminary inquiry might dispose of it satisfactorily to the inquirer so that no petition for declaratory ruling would need to be filed.

(2) *Determination of what "given state of facts" is acceptable for declaratory ruling.* The major omission in both NCAPA section 150A-17 and the agency rules adopted pursuant to it is the failure to take a position on what "facts" are appropriate for declaratory rulings. The agency certainly has strong reasons for conservation of its time by limiting petitions to those based on concrete facts, either actual or imminent, which could be the subject of a declaratory judgment by a court. For the reasons set forth above, it is believed that such a limitation would be a correct interpretation of section 150A-17, and particularly of its provision for

judicial review. In any event, the rulemaking power of the agency under section 150A-17 seems broad enough to enable it to find "undesirable" and reject any petition not stating "facts" ripe for judicial review, whether or not the section would be so limited in the absence of a rule.

(3) *Whether the facts "given" in the petition can be amplified or modified by the agency or by other interested persons.* All of the agency rules examined except those of the Board of Alcoholic Control assume, without stating, that the "facts" set forth in the petition for declaratory ruling shall be the sole "facts" considered by the agency.<sup>50</sup> For the reasons elaborated in the prior sections of this article, it is submitted that the "given state of facts" is limited by statute to those stated in the petition, without contradiction or elaboration. The agency rules should so state and should probably also contain a warning that the "binding" effect of the ruling is dependent on an accurate statement in the petition of all relevant facts, favorable and unfavorable. If the agency knows facts contradicting those in the petition, it may call them to the attention of the petitioner, with the suggestion that the petition be amended to include them, upon pain of dismissal in case of refusal. However, the agency may choose to construe section 150A-17, in accordance with the *North Carolina Administrative Procedure Act Manual*, as allowing the bringing in of additional parties. In that event, the additional parties would obviously not be bound by the petitioner's statement of facts, and the rules should allow them all the rights of a due process hearing, including confrontation, cross-examination and production of contrary evidence, on a timetable which would permit the prompt agency decision contemplated by section 150A-17. The courts could then decide whether such an adversary procedure is allowable under the section.

(4) *Mandatory requirement of findings or reasons in support of a declaratory ruling.* None of the rules compel the agency to state findings or reasons in support of its ruling, although the courts uniformly hold that such explanation of an agency decision is essential for meaningful judicial review.<sup>51</sup> The only rules which

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50. See Appendix B *infra*, Rules of the Alcoholic Beverage Control Board. Rules .0403, .0405 and .0409 require that the request list names and addresses of third parties "who may possibly be affected," provide for notice to such parties and authorize third parties to present "written comments and oral arguments." However, the rules make no provision for an adjudicatory hearing.

51. U.S.: *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), *rev'd*, 332 U.S. 194 (1947); *cf.* 5

even mention reasons are those of the Board of Alcoholic Control, and they are limited to a provision that the record for review shall include any reasons which the agency may choose to give for the decision.<sup>52</sup> It is true that section 150A-17 specifies that a declaratory ruling is subject to judicial review "in the same manner as an agency final decision or order in a contested case"; but this does not cover the point, because the requirement of findings is contained only in the contested case hearing sections,<sup>53</sup> and section 150A-2(2) provides that contested cases do not include declaratory rulings. Thus the procedural requirements for hearings in contested cases do not apply to the simplified procedure contemplated for declaratory rulings. The matter could readily be clarified by a rule specifically requiring the agency to give findings or reasons in support of its ruling. Such findings or reasons can, of course, be informal, so long as they are sufficiently clear to enable the petitioner and the reviewing court to understand the ruling.

#### F. BINDING EFFECT OF DECLARATORY RULINGS

NCAPA 150A-17 states: "A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling." These provisions require answers to some fundamental questions: (1) How "binding" can a ruling be if persons adversely interested are not made parties to the declaratory proceeding before the agency? (2) Does the "binding" effect of the ruling on the petitioner and the agency protect the petitioner if the agency exceeds its delegated powers? (3) Where is the line to be drawn between retroactive change and prospective change of a declaratory ruling?

On the first point, the petitioner is faced with the fact that section 150A-17 does not in terms provide for bringing in persons who may be adverse to the petitioner and therefore does not re-

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U.S.C. § 557(c) (1976). See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.02 (1958).

N.C.: *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979); *Taylor v. Dixon*, 251 N.C. 304, 111 S.E.2d 181 (1959). See generally 2 F. COOPER, *supra* note 1, at 471. Cf. N.C. GEN. STAT. § 105A-36 (1978).

52. See Appendix B *infra*, Rules of the North Carolina Board of Alcoholic Control, Rule .0412.

53. N.C. GEN. STAT. §§ 150A-23 to -37 (1978). The requirement of findings is contained in sections 150A-34 and 150A-36.

quire the type of adversary proceeding before the agency which the courts consider essential to a justiciable controversy. In the absence of procedures affording to such persons notice of the proceeding and an opportunity to be heard, they are obviously not bound by the agency ruling. If their first opportunity to be heard is at the judicial review stage, the court may be faced with the choice of refusing to grant judicial review because of the absence of indispensable parties or opening the proceedings to a judicial trial at which these persons can be brought in and allowed to contest all disputed issues of fact and law. Neither alternative is contemplated by the NCAPA. Whether either is available to the court will be considered below in Section G where judicial review is considered.

On the second question, involving the "binding" effect of a declaratory ruling on the petitioner and the agency, we must start with the language of section 150A-17. The section declares that the ruling is binding on "the agency and the person requesting it unless it is altered or set aside by the court." Whatever might be the conclusion in the absence of such language, the section seems clear that the ruling is binding on "the agency" and not on the government as a whole and that it is binding on both the agency and the petitioner unless set aside in the direct review proceeding which the section provides. Thus the agency cannot make a determination of its own powers which would be conclusive on *another agency* of the state government. Can the agency, by issuing a ruling extending its delegated powers, or declaring the law contrary to an express legislative prohibition, estop *itself* from retroactively correcting its error to conform to the law? The proposition might be maintainable if the petitioner had relied on the ruling to his detriment, but the statute does not require reliance.<sup>54</sup> It seems inconceivable that the legislature could have intended to grant to an agency the power to amend the statutes by fiat to favor a petitioner and to protect the favored petitioner indefinitely against compliance with the law simply because he did not seek judicial review and the agency did not change the ruling. Yet such would be the consequence of holding every ruling to be "binding." It is

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54. North Carolina cases hold that the government cannot be estopped in the exercise of a governmental function, even where a person has relied on the erroneous advice. See cases *supra* note 8. Even those authors who argue that the government should be subject to estoppel where persons have relied on erroneous advice or rulings do not contend that estoppel should apply in the absence of reliance. M. AZIMOW, *supra* note 1, at § 3.14; 2 K. DAVIS, *supra* note 31, at ch. 17.

submitted that incorrect rulings can be "binding" only when they are within the powers delegated to the agency and are at worst erroneous exercises of granted powers or abuses of discretion within granted powers. Any decision beyond or contrary to the agency's statutory authority cannot be a "ruling" within the meaning of section 150A-17 and thus cannot be binding on, or a protection to, the agency or the petitioner.

The third question, involving the line to be drawn between forbidden retroactive change and permitted prospective change of a declaratory ruling, involves a fundamental distinction between agencies and courts. Most court proceedings terminate with a final judgment based on past facts. Agencies, however, are normally engaged in an ongoing program of administration or regulation, involving a substantial amount of discretion, in which they must be free to reach new conclusions within the limits of their discretion, even though the governing statute and the agency rules have not changed. Thus, for example, long-term plans made on the basis of a declaratory ruling would not prevent the agency from prospectively changing its ruling, even though the action planned still had a long time to run. Any legal relationships entered into on the basis of an agency declaratory ruling would necessarily be subject to alteration by lawful regulatory change.

The necessary conclusion appears to be that the "binding" provision should be read to state no more than it expressly says. It cannot be binding on persons not before the agency, including other agencies of the government and other persons. It is binding unless set aside in some direct review proceeding, provided that it is within the agency's delegated powers. The binding effect is limited to matters actually considered and decided, and thus any material variation in the facts on which the issues were decided would be outside the binding effect. The agency retains the right to change the ruling prospectively, even though it might upset ongoing legal relationships based upon the former ruling. Finally, in view of the great importance of presenting to the agency all issues which the petitioner wants to raise, and of giving to the agency a complete and accurate statement of the relevant facts, the petition for a declaratory ruling and the subsequent proceedings before the agency should clearly be handled by an attorney.

#### G. AVAILABILITY AND SCOPE OF JUDICIAL REVIEW

Our consideration of judicial review starts with the paradox

that a declaratory ruling under NCAPA is not a "contested case,"<sup>55</sup> and yet it is "subject to judicial review in the same manner as an agency final decision in a contested case."<sup>56</sup> We are therefore forced to a consideration of whether the two proceedings are in fact sufficiently similar so that the same review procedure can be made applicable to them, or whether they differ in ways so fundamental that judicial review "in the same manner" cannot be had. The scanty legislative history gives us no aid in the solution of this problem.

The exclusion of declaratory rulings from the definition of "contested case" suggests that the draftsmen may not have intended to require that a petition for such a ruling must necessarily present a justiciable controversy, in spite of the provision of section 150A-17 purporting to make such rulings subject to judicial review. It may be that the provision for review of a declaratory ruling "in the same manner as" the final order in a contested case means only that, *if* a declaratory proceeding does present a justiciable controversy, it shall be subject to the same form of judicial review. While we have contended above that section 150A-17 should be interpreted to require the subject of a declaratory ruling to be justiciable, we have also recognized that agency practice embodied in present agency rules apparently permits the submission of purely hypothetical facts for a declaratory ruling and establishes no procedure for the resolution of disputed issues of fact.<sup>57</sup> On the other hand, a "contested case" is defined as a proceeding "wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing."<sup>58</sup> Obviously such a proceeding does present an ac-

55. N.C. GEN. STAT. § 150A-2(2) (1978).

56. *Id.* § 150A-17; *see also id.* § 150A-48.

57. *See* Appendix B *infra* for collection of rules. It may be a misnomer to speak of "agency practice" since most of the agencies questioned had received no petitions for declaratory rulings. Their constituency has continued to make informal inquiries as it did before the NCAPA was adopted.

58. N.C. GEN. STAT. § 150A-2(2) (1978). The cases in other states, decided under statutory provisions resembling sections 150A-2(2), -17 and -43, are divided on the question of whether a declaratory ruling by an agency on hypothetical facts is judicially reviewable. Iowa appears to be the only state in which courts have said that such a decision is judicially reviewable, but the facts of the case before the court probably presented an actual controversy susceptible of declaratory judgment. *City of Des Moines v. Public Emp. Rel. Bd.*, 275 N.W.2d 753 (Iowa 1979). *But see Sarasota County v. Department of Adm'n*, 350 So. 2d 802 (Fla. Dist. Ct. App. 1977), *cert. denied*, 362 So. 2d 1056 (Fla. 1978) (county which

tual justiciable controversy.

The statutory exclusion of the declaratory proceeding from "contested case" applies to procedure as well as substance. Section 150A-17 adopts only the procedure for judicial review of contested cases, and thus the procedure before the agency in contested cases is inapplicable. It seems reasonable to assume that the draftsmen of the Act sought to make the declaratory proceeding speedy, informal and free from the statutory safeguards which turn the "contested case" into the equivalent of a judicial trial. The rights granted by the NCAPA to the parties in a "contested case" before the agency include the right to an adjudicatory hearing,<sup>59</sup> the right to become a party to a case whenever a person claims an interest in the subject matter and may be impeded in the protection of that interest,<sup>60</sup> the right to present evidence and to cross-examine opposing witnesses,<sup>61</sup> the right to have all evidence made a part of the record,<sup>62</sup> the right of subpoena,<sup>63</sup> the right to receive proposed findings of fact and file exceptions to them<sup>64</sup> and the right to a final decision with findings of fact and conclusions of law "based exclusively on the evidence and on matters officially noticed."<sup>65</sup> As previously shown, the declaratory ruling is based on the allegations of the petition, with no requirement that adverse interests be represented or that the alleged facts be tested by normal trial procedures.

If the correct interpretation of section 150A-17 is that it governs only the procedure for judicial review, and does not necessarily require such review, then the courts have the right to reject any petition for review that does not present a justiciable case. On

would not have standing to initiate an administrative proceeding for relief cannot obtain judicial review of a declaratory statement on the subject); *Gretna Pub. School Dist. v. State Bd. of Educ.*, 201 Neb. 769, 272 N.W.2d 268 (1978) (proceeding to obtain a declaratory ruling is not a "contested case" and therefore not subject to judicial review); *Board of School Dirs. v. Wisconsin Emp. Rel. Comm'n.*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969) (declaratory ruling by Board in answer to hypothetical question concerning duty of municipal employer is not subject to judicial review, since the court will not render an advisory opinion).

59. N.C. GEN. STAT. § 150A-23(a) (1978).

60. *Id.* § 150A-23(d) (incorporating Rule 24 of the Rules of Civil Procedure, *id.* ch. 1A (1969)).

61. N.C. GEN. STAT. § 150A-25 (1978).

62. *Id.* § 150A-37.

63. *Id.* § 150A-27.

64. *Id.* § 150A-34.

65. *Id.* § 150A-36.



the other hand, if section 150A-17 intends to require the courts to review all declaratory rulings, even those based on hypothetical facts and without the presence of indispensable adverse parties, it may represent an invalid attempt by the legislative branch to expand the "judicial power" granted by Article IV, Section 1, of the state constitution to the North Carolina courts. Whichever view is adopted, a brief consideration of the extent of judicial power under the state constitution is necessary.

There appears to be no substantial difference between the concept of a justiciable case under the "judicial power" grant in the federal constitution and under the "judicial power" grant in the North Carolina Constitution.<sup>66</sup> Each requires the presence of the following elements of a case in order to give the court jurisdiction:

(1) *A legal issue.* There must be "law to apply," to use the graphic expression of the United States Supreme Court in reviewing a federal agency decision.<sup>67</sup> In other words, the issue must not be one which is reserved to the exclusive judgment of the legislative, executive or administrative authorities of the government. An agency ruling on a matter wholly "committed to agency discretion" does not present an issue which the court can decide under either federal or North Carolina law.<sup>68</sup>

66. U.S. CONST. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

N.C. CONST., art. IV, § 1:

The Judicial power of the State shall, except as provided in Section 3 of this Article [relating to administrative agencies], be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.

On the elements of a case or controversy within the federal judicial power, see Dickson, *Declaratory Remedies and Constitutional Change*, 24 VAND. L. REV. 257 (1971).

67. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971) ("Plainly, there is 'law to apply' and thus the exemption for action 'committed to agency discretion' is inapplicable." The court then held disbursement of funds by the Secretary of Transportation to be subject to judicial review).

68. U.S.: Federal APA review provisions do not authorize review of agency action "committed to agency discretion" within the meaning of 5 U.S.C. § 701(a)(2) (1976). *Laird v. Tatum*, 408 U.S. 1 (1972) (challenge to Army's surveillance of civilian political activity did not present a case for the courts); *Vaca v. Sipes*, 386 U.S. 171 (1967) (the General Counsel of the National Labor Relations

(2) *Ripeness for judicial decision.* The facts must be actual and concrete, not remote or hypothetical. A decision on remote or hypothetical "facts" would represent mere "advice," which neither the federal nor the state courts have power to give.<sup>69</sup> If section 150A-17 should be construed to permit agency declaratory rulings on "validity of a rule" as an abstract question, or on "given" facts which are not actual and concrete, it seems clear that such rulings would not be judicially reviewable, and the North Carolina courts have so held in declining to review such agency decisions.<sup>70</sup>

Board has unreviewable discretion to refuse to institute unfair labor practice proceedings); *United Elec. Contractors Ass'n v. Ordmen*, 366 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967) (the General Counsel of the National Labor Relations Board has unreviewable discretion to refuse to institute unfair labor practice proceedings).

N.C.: The right of review granted by N.C. GEN. STAT. § 150A-43 (1978) in a "contested case" is limited by the definition of "contested case" in N.C. GEN. STAT. § 150A-2(2) (1978) to a proceeding wherein the "legal rights, duties or privileges of a party" are determined. *Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 226 S.E.2d 340 (1976) (similar language in 1973 N.C. Sess. Laws ch. 1331, § 2), did not permit review of the discharge of a state employee in the absence of violation of a constitutional right.

69. U.S.: *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (the "basic rationale of the ripeness doctrine is to prevent the courts . . . from entangling themselves in abstract disagreements"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests").

N.C.: *Adams v. North Carolina Dep't of Natural & Econ. Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978) (contention that the Coastal Area Management Act and regulations invalidly authorized warrantless searches was not before the court where no search had occurred or was threatened); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974) (declaratory judgment as to the validity of a proposed contract between plaintiffs and numerous municipalities will not be granted in absence of evidence that plaintiffs have the power to bring the contract into being); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966) (declaratory judgment that city television licensing ordinance is invalid will not be granted where no license has been issued under the ordinance); *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949) (declaratory judgment as to the marketability of a real estate title will not be granted where it is not alleged that a prospective purchaser has been obtained, since the court is not authorized to give advisory opinions); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942) (it is no part of the judicial power vested in courts by the constitution to give an advisory opinion on a condemnation in the absence of an allegation that action is contemplated).

70. *Adams v. North Carolina Dep't of Natural & Econ. Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978) (designation of plaintiffs' land by the Coastal Resources Commission as an interim area of environmental concern, which might in

(3) *Adversary parties*. There must be a plaintiff with standing<sup>71</sup> and a defendant with an opposing interest who is subject to suit.<sup>72</sup> A "person aggrieved" entitled to judicial review in a "contested case" must be one whose "legal rights, duties or privileges" are determined.<sup>73</sup> Section 150A-17 makes the same tests applicable to one who seeks judicial review of a declaratory ruling. As the federal courts express it, there must be "injury in fact" to entitle a plaintiff to standing,<sup>74</sup> which means that he must have an existing

future result in denial of all applications for development permits, is not judicially reviewable until the time for application for such permits arrived); *Bragg Dev. Co. v. Braxton*, 239 N.C. 427, 79 S.E.2d 918 (1954) (notice given to plaintiff that its property would be assessed for taxes, and agreement by the parties that the question of its exemption from taxes should be submitted to the court for decision, present an "abstract question" which is not justiciable).

71. U.S.: *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (class action for declaration that members of Congress illegally held military commissions in violation of U.S. CONST. art. I, § 6, cl. 2, dismissed for lack of standing because plaintiffs suffered "injury in the abstract"); *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 35 (D.C. Cir. 1974) (an agency's general statement of policy is not judicially reviewable because it "does not have a sufficiently immediate and significant impact upon petitioners").

N.C.: *Angell v. City of Raleigh*, 267 N.C. 387, 389-90, 148 S.E.2d 233, 234-35 (1966) (court stated that "the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations" and that there must be "an actual or real existing controversy between parties having adverse interests," citing *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 410 (1949)).

72. The state is immune to suit except where it has consented to be sued. *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961). 1973 N.C. Sess. Laws ch. 1331, § 2, authorizing judicial review of a final administrative decision, was held consent to suit in a case coming within its provisions. *Metric Constructors, Inc. v. Lentz*, 31 N.C. App. 88, 228 S.E.2d 533 (1976). Consent to suit has also been implied when the state enters into a contract. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). The Declaratory Judgment Act has been held to grant jurisdiction for judicial review of a suit attacking the constitutionality of a statute. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

73. N.C. GEN. STAT. § 150A-43 (1978) (granting right to judicial review to a "person who is aggrieved by a final agency decision in a contested case"); *id.* § 150A-2(6) (defining "person aggrieved" as one "directly or indirectly affected substantially in their person, property or public office or employment by an agency decision"); *id.* § 150A-2(2) (defining "contested case" as an "agency proceeding . . . wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing"). It is apparent that the statutory right to judicial review requires that all three sections be satisfied.

74. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (conservation organization seeking to enjoin proposed development of wilderness area, but not alleging that

interest which is harmed or threatened with harm. One who poses to the agency a purely hypothetical question would obviously not meet this test. So far as the defendant is concerned, an agency seeking to sustain its declaratory ruling would meet the requirement of an opposing interest.<sup>75</sup> The right granted by section 150A-17 to judicial review of an agency declaratory ruling would constitute a sufficient statutory waiver of the agency's sovereign immunity so as to make it subject to suit.<sup>76</sup>

(4) *Resolution of the controversy by judicial decision.* In a sense, this requirement is merely the summation of the preceding three, but it serves to emphasize that the court must be able to enter a judgment which is subject only to review by a higher court, and not to the discretion of any other branch of the government. The courts have recognized this requirement.<sup>77</sup> It would not be met, for example, by appeal from an agency ruling which merely

it or its members used the area for any purpose, failed to allege "injury in fact" sufficient for standing); *Association of Data Proc. Serv. Org'ns, Inc. v. Camp*, 397 U.S. 150 (1970) (plaintiff must allege "injury in fact, economic or otherwise").

75. N.C. GEN. STAT. § 150A-2(6) (1978) ("Person aggrieved" includes any person or persons "affected substantially in their . . . public decision, was held consent to suit in a case coming within its provisions"); *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963) (under 1973 N.C. Sess. Laws ch. 1331, § 2, a "person aggrieved," entitled to review of an agency decision, included a public official suffering loss only in his official capacity). It follows a fortiori that an agency defending its declaratory ruling would have sufficient interest to be a party respondent on judicial review.

76. *Metric Constructors, Inc. v. Lentz*, 31 N.C. App. 88, 228 S.E.2d 533 (1976).

77. U.S.: *Chicago S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (the court had no power to review the action of the Civil Aeronautics Board in granting an overseas route, in spite of a statute vesting such power of review in the court, where the Board's decision was subject to reversal or modification by the President); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion").

N.C.: *Bragg Dev. Co. v. Braxton*, 239 N.C. 427, 79 S.E.2d 918 (1950) (where the parties submitted to the court a question of the legality of a tax not yet levied, the case was dismissed because "no justiciable question on which the court, in a civil action, could render a judgment is disclosed" and any judgment "would be wholly advisory in nature"); *Tryon v. Duke Power Co.*, 222 N.C. 200, 206 S.E.2d 178 (1942) (question as to whether plaintiff town had the right to condemn defendant's property, in the absence of any allegation of intent to do so, does not present a controversy under the Declaratory Judgment Act, since the result would be purely advisory).

exercised unreviewable agency discretion, although a court does have power to order the agency to exercise a discretion which the law requires rather than merely refusing to act.<sup>78</sup>

Lack of a justiciable controversy in the record coming up to the reviewing court under section 150A-17 cannot be corrected by trial in that court. As pointed out above, if the court were to hear and determine anew a matter on which the agency had issued a declaratory ruling (as distinguished from the agency's refusal to issue a ruling), the court would be violating the doctrine which places primary jurisdiction in the agency over matters within its jurisdiction.<sup>79</sup> The court would also be violating the provision of section 150A-17 that there be "judicial review in the same manner" as in a contested case, since in contested cases the reviewing court "shall take no evidence not offered at the hearing" before the agency.<sup>80</sup> As pointed out above, in declaratory proceedings before the agency, the only evidence "offered" should be the facts stated in the petition, which are the exclusive basis for review.<sup>81</sup> There is thus no way by which evidence can be taken on review without contradicting the provisions of the NCAPA.

Can the limitations of judicial review under the NCAPA be overcome by some other judicial remedy available to the petitioner under the law? Section 150A-43 authorizes such a remedy "to test the validity of any administrative action not made reviewable under this Article." The answer appears clearly negative. Insofar as the record and ruling presented for review contain a justiciable case, petition for review under the NCAPA is the exclusive method of review by the clear terms of both sections 150A-17 and 150A-43. It is true that the North Carolina courts have approved declaratory

78. *McGrath v. Kristensen*, 340 U.S. 162 (1950) (court could order the U.S. Attorney General to exercise the discretion granted him by statute as to the deportation or non-deportation of an alien, where he mistakenly assumed that the statute required deportation, even though his ultimate decision was not judicially reviewable).

79. See *supra* III.B. Primary Jurisdiction and Exhaustion of Administrative Remedies.

80. N.C. GEN. STAT. § 150A-50 (1978).

81. It is true that N.C. GEN. STAT. § 150A-50 authorizes the court to "hear . . . the matter de novo" where "no record was made of the administrative proceeding or the record is inadequate"; however, this provision obviously refers to a situation where an agency trial was actually held but not recorded or not completely recorded. It is not applicable to a declaratory ruling proceeding where the decision was made on the basis of the facts stated in the petition, and all the matters before the agency are contained in the record on review.

judgment or certiorari to review agency action not otherwise reviewable, but these remedies have been limited to justiciable controversies.<sup>82</sup> It seems inconceivable that the constitutional requirements for a justiciable controversy previously established under the Declaratory Judgments Act and in review by certiorari should be ignored in judicial review of declaratory rulings.

If we apply the foregoing considerations to NCAPA section 150A-17, we are left with the following possible alternative interpretations:

(1) The section may be construed to authorize declaratory rulings by the agency only on questions which will meet the requirements of a justiciable case if subsequently reviewed in the courts. It is submitted that this interpretation is to be preferred, for the reasons set forth at length above. This interpretation requires that a petition submitted for agency ruling must present a legal issue, not an issue of unreviewable agency discretion; that the facts "given" to the agency as a basis for decision must be ripe for judicial review, not incomplete, remote, hypothetical or subject to contest; that the adversary parties before the court must be either confined to the petitioner and the agency, or, if other parties are indispensable to the court's decision, that the other parties brought in on review do not contest the completeness and accuracy of the facts "given" to the agency and that the court must be able to resolve the controversy by its judgment.

(2) The section may be construed to authorize declaratory rulings by the agency on both justiciable and nonjusticiable questions but to require judicial review only of those rulings which meet the requirements of a justiciable case. This is a possible interpretation, although it is believed to be an incorrect one. A major difficulty with this interpretation is that it would apparently make "binding" on the petitioner and the agency an erroneous ruling which would not be judicially reviewable because it did not meet one or more of the requirements of a justiciable case. The ruling

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82. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E.2d 375 (1967) (certiorari will not lie to review the executive action of a chief of police in demoting a police captain but will lie to review the quasi-judicial action of a civil service board in removing him from the police department); *In re Markham*, 259 N.C. 566, 569, 131 S.E.2d 329, 332 (1963), *cert. denied*, 375 U.S. 931 (1963) ("The writ of certiorari issues only to review the judicial or quasi-judicial action of an inferior tribunal, commission or officer"; held that it did not lie to review the refusal of a city council to amend the zoning ordinance as it pertained to plaintiff's property, and the writ would be dismissed).

would remain "binding" until such time as the agency chose to set it aside "prospectively," which might be never.

(3) The section may be construed to authorize declaratory rulings by the agency on both justiciable and nonjusticiable questions, and to require the courts to grant review in all cases. It is submitted that this interpretation is inadmissible. It would compel the courts either to greatly expand the established definition of "judicial power" or to declare the section in part unconstitutional as legislative interference with the power or jurisdiction rightfully pertaining to the judicial department in violation of Article IV, Section 1, of the State Constitution.

The conclusion seems unavoidable that an attorney considering a request for declaratory ruling under NCAPA 150A-17 must assume the risk of determining whether the record as it emerges from the agency will present the elements of a justiciable case. If it will not, his client as well as the agency will be "bound" without the possibility of judicial review; and the only advantage gained by petition for declaratory ruling, as compared to a request for informal advice, would be that petitioner would obtain a ruling which the agency must follow until the agency sets it aside. It is questionable whether, in most cases, this advantage is worth the disadvantages which would result from an unfavorable ruling in a nonreviewable situation.

#### IV. PETITIONS FOR PROMULGATION, AMENDMENT OR REPEAL OF RULES

The preceding discussion has dealt with the means of seeking agency guidance in situations where the petitioner believes that an agency rule is invalid, or that a statute or rule does not apply to "a given state of facts" which he presents to the agency. However, situations may arise where no rule covers petitioner's situation, or where the existing rule is unfavorable but is clearly authorized by the relevant statute or where petitioner is willing to accept the likelihood that the existing rule is authorized. In any of these situations, NCAPA section 150A-16 is applicable. The section says:

*§ 150A-16. Petition for adoption of rules.*—Any person may petition an agency requesting the promulgation, amendment, or repeal of a rule, and may accompany his petition with such data, views, and arguments as he thinks pertinent. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the

petition in writing (stating its reasons for the denial) or shall initiate rule-making proceedings in accordance with G.S. 150A-12 and G.S. 150A-13. Denial of the petition to initiate rule making under this section shall be considered a final agency decision for purposes of judicial review, which shall be limited to questions of abuse of discretion.

This section is new to North Carolina, although a similar section is contained in the Revised Model State Administrative Procedure Act.<sup>83</sup>

A petition under section 150A-16 may not appropriately question the validity of an agency rule, since that subject is covered by a petition for declaratory ruling under section 150A-17. A petition under section 150A-16 is simply an appeal to the discretion of the agency to promulgate a new rule or to amend or repeal an old one which petitioner finds unsatisfactory. This reading of the section is confirmed by the provision for appeal from a denial of the petition, which is limited to "questions of abuse of discretion." The petition under section 150A-16 will therefore be appropriate only where petitioner either has no remedy under section 150A-17 or where the remedy under that section has been exhausted without a favorable result.

Since a petition under section 150A-16 is an appeal to the agency to exercise its discretion within its granted powers, it is apparent that the doctrines of primary jurisdiction and exhaustion of administrative remedies require that the remedy granted by that section be pursued prior to invoking the jurisdiction of a court.<sup>84</sup> Action on the petition is not discretionary, because the agency is required either to deny it or to initiate rulemaking proceedings within thirty days. If the petition is granted, obviously the petitioner must await the outcome of the rulemaking proceedings before seeking judicial review. If the petition is denied, the section states that the denial "shall be considered a final agency decision for purposes of judicial review."

The first question presented by section 150A-16 involves the standing of petitioner before the agency and subsequently before the court on review. The section provides that "any person" may request the promulgation, amendment or repeal of a rule. If the section is read literally, the petitioner need have no interest in the subject of the petition, or solely a hypothetical interest. It is note-

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83. 13 U.L.A. § 6 at 378 (Supp. 1979).

84. See discussion of primary jurisdiction under III.B., *supra*.



worthy that section 150A-16, unlike section 150A-17, does not require the agency to issue a ruling or show "good cause" for refusal; the agency is permitted either to deny the petition or to initiate rulemaking proceedings. It therefore seems likely that section 150A-16 is to be interpreted in accordance with its literal language to permit "any person" to file a petition but also to permit the agency in its discretion to deny the petition, provided only that it state "its reasons for the denial," which might simply be that petitioner has insufficient interest in the subject matter. A petitioner who was not actually "aggrieved" by the lack of a rule, or by the form or substance of an existing rule, would seem to have no standing to object in court to the agency's denial; and even if he did have sufficient standing to entitle him to be heard, it would seem improbable that he could convince the court that there had been an "abuse of discretion." This interpretation of the section harmonizes with its apparent purpose, to allow anyone to bring to the agency's attention the possible need for promulgation, amendment or repeal of a rule—in the same way that anyone might ask the legislature to adopt a statute—but to allow the agency broad discretion to proceed or not to proceed.

If this interpretation of section 150A-16 is correct, then the application of the judicial review provision of the section to an existing rule is a narrow one. Legislative rules are usually reviewable only to determine whether (1) the rule is within the powers granted to the agency by the legislature, (2) the rule was adopted pursuant to proper procedure and (3) the rule is reasonable in the sense of being the product of reason rather than an arbitrary act.<sup>85</sup> These questions are not open to review under section 150A-16, since all of them involve the validity of the rule, and the validity of a rule is to be tested solely under section 150A-17. Consequently,

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85. The following recent cases illustrate these criteria:

- (1) *Within the granted powers*: *State ex rel Utilities Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978) (Commission rule allowing reasonable costs of exploration for gas to be recovered through rate increases held to be within its power to compel adequate and efficient utility service);
- (2) *Adopted pursuant to proper procedure*: *Adams v. North Carolina Dep't of Natural and Econ. Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978) (Coastal Resources Commission held to have adopted guidelines in accordance with agency statute and rulemaking procedures of N.C. GEN. STAT. §§ 150A-9 to -17 (1978));
- (3) *Reasonable rather than arbitrary*: *State ex rel Utilities Comm'n v. Edmisten*, 294 N.C. 598, 611-12, 242 S.E.2d 862, 870 (1978), (state economic regulation "need only bear a rational relationship to a legitimate governmental objective" to be valid).

the only possible ground for attacking an existing rule would appear to be an appeal to the discretion of the agency to change it. Changes in the law underlying the rule, or in the facts found or assumed at the time it was adopted, which would make unreasonable a rule which was valid when adopted would not be sufficient, since section 150A-17 has been correctly interpreted by the rules of some of the agencies to cover precisely this situation.<sup>86</sup>

The principal area within which section 150A-16 can operate would appear to be the situation in which the agency must or should adopt a rule but has failed to do so. Section 150A-17 does not authorize a declaratory ruling on the lawfulness of the agency's failure to adopt a rule, so section 150A-16 alone will govern. Agencies are required by NCAPA section 150A-11 to adopt rules of practice, and failure to do so would clearly be an appropriate occasion for a petition under section 150A-16. Section 150A-17 says that the agency "shall prescribe in its rules the circumstances in which rulings shall or shall not be issued," and failure to do so would also be an appropriate occasion for a petition under section 150A-16. Another occasion would be where an agency was authorized to make selective grants of funds for certain purposes but had failed to adopt rules which would specify the grounds on which its discretion would be exercised to prefer one applicant over another.<sup>87</sup> Occasionally a statute will provide that it is not to become effective until the agency charged with its enforcement adopts rules implementing the statute, and here also the agency should entertain a petition under section 150A-16 if it has not acted.<sup>88</sup>

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86. See, e.g., Board of Medical Examiners Rule .0007, and Board of Architecture Rule .0503, in Appendix B, *infra*.

87. *Morton v. Ruiz*, 415 U.S. 199 (1974) (where statute directed the Bureau of Indian Affairs to expend funds for the "benefit, care and assistance of the Indians throughout the United States," the court said that "the determination of eligibility cannot be made on an ad hoc basis," but the Bureau must adopt rules specifying whether benefits are limited to Indians living on the reservation or may include Indians living on or near the reservation).

88. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (where the Fair Labor Standards Act provided for exemption of employees "within the area of production (as defined by the Administrator,) engaged in . . . canning of agricultural . . . commodities," the Administrator was directed by the court to adopt a valid regulation to make the statute effective, even though the regulation had to be applied retroactively); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) (where state statute authorized state university to expel student for "misconduct" and authorized the university to make rules, held that a student could not be expelled under the statute until the university first adopted rules defining "misconduct").

More often, however, the adoption of substantive rules is within the agency's discretion, and its decision to proceed without rules on a case-by-case basis will not be overturned.<sup>89</sup> In all cases, the petitioner would have to show standing in order to obtain judicial review of the refusal.

Unlike the section on declaratory rulings, section 150A-16 does not mandate a right of review and provide the form of review, but says merely that denial of the petition to initiate rulemaking "shall be considered a final agency decision for purposes of judicial review." Since there is no provision for taking evidence or hearing other parties, the record presented to the reviewing court will consist only of the petition; any data, views and arguments which may accompany the petition; and the agency's order of denial, including its "reasons." Statutory review under section 150A-43 is obviously inapplicable, since the proceedings are not of a judicial or quasi-judicial character. Under North Carolina decisions, the appropriate method of review, if review is available, would be action for declaratory judgment.<sup>90</sup>

## V. CONCLUSION

Our survey has indicated that the attorney must be prepared

89. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (court held that in determining the meaning of "managerial employees" exempt from the National Labor Relations Act, the Board could proceed case-by-case rather than by rule). *Supra* note 1, at 180. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the choice between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); see 1 F. COOPER, *supra* note 1.

90. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971) (where the Board of Paroles under N.C. GEN. STAT. § 148-62 (1978) revoked plaintiff's parole and directed that his former and current sentences be served consecutively, and where plaintiff's attack on the constitutionality of the statute could not be pursued under the Post Conviction Act, habeas corpus or the former judicial review statute N.C. GEN. STAT. §§ 143-306 to -316 (1969), held that the Declaratory Judgment Act, N.C. GEN. STAT. §§ 1-253 to -267 (1969), provided an appropriate remedy). The same result should be reached under the N.C. GEN. STAT. § 150A-43 (1978) provision: "Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article." *Snow v. North Carolina Board of Architecture*, 273 N.C. 559, 160 S.E.2d 719 (1968) (mandamus lies only where plaintiff has no other adequate remedy). *City of Hickory v. Catawba Valley Mach. Co.*, 39 N.C. App. 236, 249 S.E.2d 851 (1978) (collateral attack on agency order by defense to enforcement after order becomes final is not allowable).

to proceed with caution past the pitfalls involved in each method of seeking agency guidance or relief not involving a contested case. We have discussed these approaches to the agency:

(1) *Informal requests for advice.* Such a request is the easiest first step towards settling a troublesome question of agency authority, and normally the agency will adhere to the advice given. If the attorney disagrees with the advice he receives, he is not compelled to follow it, provided that he and his client are willing to take the risks of adverse regulatory action if the advice is unfavorable, and he cannot compel the agency to adhere to the advice if it is favorable. Seeking informal advice, while often necessary, should therefore be pursued only with full appreciation of its risks.

(2) *Requests for declaratory rulings.* NCAPA section 150A-17 establishes the procedural and substantive framework for such requests. The section was intended as protection to the agency and the petitioner against the risks of informal advice, but it is seriously defective and in need of revision. The chief defects arise from the failure of the legislature to take clear positions on what kind of "given" facts are appropriate for ruling, whether the "facts" are open to contest and what are the availability and scope of judicial review. Present agency rules under the section largely fail to correct these defects, although the agencies probably have statutory authority to make substantial corrections by their rules. The section and the present rules fall short of the apparent purpose of the draftsmen because the attorney proposing to submit a petition must still determine at his peril whether his petition will lay the foundation for judicial review if the agency's ruling is unsatisfactory; the attorney must determine whether the ruling he obtains is within the agency's powers, otherwise the "binding" effect will be lost; and the agency can still "prospectively" change the ruling, even though long-term commitments have been made in reliance on it. The limitations on the "binding" effect of the ruling, and the possible lack of availability of judicial review, leave the client exposed to some of the risks of seeking informal advice, while he assumes the additional risk of being bound in some cases by an erroneous interpretation of the law. In each instance the risks of a petition under section 150A-17 must be fully weighed against its advantages before proceeding.

(3) *Petitions for promulgation, amendment or repeal of rules.* NCAPA section 150A-16, providing for such petitions, does not suffer from the defects of section 150A-17, but its utility is severely limited by the fact that it leaves almost unreviewable discre-

tion to grant or deny the petition in the agency. However, the subject matter is clearly one within the agency's primary jurisdiction, and section 150A-16 procedure must be followed to lay a foundation for appeal to the courts. Its advantage lies principally in the fact that it does compel the agency to act, either affirmatively or negatively, within thirty days.

## APPENDIX A

## NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 1	DEPARTMENT OF ADMINISTRATION . . . . .	45
TITLE 2	DEPARTMENT OF AGRICULTURE . . . . .	47
TITLE 3	DEPARTMENT OF STATE AUDITOR . . . . .	52
TITLE 4	DEPARTMENT OF COMMERCE . . . . .	52
TITLE 5	DEPARTMENT OF CORRECTION . . . . .	54
TITLE 6	COUNCIL OF STATE . . . . .	55
TITLE 7	DEPARTMENT OF CULTURAL RESOURCES . . . . .	55
TITLE 8	STATE BOARD OF ELECTIONS . . . . .	56
TITLE 9	GOVERNOR AND LIEUTENANT GOVERNOR (EXECUTIVE ORDERS) . . . . .	57
TITLE 10	DEPARTMENT OF HUMAN RESOURCES . . . . .	57
TITLE 11	DEPARTMENT OF INSURANCE . . . . .	65
TITLE 12	DEPARTMENT OF JUSTICE . . . . .	66
TITLE 13	DEPARTMENT OF LABOR . . . . .	67
TITLE 14	DEPARTMENT OF MILITARY AND VETERANS AFFAIRS . . . . .	68
TITLE 15	DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES . . . . .	68
TITLE 16	DEPARTMENT OF PUBLIC EDUCATION . . . . .	71
TITLE 17	DEPARTMENT OF REVENUE . . . . .	72
TITLE 18	DEPARTMENT OF STATE . . . . .	73
TITLE 19A	DEPARTMENT OF TRANSPORTATION . . . . .	74
TITLE 20	DEPARTMENT OF STATE TREASURER . . . . .	75
TITLE 21	OCCUPATIONAL LICENSING BOARDS . . . . .	76

## NORTH CAROLINA ADMINISTRATIVE CODE

## TITLE 1

## DEPARTMENT OF ADMINISTRATION

*CHAPTER 1—DEPARTMENTAL RULES*

SUBCHAPTER 1A—Organization of the Department

SUBCHAPTER 1B—Departmental Administrative  
Procedures

SUBCHAPTER 1C—Use of Public Buildings and Grounds

*CHAPTER 2—STATE BUDGET AND MANAGEMENT*SUBCHAPTER 2A—Division of State Budget and  
Management

SUBCHAPTER 2B—Appropriations and Allotments

SUBCHAPTER 2C—Reporting on Appropriations  
SUBCHAPTER 2D—Fiscal Policies and Regulations  
SUBCHAPTER 2E—Travel Transportation and Allowances  
SUBCHAPTER 2F—Disbursing  
SUBCHAPTER 2G—Advisory Budget Commission

**CHAPTER 3—GENERAL SERVICES**

SUBCHAPTER 3A—Physical Plant  
SUBCHAPTER 3B—Grounds  
SUBCHAPTER 3C—Security

**CHAPTER 4—AUXILIARY SERVICES**

SUBCHAPTER 4A—State-owned Parking Lots  
SUBCHAPTER 4B—Inter Office Mail Service  
SUBCHAPTER 4C—Central Motor Pool

**CHAPTER 5—PURCHASE AND CONTRACT**

SUBCHAPTER 5A—Division of Purchase and Contract  
SUBCHAPTER 5B—Purchase Procedures  
SUBCHAPTER 5C—Surplus Property  
SUBCHAPTER 5D—Consultants and Contractual Services

**CHAPTER 6—STATE PROPERTY AND CONSTRUCTION**

SUBCHAPTER 6A—Division of State Property and  
Construction  
SUBCHAPTER 6B—Real Property  
SUBCHAPTER 6C—State Construction Office  
SUBCHAPTER 6D—Capital Building Authority

**CHAPTER 7—OFFICE OF STATE MANAGEMENT SYSTEMS**

**CHAPTER 8—OFFICE OF STATE PERSONNEL**

SUBCHAPTER 8A—General Provisions  
SUBCHAPTER 8B—State Personnel Commission  
SUBCHAPTER 8C—Personnel Administration  
SUBCHAPTER 8D—Compensation  
SUBCHAPTER 8E—Employee Benefits  
SUBCHAPTER 8F—Position Analysis  
SUBCHAPTER 8G—Classifications  
SUBCHAPTER 8H—Recruitment and Testing Section  
SUBCHAPTER 8I—Service to Local Government  
SUBCHAPTER 8J—Employee Relations  
SUBCHAPTER 8K—Personnel Training

**CHAPTER 9—DIVISION OF INTERGOVERNMENTAL RELATIONS**

**CHAPTER 10—STATE PLANNING**

**CHAPTER 11—HUMAN RELATIONS COUNCIL**

**CHAPTER 12—MARINE AFFAIRS**

**CHAPTER 13—OFFICE FOR CITIZEN PARTICIPATION**

**CHAPTER 14—NORTH CAROLINA DRUG COMMISSION**

**SUBCHAPTER 14A—Organization of North Carolina Drug Commission**

**SUBCHAPTER 14B—Manufacturers, Distributors, Dispensers and Researchers of Controlled Substances**

**SUBCHAPTER 14C—Drug Treatment Facilities**

**SUBCHAPTER 14D—Procedure for Amending Rules**

**SUBCHAPTER 14E—Policies and Procedures for Grant Review**

**CHAPTER 15—COMMISSION OF INDIAN AFFAIRS**

**CHAPTER 16—CHILD DAY CARE LICENSING COMMISSION**

**CHAPTER 17—COUNCIL ON THE STATUS OF WOMEN**

**CHAPTER 18—OFFICE OF EMPLOYMENT AND TRAINING**

**CHAPTER 19—STATE YOUTH ADVISORY COUNCIL**

**CHAPTER 20—NORTH CAROLINA PUBLIC EMPLOYEE DEFERRED COMPENSATION PLAN**

**CHAPTER 21—ADMINISTRATIVE ANALYSIS DIVISION**

**CHAPTER 22—CLEAN WATER BOND ACT**

**CHAPTER 23—REGIONAL WATER SUPPLY PLANNING ACT OF 1971**

**CHAPTER 24—REGIONAL SEWAGE DISPOSAL PLANNING ACT OF 1971**

**CHAPTER 25—NORTH CAROLINA ENVIRONMENTAL POLICY ACT**

## **NORTH CAROLINA ADMINISTRATIVE CODE**

### **TITLE 2**

### **DEPARTMENT OF AGRICULTURE**

#### **CHAPTER 1—DEPARTMENTAL RULES**



- CHAPTER 2—RULEMAKING AND CONTESTED CASE PROCEDURES**  
SUBCHAPTER 2A—Departmental Rulemaking Procedures  
SUBCHAPTER 2B—Contested Cases  
SUBCHAPTER 2C—Conduct of Contested Cases  
SUBCHAPTER 2D—Decisions in Contested Cases
- CHAPTER 3—COMMISSIONER OF AGRICULTURE**
- CHAPTER 4—BOARD OF AGRICULTURE**
- CHAPTER 5—DEPUTY COMMISSIONER OF AGRICULTURE**
- CHAPTER 6—PUBLIC AFFAIRS OFFICE**
- CHAPTER 7—ANIMAL HEALTH DIVISION**  
SUBCHAPTER 7A—Organization  
SUBCHAPTER 7B—Rules and Regulations Adopted by Reference  
SUBCHAPTER 7C—Diagnostic Laboratories  
SUBCHAPTER 7D—Animal Diseases  
SUBCHAPTER 7E—Hog Cholera and Garbage Feeding  
SUBCHAPTER 7F—Meat Inspection  
SUBCHAPTER 7G—Poultry Products Inspection  
SUBCHAPTER 7H—Poultry Diseases  
SUBCHAPTER 7I—Rendering Plants  
SUBCHAPTER 7J—Livestock Market Regulations  
SUBCHAPTER 7K—Biological Residues in Animals  
SUBCHAPTER 7L—Livestock Branding
- CHAPTER 8—CONSUMER STANDARDS DIVISION**  
SUBCHAPTER 8A—Organizational Rules  
SUBCHAPTER 8B—Rules and Regulations Adopted by Reference  
SUBCHAPTER 8C—Engineering Section  
SUBCHAPTER 8D—Measurement Section  
SUBCHAPTER 8E—Analytical Section
- CHAPTER 9—FOOD AND DRUG PROTECTION DIVISION**  
SUBCHAPTER 9A—Organization  
SUBCHAPTER 9B—Rules and Standards Adopted by Reference  
SUBCHAPTER 9C—Current Good Manufacturing Practices for Specific Food Industries  
SUBCHAPTER 9D—Canned Dog and Cat Food  
SUBCHAPTER 9E—Feed  
SUBCHAPTER 9F—Internal Combustion Engine Antifreezes

**SUBCHAPTER 9G—Milk and Milk Products**

**SUBCHAPTER 9H—Disposition of Damaged or Unclean Foods**

**SUBCHAPTER 9I—Procedures for Handling Complaints**

**CHAPTER 10—PEST CONTROL DIVISION**

**SUBCHAPTER 10A—Organization Rules**

**SUBCHAPTER 10B—Plant Protection Section; Biological Activities**

**SUBCHAPTER 10C—Plant Protection Section; Plant Pest Activities**

**SUBCHAPTER 10D—Pesticides Section**

**SUBCHAPTER 10E—Structural Pest Section**

**CHAPTER 11—SEED AND FERTILIZER DIVISION**

**SUBCHAPTER 11A—Organizational Rules**

**SUBCHAPTER 11B—Liming Materials and Fertilizers**

**SUBCHAPTER 11C—Seeds**

**CHAPTER 12—AGRONOMIC DIVISION**

**SUBCHAPTER 12A—General**

**SUBCHAPTER 12B—Description of Major Program Areas**

**CHAPTER 13—CROP STATISTICS DIVISION**

**SUBCHAPTER 13A—Organization**

**SUBCHAPTER 13B—Goals and Objectives**

**SUBCHAPTER 13C—Specific Means Used to Reach the Program's Goals and Objectives**

**SUBCHAPTER 13D—Relation to Federal Government, Local Government and Other State Departments**

**SUBCHAPTER 13E—Adoption by Reference**

**CHAPTER 14—FOOD DISTRIBUTION DIVISION**

**CHAPTER 15—MARKETS DIVISION**

**SUBCHAPTER 15A—Organization**

**SUBCHAPTER 15B—Goals and Policies; Market News Section**

**SUBCHAPTER 15C—Agricultural Fairs Section**

**SUBCHAPTER 15D—Agricultural Product Promotion Section**

**SUBCHAPTER 15E—Cooperative Services Section**

**SUBCHAPTER 15F—Engineering Section**

**SUBCHAPTER 15G—Field Crops Section**

- SUBCHAPTER 15H—Livestock Section
- SUBCHAPTER 15I—Horticultural Crops Section
- SUBCHAPTER 15J—Poultry Section
- SUBCHAPTER 15K—Market Rules and Regulations

*CHAPTER 16—RESEARCH STATIONS DIVISION*

- SUBCHAPTER 16A—Purpose
- SUBCHAPTER 16B—Organization
- SUBCHAPTER 16C—Research Stations
- SUBCHAPTER 16D—Services

*CHAPTER 17—STATE FARM OPERATIONS DIVISION*

- SUBCHAPTER 17A—General
- SUBCHAPTER 17B—Cooperation
- SUBCHAPTER 17C—State Farms

*CHAPTER 18—MUSEUM OF NATURAL HISTORY*

- SUBCHAPTER 18A—General
- SUBCHAPTER 18B—Services to Community

*CHAPTER 19—ADMINISTRATIVE SERVICES DIVISION*

- SUBCHAPTER 19A—General Goals and Objectives
- SUBCHAPTER 19B—Personnel

*CHAPTER 20—THE NORTH CAROLINA STATE FAIR*

- SUBCHAPTER 20A—Organization
- SUBCHAPTER 20B—Regulations of the State Fair
- SUBCHAPTER 20C—Premium Book
- SUBCHAPTER 20D—Premium Book; Horse Show

*CHAPTER 21—STATE FARMERS' MARKET*

- SUBCHAPTER 21A—Organizational Rules
- SUBCHAPTER 21B—Authority, Duties and Responsibility of Manager
- SUBCHAPTER 21C—Fees, Charges and Rentals
- SUBCHAPTER 21D—Operations
- SUBCHAPTER 21E—Farmers' Market Lease Agreement

*CHAPTER 22—N.C. RURAL REHABILITATION CORPORATION*

- SUBCHAPTER 22A—Organization
- SUBCHAPTER 22B—Meetings

*CHAPTER 23—SWINE DISEASE COMMITTEE*

- SUBCHAPTER 23A—General
- SUBCHAPTER 23B—Purpose
- SUBCHAPTER 23C—Meetings

**CHAPTER 24—LIVESTOCK MARKET ADVISORY BOARD****SUBCHAPTER 24A—Organization****SUBCHAPTER 24B—Duties****SUBCHAPTER 24C—Meetings****CHAPTER 25—GASOLINE AND OIL INSPECTION BOARD****SUBCHAPTER 25A—Membership and Duties****SUBCHAPTER 25B—Rules and Regulations (Repealed)****SUBCHAPTER 25C—Gasoline and Oil Inspection****CHAPTER 26—N.C. STRUCTURAL PEST CONTROL COMMITTEE****SUBCHAPTER 26A—Organization****SUBCHAPTER 26B—Meetings****SUBCHAPTER 26C—Hearings****SUBCHAPTER 26D—Regulation Adoption****CHAPTER 27—PESTICIDE BOARD****SUBCHAPTER 27A—Organization****SUBCHAPTER 27B—Meetings****SUBCHAPTER 27C—Regulation Adoption****CHAPTER 28—PESTICIDE ADVISORY BOARD****SUBCHAPTER 28A—Organization****SUBCHAPTER 28B—Functions****SUBCHAPTER 28C—Meetings****CHAPTER 29—BOARD OF CROP SEED IMPROVEMENT****SUBCHAPTER 29A—Organization****SUBCHAPTER 29B—Duties****SUBCHAPTER 29C—Meetings****CHAPTER 30—STATE FARM OPERATIONS COMMISSION****SUBCHAPTER 30A—Purpose, Objective and Organization****SUBCHAPTER 30B—Powers and Duties****SUBCHAPTER 30C—Meetings****CHAPTER 31—THE NORTH CAROLINA AGRICULTURAL HALL OF  
FAME****SUBCHAPTER 31A—Purpose****SUBCHAPTER 31B—Board of Directors****SUBCHAPTER 31C—Eligibility****SUBCHAPTER 31D—Meetings****CHAPTER 32—ADVISORY BOARD FOR NATURAL HISTORY MUSEUM****SUBCHAPTER 32A—Purpose****SUBCHAPTER 32B—Organization**

**SUBCHAPTER 32C—Meetings**

**CHAPTER 33—CATTLE DISEASE COMMITTEE**

**SUBCHAPTER 33A—General**

**SUBCHAPTER 33B—Purpose**

**SUBCHAPTER 33C—Meetings**

**CHAPTER 34—STRUCTURAL PEST CONTROL DIVISION**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 3**

**DEPARTMENT OF STATE AUDITOR**

**CHAPTER 1—DEPARTMENTAL RULES**

**CHAPTER 2—LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND**

**CHAPTER 3—NORTH CAROLINA FIREMEN'S PENSION FUND**

**CHAPTER 4—STATE BOARD OF PENSIONS**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 4**

**DEPARTMENT OF COMMERCE**

**CHAPTER 1—DEPARTMENTAL RULES**

**SUBCHAPTER 1A—Organization**

**SUBCHAPTER 1B—Rulemaking Hearings, Emergency Rules and Declaratory Rulings**

**SUBCHAPTER 1C—Personnel Rules**

**SUBCHAPTER 1D—Budget Division Rules**

**CHAPTER 2—BOARD OF ALCOHOLIC CONTROL**

**SUBCHAPTER 2A—Organizational Rules**

**SUBCHAPTER 2B—General Policies for State Board**

**SUBCHAPTER 2C—Local Boards of Alcoholic Control**

**SUBCHAPTER 2D—Purchase, Distribution and Sale of Spirituous Liquors**

**SUBCHAPTER 2E—Malt Beverages; Retail**

**SUBCHAPTER 2F—Malt Beverages; Wholesalers; Manufacturers**

SUBCHAPTER 2G—Social Establishments  
 SUBCHAPTER 2H—Restaurants and Related Places  
 SUBCHAPTER 2I—Special Permits  
 SUBCHAPTER 2J—Retail Wine  
 SUBCHAPTER 2K—Wine; Manufacturers, Bottlers and Wholesalers

*CHAPTER 3—BANKING COMMISSION*

SUBCHAPTER 3A—Organization  
 SUBCHAPTER 3B—Rulemaking and Contested Cases  
 SUBCHAPTER 3C—Banks  
 SUBCHAPTER 3D—Banks Acting in a Fiduciary Capacity  
 SUBCHAPTER 3E—Licensees Under North Carolina Consumer Finance Act  
 SUBCHAPTER 3F—Licensees Under Sale of Checks Acts  
 SUBCHAPTER 3G—Funeral and Burial Trust Funds

*CHAPTER 4—BURIAL COMMISSION*

*CHAPTER 5—CEMETERY COMMISSION*

SUBCHAPTER 5A—Organization  
 SUBCHAPTER 5B—Rulemaking, Declaratory Rulings and Contested Cases  
 SUBCHAPTER 5C—Licensing  
 SUBCHAPTER 5D—Trust Funds

*CHAPTER 6—CREDIT UNION DIVISION; CREDIT UNION COMMISSION*

SUBCHAPTER 6A—Organization  
 SUBCHAPTER 6B—Rulemaking, Declaratory Rulings and Contested Cases  
 SUBCHAPTER 6C—Credit Unions

*CHAPTER 7—MILK COMMISSION*

*CHAPTER 8—RURAL ELECTRIFICATION AUTHORITY*

*CHAPTER 9—SAVINGS AND LOAN DIVISION; SAVINGS AND LOAN COMMISSION*

SUBCHAPTER 9A—Organization  
 SUBCHAPTER 9B—Rulemaking, Declaratory Rulings and Contested Cases  
 SUBCHAPTER 9C—Operation of State-chartered Savings and Loan Associations  
 SUBCHAPTER 9D—Savings Accounts, Shares, Bonus Plans and Contract for Savings Programs  
 SUBCHAPTER 9E—Mortgage Loans, Share Loans and Loan

**Expenses****SUBCHAPTER 9F—Investments and Fiscal Agent****SUBCHAPTER 9G—Regulations Relative to Certain Tax Matters****SUBCHAPTER 9H—Service Corporations****CHAPTER 10—INDUSTRIAL COMMISSION****CHAPTER 11—UTILITIES COMMISSION****CHAPTER 12—ENERGY DIVISION****NORTH CAROLINA ADMINISTRATIVE CODE****TITLE 5****DEPARTMENT OF CORRECTION****CHAPTER 1—DEPARTMENTAL RULES****SUBCHAPTER 1A—Organization of the Department of Correction****SUBCHAPTER 1B—General Administration****SUBCHAPTER 1C—Fiscal Administration****SUBCHAPTER 1D—Staff Development and Training****CHAPTER 2—DIVISION OF PRISONS****SUBCHAPTER 2A—Organization and Personal Conduct****SUBCHAPTER 2B—Inmate Conduct Rules, Discipline****SUBCHAPTER 2C—Classification****SUBCHAPTER 2D—Public Communications****SUBCHAPTER 2E—Treatment****SUBCHAPTER 2F—Custody and Security****SUBCHAPTER 2G—Court Related Procedures****CHAPTER 3—DIVISION OF ADULT PROBATION AND PAROLE****SUBCHAPTER 3A—General Provisions****SUBCHAPTER 3B—Interstate Compact for Out-of-state Parolee Supervision****SUBCHAPTER 3C—Investigations****SUBCHAPTER 3D—Supervision****SUBCHAPTER 3E—Interstate Compact for Out-of-state Parolee and Probationer Supervision****CHAPTER 4—PAROLE COMMISSION****SUBCHAPTER 4A—Organization of the Parole Commission****SUBCHAPTER 4B—Duties and Responsibilities of the**

## Commission

- SUBCHAPTER 4C—Policy, Review and Investigation
- SUBCHAPTER 4D—Procedure; Review and Investigation
- SUBCHAPTER 4E—Work Release
- SUBCHAPTER 4F—Parole Supervision, Discharge and Revocation

## NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 6  
COUNCIL OF STATE

- CHAPTER 1*—DEPARTMENTAL RULES
- CHAPTER 2*—RULEMAKING PROCEDURES
- CHAPTER 3*—ADMINISTRATIVE HEARINGS
- CHAPTER 4*—DECLARATORY RULINGS

## NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 7  
DEPARTMENT OF CULTURAL RESOURCES

- CHAPTER 1*—DEPARTMENTAL RULES
  - SUBCHAPTER 1A—Department of Cultural Resources
  - SUBCHAPTER 1B—Procedural Rules
  - SUBCHAPTER 1C—Personnel
  - SUBCHAPTER 1D—North Carolina Awards Committee
- CHAPTER 2*—DIVISION OF STATE LIBRARY
  - SUBCHAPTER 2A—Divisional Rules
  - SUBCHAPTER 2B—Technical Services
  - SUBCHAPTER 2C—Information Services
  - SUBCHAPTER 2D—Library for the Blind and Physically Handicapped
  - SUBCHAPTER 2E—Public Library Development Services
  - SUBCHAPTER 2F—North Carolina Public Librarian Certification Commission
- CHAPTER 3*—DIVISION OF THE ARTS
  - SUBCHAPTER 3A—Divisional Rules
  - SUBCHAPTER 3B—North Carolina Museum of Art



SUBCHAPTER 3C—Community  
SUBCHAPTER 3D—Theatre Arts Section  
SUBCHAPTER 3E—Art Museum Building Commission  
SUBCHAPTER 3F—Art Commission

**CHAPTER 4—DIVISION OF ARCHIVES AND HISTORY**

SUBCHAPTER 4A—Divisional Rules  
SUBCHAPTER 4B—Archives and Records Section  
SUBCHAPTER 4C—Historic Sites Regulations  
SUBCHAPTER 4D—Museum of History  
SUBCHAPTER 4E—Historical Publications Section  
SUBCHAPTER 4F—State Capitol and Visitor Center  
SUBCHAPTER 4G—Historic Preservation Section  
SUBCHAPTER 4H—Highway Historical Marker Program  
SUBCHAPTER 4I—Tryon Palace Section  
SUBCHAPTER 4J—Exploration and Salvage Regulations  
SUBCHAPTER 4K—Environmental Review

**CHAPTER 5—U.S.S. NORTH CAROLINA BATTLESHIP COMMISSION**

**CHAPTER 6—TRYON PALACE COMMISSION**

**CHAPTER 7—HISTORIC BATH COMMISSION**

**CHAPTER 8—HISTORIC MURFREESBORO**

**CHAPTER 9—EDENTON HISTORICAL COMMISSION**

**CHAPTER 10—JOHN MOTLEY MOREHEAD MEMORIAL COMMISSION**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 8**

**STATE BOARD OF ELECTIONS**

**CHAPTER 1—DEPARTMENTAL RULES**

**CHAPTER 2—CONTESTS WITH RESPECT TO ELECTIONS**

**CHAPTER 3—CHARGES AGAINST COUNTY ELECTION OFFICIALS**

**CHAPTER 4—VOTING EQUIPMENT**

**CHAPTER 5—MODIFIED FULL TIME REGISTRATION SYSTEM**

## NORTH CAROLINA ADMINISTRATIVE CODE

**TITLE 9**  
**GOVERNOR AND LIEUTENANT GOVERNOR**  
**(EXECUTIVE ORDERS)**

Executive Orders are arranged sequentially by number and must be requested by number.

## NORTH CAROLINA ADMINISTRATIVE CODE

**TITLE 10**  
**DEPARTMENT OF HUMAN RESOURCES**

**CHAPTER 1—DEPARTMENTAL RULES**

SUBCHAPTER 1A—Identifying Information

SUBCHAPTER 1B—Procedure

SUBCHAPTER 1C—Personnel

SUBCHAPTER 1D—Information

SUBCHAPTER 1E—Property

SUBCHAPTER 1F—Reimbursement

SUBCHAPTER 1G—Plans and Programs

SUBCHAPTER 1H—Volunteer Services

SUBCHAPTER 1I—General Policies

SUBCHAPTER 1J—1122 Program

**CHAPTER 2—CONFEDERATE WOMEN'S HOME**

SUBCHAPTER 2A—General Provisions

SUBCHAPTER 2B—Definitions

SUBCHAPTER 2C—Admission

SUBCHAPTER 2D—Conduct of Residents

SUBCHAPTER 2E—Meals

**CHAPTER 3—FACILITY SERVICES**

SUBCHAPTER 3A—Identifying Information

SUBCHAPTER 3B—Procedural Rules

SUBCHAPTER 3C—Licensing of Hospitals

SUBCHAPTER 3D—Rules and Regulations Governing Ambulance Service

SUBCHAPTER 3E—Certifications of Clinics for Abortion

SUBCHAPTER 3F—Licensure of Nursing Home Administrators

SUBCHAPTER 3G—Radiation Protection

SUBCHAPTER 3H—Licensing of Nursing Homes and Intermediate Care Facilities

SUBCHAPTER 3I—The Operation of Juvenile Detention Facilities

SUBCHAPTER 3J—The Operation of Local Confinement Facilities

SUBCHAPTER 3K—The Educational Loan Program

SUBCHAPTER 3L—The Licensing of Home Health Agencies

SUBCHAPTER 3M—Minimum Standards for Mobile Intensive Care Units

SUBCHAPTER 3N—Guidelines Health Care Facilities Finance Act

*CHAPTER 4—HEALTH SERVICES*

SUBCHAPTER 4A—Identifying Information

SUBCHAPTER 4B—Procedural Rules

*CHAPTER 5—HEALTH; ADMINISTRATIVE SERVICES*

*CHAPTER 6—HEALTH; DENTAL HEALTH*

SUBCHAPTER 6A—School Water Fluoridation

SUBCHAPTER 6B—Fluoride Mouthrinse Program

SUBCHAPTER 6C—Fluoride Brush-in Program

SUBCHAPTER 6D—Dental Care Program

*CHAPTER 7—HEALTH; EPIDEMIOLOGY*

SUBCHAPTER 7A—Acute Communicable Disease Control

SUBCHAPTER 7B—Highway Safety

SUBCHAPTER 7C—Occupational Health

SUBCHAPTER 7D—Tuberculosis Control

SUBCHAPTER 7E—Venereal Disease Control

SUBCHAPTER 7F—Veterinary Public Health

SUBCHAPTER 7G—Vital Records

*CHAPTER 8—HEALTH; PERSONAL HEALTH*

SUBCHAPTER 8A—Chronic Disease

SUBCHAPTER 8B—Maternal and Child Health

SUBCHAPTER 8C—Nutrition and Dietary Services

SUBCHAPTER 8D—Crippled Children; Developmental Disabilities Branch

SUBCHAPTER 8E—Developmental Evaluation Centers; Developmental Disabilities Branch

SUBCHAPTER 8F—Sickle Cell Syndrome; Genetic Counseling; Developmental Disabilities Branch

SUBCHAPTER 8G—Prenatal Care

**SUBCHAPTER 8H—Family Planning****CHAPTER 9—HEALTH; LABORATORY****SUBCHAPTER 9A—General Policies****SUBCHAPTER 9B—Biochemistry****SUBCHAPTER 9C—Environmental Sciences****SUBCHAPTER 9D—Certification and Improvement****SUBCHAPTER 9E—Microbiology****SUBCHAPTER 9F—Syphilis Serology****SUBCHAPTER 9G—Virology****SUBCHAPTER 9H—Cancer Cytology****CHAPTER 10—HEALTH SERVICES; SANITARY ENGINEERING****SUBCHAPTER 10A—Sanitation****SUBCHAPTER 10B—Shellfish Sanitation****SUBCHAPTER 10C—Solid Waste and Vector Control****SUBCHAPTER 10D—Water Supplies****SUBCHAPTER 10E—Water Treatment Facility Operations****CHAPTER 11—MEDICAL EXAMINER; DEATH INVESTIGATION****CHAPTER 12—HEALTH; OFFICE OF LOCAL SERVICES****CHAPTER 13—HEALTH; SPECIALTY HOSPITALS****SUBCHAPTER 13A—Identifying Information****SUBCHAPTER 13B—Procedure****SUBCHAPTER 13D—Lenox Baker Hospital****SUBCHAPTER 13E—North Carolina Orthopedic Hospital****SUBCHAPTER 13F—Pulmonary Hospitals****CHAPTER 14—MENTAL HEALTH; GENERAL****SUBCHAPTER 14A—Identifying Information****SUBCHAPTER 14B—Rules of Procedure****SUBCHAPTER 14C—General Rules****SUBCHAPTER 14D—Policies on Inpatient and Related Services; Serious Mental and Emotional Disorders****CHAPTER 15—MENTAL HEALTH; HOSPITALS****SUBCHAPTER 15A—General Rules for Hospitals****SUBCHAPTER 15B—Broughton Hospital****SUBCHAPTER 15C—Cherry Hospital****SUBCHAPTER 15D—Dorothea Dix Hospital****SUBCHAPTER 15E—John Umstead Hospital****CHAPTER 16—MENTAL HEALTH; MR CENTERS**

- SUBCHAPTER 16A—General Rules for MR Centers
- SUBCHAPTER 16E—Caswell Center
- SUBCHAPTER 16C—Murdoch Center
- SUBCHAPTER 16D—O’Berry Center
- SUBCHAPTER 16E—Western Carolina Center; Identifying Information

**CHAPTER 17—MENTAL HEALTH; AR CENTERS**

- SUBCHAPTER 17A—General Rules for AR Centers
- SUBCHAPTER 17B—Black Mountain AR Center
- SUBCHAPTER 17C—Butner AR Center
- SUBCHAPTER 17D—Walter B. Jones Alcoholic Rehabilitation Center

**CHAPTER 18—MENTAL HEALTH; OTHER PROGRAMS**

- SUBCHAPTER 18A—Wright School
- SUBCHAPTER 18B—Butner Ordinances
- SUBCHAPTER 18C—Effect and Applicability of Chapter 18
- SUBCHAPTER 18D—General Standards
- SUBCHAPTER 18E—Balanced and Integrated Programming
- SUBCHAPTER 18F—Program Support Standards
- SUBCHAPTER 18G—Consumer Record Standards
- SUBCHAPTER 18H—Manpower Standards
- SUBCHAPTER 18I—Essential Services; Generally
- SUBCHAPTER 18J—Essential Services Program Requirements for Mental Health
- SUBCHAPTER 18L—Essential Services Program Requirements for Adult Mental Health
- SUBCHAPTER 18M—Essential Services Program Requirements for Alcoholism
- SUBCHAPTER 18N—Essential Services Program Requirements for Drug Abuse
- SUBCHAPTER 18O—Standards for Optional Mental Retardation Service Programs
- SUBCHAPTER 18P—Standards for Optional Child Mental Health Programs
- SUBCHAPTER 18Q—Standards for Optional Alcoholism Services Programs

**CHAPTER 19—SERVICES FOR THE BLIND**

- SUBCHAPTER 19A—Organization
- SUBCHAPTER 19B—Procedural Rules
- SUBCHAPTER 19C—Business Enterprises Program
- SUBCHAPTER 19D—Homebound Blind; Self-employment

**Program**

- SUBCHAPTER 19E—Supplemental Aid to the Blind
- SUBCHAPTER 19F—Special Adaptive Services
- SUBCHAPTER 19G—Vocational Rehabilitation
- SUBCHAPTER 19H—Medical/Eye Care Program
- SUBCHAPTER 19I—State Standards of Performance for Workshops Serving the Blind

**Chapter 20—DIVISION OF VOCATIONAL REHABILITATION SERVICES**

- SUBCHAPTER 20A—Identifying Information
- SUBCHAPTER 20B—Procedure
- SUBCHAPTER 20C—Program Rules
- SUBCHAPTER 20D—Standards for Facilities and Providers
- SUBCHAPTER 20F—Governor's Council on Employment of the Handicapped

**CHAPTER 21—THE GOVERNOR MOREHEAD SCHOOL**

- SUBCHAPTER 21A—Identifying Information
- SUBCHAPTER 21B—Campus Regulations
- SUBCHAPTER 21C—Procedure

**CHAPTER 22—OFFICE FOR AGING**

- SUBCHAPTER 22A—Identifying Information
- SUBCHAPTER 22B—Title III
- SUBCHAPTER 22C—Title VII

**CHAPTER 23—N.C. SCHOOLS FOR THE DEAF**

- SUBCHAPTER 23A—Administration
- SUBCHAPTER 23B—Campus Regulations
- SUBCHAPTER 23C—Rulemaking Procedures

**CHAPTER 24—SOCIAL SERVICES; GENERAL****CHAPTER 25—SOCIAL SERVICES; PROCEDURE****CHAPTER 26—MEDICAL SERVICES**

- SUBCHAPTER 26A—Identifying Information
- SUBCHAPTER 26B—Medical Services Provided
- SUBCHAPTER 26C—Amount, Duration and Scope of Assistance
- SUBCHAPTER 26D—Limitations on Amount, Duration and Scope
- SUBCHAPTER 26E—Cooperative Agreements
- SUBCHAPTER 26F—Manuals and Forms

**CHAPTER 27—CHILD SUPPORT ENFORCEMENT**

**CHAPTER 28—DISABILITY DETERMINATION**

**CHAPTER 29—INCOME MAINTENANCE; GENERAL**

**CHAPTER 30—FOOD ASSISTANCE**

**CHAPTER 31—AFDC**

**SUBCHAPTER 31A—Identifying Information**

**SUBCHAPTER 31B—Definitions**

**SUBCHAPTER 31C—Eligibility**

**SUBCHAPTER 31D—Application Process**

**SUBCHAPTER 31E—Change of Situation**

**SUBCHAPTER 31F—Redetermination of Eligibility**

**SUBCHAPTER 31G—Authorization of Change in Payment**

**SUBCHAPTER 31H—Forms Used for Application, Eligibility  
and Furnishing Assistance**

**SUBCHAPTER 31I—Work Registration**

**SUBCHAPTER 31J—Eligibility Verification**

**SUBCHAPTER 31K—Need**

**SUBCHAPTER 31L—Reserve**

**SUBCHAPTER 31M—Income**

**SUBCHAPTER 31N—Computing the Budget**

**SUBCHAPTER 31O—Forms Used for Income, Reserve and  
Budgeting**

**SUBCHAPTER 31P—AFDC-FC**

**SUBCHAPTER 31Q—Protective and Vendor Payments**

**SUBCHAPTER 31R—Paternity and Support**

**SUBCHAPTER 31S—Miscellaneous**

**CHAPTER 32—MEDICAL ASSISTANCE**

**SUBCHAPTER 32A—Identifying Information**

**SUBCHAPTER 32B—Definitions**

**SUBCHAPTER 32C—Eligibility**

**SUBCHAPTER 32D—Application Process**

**SUBCHAPTER 32E—Eligibility Determination**

**SUBCHAPTER 32F—Reserve**

**SUBCHAPTER 32G—Income**

**SUBCHAPTER 32H—Maintenance and Budgeting Principles**

**SUBCHAPTER 32I—AFDC-MA; Specified Relative;  
Deprivation**

**SUBCHAPTER 32J—Disability and Blindness  
Determination**

**SUBCHAPTER 32K—Spend-down; Patient's Monthly  
Liability**

- SUBCHAPTER 32L—Certification and Authorization
- SUBCHAPTER 32M—Classification
- SUBCHAPTER 32N—Identification Card
- SUBCHAPTER 32O—Change in Situation
- SUBCHAPTER 32P—Redetermination of Eligibility
- SUBCHAPTER 32Q—Client Fraud
- SUBCHAPTER 32R—Miscellaneous

**CHAPTER 33—STATE/COUNTY SPECIAL ASSISTANCE**

- SUBCHAPTER 33A—General
- SUBCHAPTER 33B—Coverage
- SUBCHAPTER 33C—Application Process
- SUBCHAPTER 33D—Age, Citizenship and Residence
- SUBCHAPTER 33E—Reserve
- SUBCHAPTER 33F—Income
- SUBCHAPTER 33G—Disability Determination
- SUBCHAPTER 33H—Special Need
- SUBCHAPTER 33I—Budgeting Principles
- SUBCHAPTER 33J—Mixed Budgeting for Groups I and II
- SUBCHAPTER 33K—Payment Procedures for Groups I and II
- SUBCHAPTER 33L—Change in Situation
- SUBCHAPTER 33M—Redetermination of Eligibility
- SUBCHAPTER 33N—Eligibility for Medical Assistance
- SUBCHAPTER 33O—Personal Representative
- SUBCHAPTER 33P—Guardianship or Trustee Provisions
- SUBCHAPTER 33Q—Financial Responsibility
- SUBCHAPTER 33R—Miscellaneous

**CHAPTER 34—INCOME MAINTENANCE; MISCELLANEOUS**

- SUBCHAPTER 34A—Identifying Information
- SUBCHAPTER 34B—Cooperative Agreements and Coordination

**CHAPTER 35—FAMILY SERVICES; GENERAL**

**CHAPTER 36—CONTRACT SERVICES**

**CHAPTER 37—PSYCHOLOGICAL SERVICES**

**CHAPTER 38—PACE**

- SUBCHAPTER 38A—Identifying Information
- SUBCHAPTER 38B—PACE Program
- SUBCHAPTER 38C—Pay Program
- SUBCHAPTER 38D—Place Program



**CHAPTER 39—WIN**

**SUBCHAPTER 39A—Identifying Information; Manual**

**SUBCHAPTER 39B—Models**

**CHAPTER 40—JOB CORPS**

**CHAPTER 41—CHILDREN'S SERVICES**

**SUBCHAPTER 41A—Identifying Information**

**SUBCHAPTER 41B—Manuals and Forms; Coverage**

**SUBCHAPTER 41C—Day Care Center Certification**

**SUBCHAPTER 41D—Family Day Care Home Certification**

**SUBCHAPTER 41E—Licensing of Group Homes for Children**

**SUBCHAPTER 41F—Licensing of Family Foster Homes**

**SUBCHAPTER 41G—Child Care Institution Standards**

**SUBCHAPTER 41H—Adoption Standards**

**SUBCHAPTER 41I—Protective Services**

**SUBCHAPTER 41J—Foster Home Fund**

**SUBCHAPTER 41K—Interstate Laws**

**SUBCHAPTER 41L—Delinquency Prevention**

**CHAPTER 42—INDIVIDUAL AND FAMILY SUPPORT**

**SUBCHAPTER 42A—Identifying Information**

**SUBCHAPTER 42B—Licensing of Homes for Developmentally Disabled Adults**

**SUBCHAPTER 42C—Licensing of Family Care Homes**

**SUBCHAPTER 42D—Licensing of Homes for the Aged and Infirm**

**SUBCHAPTER 42E—Day Activity for Adults**

**SUBCHAPTER 42F—Maternity Home Fund**

**SUBCHAPTER 42G—Family Planning Services**

**SUBCHAPTER 42H—Other Services**

**SUBCHAPTER 42I—Employment and Training Support Services**

**SUBCHAPTER 42J—Health Support Services**

**SUBCHAPTER 42K—Preparation and Delivery of Meals**

**SUBCHAPTER 42L—Legal Services**

**SUBCHAPTER 42M—Information and Referral Services**

**SUBCHAPTER 42N—Transportation Services**

**SUBCHAPTER 42O—Personal and Family Counseling**

**SUBCHAPTER 42P—Chore Services**

**CHAPTER 43—TITLE XX COMPREHENSIVE ANNUAL SERVICES PROGRAM PLAN**

SUBCHAPTER 43A—General Information  
 SUBCHAPTER 43B—General Policies  
 SUBCHAPTER 43C—Eligibility for Services  
 SUBCHAPTER 43D—Services to Be Provided

CHAPTER 44—DIVISION OF YOUTH SERVICES  
 SUBCHAPTER 44A—Identifying Information  
 SUBCHAPTER 44B—North Carolina Minimum Standards  
 for Juvenile Detention Facilities

## NORTH CAROLINA ADMINISTRATIVE CODE

### TITLE 11

#### DEPARTMENT OF INSURANCE

CHAPTER 1—DEPARTMENTAL RULES  
 CHAPTER 2—SUPPORT SERVICES DIVISION  
 CHAPTER 3—ADMINISTRATIVE LAW DIVISION  
 CHAPTER 4—CONSUMER INSURANCE INFORMATION DIVISION  
 CHAPTER 5—FIRE AND RESCUE SERVICES DIVISION  
 CHAPTER 6—AGENTS' LICENSING DIVISION  
 CHAPTER 7—STATE PROPERTY FIRE INSURANCE FUND DIVISION  
 CHAPTER 8—ENGINEERING AND BUILDING CODES DIVISION  
 CHAPTER 9—INVESTIGATIONS DIVISION  
 CHAPTER 10—FIRE AND CASUALTY DIVISION  
 CHAPTER 11—COMPANY OPERATIONS DIVISION  
 SUBCHAPTER 11A—General Provisions  
 SUBCHAPTER 11B—Securities  
 SUBCHAPTER 11C—Examinations Operational Unit  
 SUBCHAPTER 11D—Liquidation and Merger Operations  
 Unit  
 SUBCHAPTER 11E—Tax, Audit and Statistical Operational  
 Unit  
 SUBCHAPTER 11F—Actuarial Operational Unit  
 CHAPTER 12—LIFE, ACCIDENT AND HEALTH DIVISION  
 CHAPTER 13—SPECIAL SERVICES DIVISION

**CHAPTER 14—ADMISSIONS DIVISION**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 12**

**DEPARTMENT OF JUSTICE**

**CHAPTER 1—DEPARTMENTAL RULES**

**CHAPTER 2—OFFICE OF THE ATTORNEY GENERAL**

**SUBCHAPTER 2A—Office Rules**

**SUBCHAPTER 2B—Rulemaking and Administrative Hearing Procedures**

**SUBCHAPTER 2C—Division Two**

**SUBCHAPTER 2D—Division Three**

**SUBCHAPTER 2E—Division Four**

**SUBCHAPTER 2F—Division Five**

**SUBCHAPTER 2G—Administrative Procedures Rules for Filing**

**SUBCHAPTER 2H—Torrens Act Rules and Forms**

**SUBCHAPTER 2I—Company and Railroad Police**

**CHAPTER 3—STATE BUREAU OF INVESTIGATION**

**CHAPTER 4—POLICE INFORMATION NETWORK**

**SUBCHAPTER 4A—Organizational Rules**

**SUBCHAPTER 4B—Office Rules**

**SUBCHAPTER 4C—Management Control**

**SUBCHAPTER 4D—Rulemaking and Administrative Hearings Procedures**

**CHAPTER 5—TRAINING AND STANDARDS COUNCIL**

**CHAPTER 6—THE NORTH CAROLINA JUSTICE ACADEMY**

**SUBCHAPTER 6A—Organization and Rules**

**SUBCHAPTER 6B—Rulemaking and Administrative Hearing Procedures**

**CHAPTER 7—PRIVATE PROTECTIVE SERVICES**

**CHAPTER 8—GENERAL STATUTES COMMISSION**

## NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 13  
DEPARTMENT OF LABOR*CHAPTER 1—DEPARTMENTAL RULES*

SUBCHAPTER 1A—General Provisions and Organization

SUBCHAPTER 1B—Rulemaking and Administrative Hearing Procedures

SUBCHAPTER 1C—Personnel Rules

*CHAPTER 2—APPRENTICESHIP DIVISION**CHAPTER 3—BOILER AND PRESSURE VESSEL DIVISION**CHAPTER 4—CONCILIATION AND ARBITRATION DIVISION*

SUBCHAPTER 4A—Division Rules

SUBCHAPTER 4B—Voluntary Arbitration

SUBCHAPTER 4C—Mediation

SUBCHAPTER 4D—Technical and Educational Services

*CHAPTER 5—ELEVATOR DIVISION**CHAPTER 6—MINE AND QUARRY DIVISION**CHAPTER 7—OFFICE OF OCCUPATIONAL SAFETY AND HEALTH*

SUBCHAPTER 7A—General Rules

SUBCHAPTER 7B—Occupational Safety and Health Act Operational Procedures

SUBCHAPTER 7C—Safety and Health

SUBCHAPTER 7D—Standards Interpretation

SUBCHAPTER 7E—Construction; Standards Interpretations

*CHAPTER 8—STATISTICS DIVISION**CHAPTER 9—STATE EMPLOYMENT STANDARDS DIVISION*

SUBCHAPTER 9A—General Rules

SUBCHAPTER 9B—Procedures and Rules

SUBCHAPTER 9C—Wage, Hour and Child Labor Provisions

SUBCHAPTER 9D—Private Employment Agency Provisions

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 14  
DEPARTMENT OF MILITARY AND  
VETERANS AFFAIRS**

**CHAPTER 1—DEPARTMENTAL RULES**

**SUBCHAPTER 1A—General Provisions**

**SUBCHAPTER 1B—Rulemaking and Administrative  
Hearings**

**CHAPTER 2—THE NATIONAL GUARD**

**CHAPTER 3—DIVISION OF VETERANS AFFAIRS**

**SUBCHAPTER 3A—Division of Veterans Affairs; General  
Provisions**

**SUBCHAPTER 3B—Veterans Affairs Commission**

**CHAPTER 4—CIVIL PREPAREDNESS**

**CHAPTER 5—ENERGY (Transferred to 4 NCHC 15)**

**SUBCHAPTER 5A—Organization**

**SUBCHAPTER 5B—Energy Policy Council**

**CHAPTER 6—CIVIL AIR PATROL**

**CHAPTER 7—STATE HIGHWAY PATROL**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 15  
DEPARTMENT OF NATURAL AND  
ECONOMIC RESOURCES**

**CHAPTER 1—DEPARTMENTAL RULES**

**SUBCHAPTER 1A—General Organization**

**SUBCHAPTER 1B—General Administration**

**SUBCHAPTER 1C—Interim Regulations Relating to Man-  
agement of Core Banks Recreation Area**

**SUBCHAPTER 1D—Conformity with North Carolina En-  
vironmental Policy Act**

**CHAPTER 2—ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 2A—Organization of Environmental Man-  
agement Commission**

**SUBCHAPTER 2B—Surface Water Standards, Monitoring**

- SUBCHAPTER 2C—Well Construction Standards
- SUBCHAPTER 2D—Air Pollution Control Requirements
- SUBCHAPTER 2E—Capacity Use Area Water Withdrawal
- SUBCHAPTER 2F—Construction Grants
- SUBCHAPTER 2G—Water Resources Programs
- SUBCHAPTER 2H—Procedures for Permits, Approvals
- SUBCHAPTER 2I—Hearings
- SUBCHAPTER 2J—Civil Penalties
- SUBCHAPTER 2K—Dam Safety

**CHAPTER 3—MARINE FISHERIES**

- SUBCHAPTER 3A—Division Rules
- SUBCHAPTER 3B—Fisheries Regulations for Coastal Waters
- SUBCHAPTER 3C—Licenses, Permits and Leases
- SUBCHAPTER 3D—Dredge and Fill
- SUBCHAPTER 3E—Marine Fisheries Commission
- SUBCHAPTER 3F—Jurisdiction of Agencies; Classification of Waters

**CHAPTER 4—SEDIMENTATION CONTROL**

- SUBCHAPTER 4A—Sedimentation Control Commission Organization
- SUBCHAPTER 4B—Erosion and Sediment Control
- SUBCHAPTER 4C—Sedimentation Control Civil Penalties
- SUBCHAPTER 4D—Local Ordinances

**CHAPTER 5—MINING, MINERAL RESOURCES**

- SUBCHAPTER 5A—Organization and Administration
- SUBCHAPTER 5B—Mining Permitting Regulations
- SUBCHAPTER 5C—Geophysical Exploration
- SUBCHAPTER 5D—Oil and Gas Conservation
- SUBCHAPTER 5E—Disposition of Mineral Deposits on State Lands Under Water

**CHAPTER 6—SOIL AND WATER CONSERVATION COMMISSION**

- SUBCHAPTER 6A—Organization and Operation
- SUBCHAPTER 6B—District Programs; Reorganization, Expenses and Eminent Domain
- SUBCHAPTER 6C—Small Watershed Programs

**CHAPTER 7—COASTAL RESOURCES COMMISSION**

- SUBCHAPTER 7A—Organization and Duties
- SUBCHAPTER 7B—Land Use Planning Guidelines
- SUBCHAPTER 7C—Grant Criteria and Procedures for First-

- phase Coastal Resources Planning
- SUBCHAPTER 7D—Generally Applicable Standards of Review for Land Use Plans and Synopses
- SUBCHAPTER 7E—Criteria for Local Enforcement and Implementation Plans
- SUBCHAPTER 7F—Interim Areas of Environmental Concern
- SUBCHAPTER 7G—Notice Requirement of the Interim Area of Environmental Concern Program
- CHAPTER 8—WASTEWATER TREATMENT PLANT OPERATORS CERTIFICATION COMMISSION**
- SUBCHAPTER 8A—Authority, Organization, Structure, Definitions and Hearing Procedures
- SUBCHAPTER 8B—Certification of Operators
- SUBCHAPTER 8C—Classification of Wastewater Treatment Facilities
- SUBCHAPTER 8D—Powers and Enforcement
- SUBCHAPTER 8E—Training Wastewater Treatment Plant Operators
- CHAPTER 9—DIVISION OF FOREST RESOURCES**
- SUBCHAPTER 9A—Division Organization
- SUBCHAPTER 9B—Delegation
- SUBCHAPTER 9C—Division Programs
- CHAPTER 10—WILDLIFE RESOURCES AND WATER SAFETY**
- SUBCHAPTER 10A—Wildlife Resources Commission
- SUBCHAPTER 10B—Hunting and Trapping
- SUBCHAPTER 10C—Inland Fishing Regulations
- SUBCHAPTER 10D—Game Lands Regulations
- SUBCHAPTER 10E—Fishing and Boating Access Areas
- SUBCHAPTER 10F—Motorboats and Water Safety
- SUBCHAPTER 10G—Distribution and Sale of Hunting, Fishing and Trapping License
- SUBCHAPTER 10H—Regulated Activities
- SUBCHAPTER 10I—Endangered and Threatened Species
- CHAPTER 11—LAW AND ORDER**
- CHAPTER 12—PARKS AND RECREATION AREA RULES**
- SUBCHAPTER 12A—Organization and Duties
- SUBCHAPTER 12B—Parks and Recreation Areas
- SUBCHAPTER 12C—State Lakes Regulations
- SUBCHAPTER 12D—Selection of Lands for Acquisition

SUBCHAPTER 12E—North Carolina Zoological Park  
Regulations

*CHAPTER 13*—COMMUNITY ASSISTANCE AND ECONOMIC DEVELOPMENT PROGRAMS

SUBCHAPTER 13A—Organization and Purpose

SUBCHAPTER 13B—Governor's Award Program

SUBCHAPTER 13C—Local Planning and Management  
Grants

SUBCHAPTER 13D—Land and Water Conservation Fund  
Grants-in-aid Program

SUBCHAPTER 13E—Travel Development Matching Grants

SUBCHAPTER 13F—Science and Technology

SUBCHAPTER 13G—Industrial and Pollution Control  
Revenue Bonds

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 16

DEPARTMENT OF PUBLIC EDUCATION

*CHAPTER 1*—DEPARTMENTAL RULES

SUBCHAPTER 1A—Rules of Organization

SUBCHAPTER 1B—Rules of Practice

SUBCHAPTER 1C—Commissions

*CHAPTER 2*—PUBLIC INSTRUCTION

SUBCHAPTER 2A—State Superintendent of Public Instruction;  
General Provisions

SUBCHAPTER 2B—Regional Centers and Federal Relations

SUBCHAPTER 2C—Administrative Services

SUBCHAPTER 2D—Area of Human Relations and Student  
Affairs

SUBCHAPTER 2E—Instructional Services Area

SUBCHAPTER 2F—Personnel Relations and Public Affairs  
Area

SUBCHAPTER 2G—Planning, Research and Development

SUBCHAPTER 2H—Teacher Education Area

*CHAPTER 3*—CONTROLLER'S OFFICE

*CHAPTER 4*—DEPARTMENT OF COMMUNITY COLLEGES

SUBCHAPTER 4A—Rules of Organization

SUBCHAPTER 4B—The Comprehensive Community College



- System  
SUBCHAPTER 4C—Institutions; Organizations and Operations  
SUBCHAPTER 4D—Institutions; Fiscal Affairs  
SUBCHAPTER 4E—Educational Programs

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 17  
DEPARTMENT OF REVENUE**

**CHAPTER 1—DEPARTMENTAL RULES**

- SUBCHAPTER 1A—Organization of the Department  
SUBCHAPTER 1B—Personnel Rules  
SUBCHAPTER 1C—General Administration

**CHAPTER 2—ADMINISTRATIVE SERVICES**

- SUBCHAPTER 2A—Field Forces Division  
SUBCHAPTER 2B—Accounting Division  
SUBCHAPTER 2C—Planning and Processing Division  
SUBCHAPTER 2D—Tax Research Division  
SUBCHAPTER 2E—Supply and Service Division

**CHAPTER 3—INHERITANCE AND GIFT TAX DIVISION**

- SUBCHAPTER 3A—Divisional Rules  
SUBCHAPTER 3B—Inheritance Tax  
SUBCHAPTER 3C—Gift Tax

**CHAPTER 4—LICENSE AND EXCISE TAX DIVISION**

- SUBCHAPTER 4A—Divisional Rules  
SUBCHAPTER 4B—License Taxes  
SUBCHAPTER 4C—Cigarette Tax  
SUBCHAPTER 4D—Soft Drink Tax  
SUBCHAPTER 4E—Intoxicating Liquors Tax  
SUBCHAPTER 4F—Excise Stamp Tax on Conveyances

**CHAPTER 5—CORPORATE INCOME AND FRANCHISE TAX DIVISION**

- SUBCHAPTER 5A—Divisional Rules  
SUBCHAPTER 5B—Franchise Tax  
SUBCHAPTER 5C—Corporate Income Tax  
SUBCHAPTER 5D—Declaration of Income by Corporations

**CHAPTER 6—INDIVIDUAL INCOME TAX DIVISION**

- SUBCHAPTER 6A—Divisional Rules

**SUBCHAPTER 6B—Individual Income Tax**

**SUBCHAPTER 6C—Withholding**

**SUBCHAPTER 6D—Estimated Tax**

**CHAPTER 7—SALES AND USE TAX DIVISION**

**SUBCHAPTER 7A—Divisional Rules**

**SUBCHAPTER 7B—State Sales and Use Tax**

**SUBCHAPTER 7C—Local Government and Mecklenburg  
County Sales and Use Tax Acts**

**CHAPTER 8—INTANGIBLES TAX DIVISION**

**CHAPTER 9—GASOLINE TAX DIVISION**

**SUBCHAPTER 9A—Divisional Rules**

**SUBCHAPTER 9B—Gasoline Tax**

**SUBCHAPTER 9C—Special Fuels Tax**

**SUBCHAPTER 9D—Highway Fuel Use Tax**

**SUBCHAPTER 9E—Gasoline, Special Fuels and Kerosene  
Inspection**

**CHAPTER 10—AD VALOREM TAX DIVISION**

**CHAPTER 11—PROPERTY TAX COMMISSIONS**

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 18**

**DEPARTMENT OF STATE**

**CHAPTER 1—DEPARTMENTAL RULES**

**CHAPTER 2—GENERAL ADMINISTRATION DIVISION**

**CHAPTER 3—PUBLICATIONS DIVISION**

**CHAPTER 4—CORPORATIONS DIVISION**

**CHAPTER 5—UNIFORM COMMERCIAL CODE DIVISION**

**CHAPTER 6—SECURITIES DIVISION**

**CHAPTER 7—NOTARY PUBLIC DIVISION**

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 19A

DEPARTMENT OF TRANSPORTATION

*CHAPTER 1—DEPARTMENTAL RULES*

SUBCHAPTER 1A—Organization of the Department

SUBCHAPTER 1B—Rulemaking Procedure

SUBCHAPTER 1C—Administrative Hearing Procedure

*CHAPTER 2—DIVISION OF HIGHWAYS*

SUBCHAPTER 2A—General Administration

SUBCHAPTER 2B—Highway Planning

SUBCHAPTER 2C—Secondary Roads

SUBCHAPTER 2D—Highway Operations

SUBCHAPTER 2E—Miscellaneous Functions

*CHAPTER 3—DIVISION OF MOTOR VEHICLES*

SUBCHAPTER 3A—Administration

SUBCHAPTER 3B—Drivers Services Section

SUBCHAPTER 3C—Vehicle Services Section

SUBCHAPTER 3D—License and Theft Section

SUBCHAPTER 3E—Tax Audit Section

SUBCHAPTER 3F—Program Planning and Evaluation

SUBCHAPTER 3H—Governor's Highway Safety Program

*CHAPTER 4—SECRETARY OF TRANSPORTATION*

SUBCHAPTER 4A—Duties and Responsibilities

SUBCHAPTER 4B—Personnel

*CHAPTER 5—ASSISTANT SECRETARY FOR MANAGEMENT*

SUBCHAPTER 5A—Automated Data Processing

SUBCHAPTER 5B—Fiscal

SUBCHAPTER 5C—Purchasing

*CHAPTER 6—ASSISTANT SECRETARY FOR PLANNING*

SUBCHAPTER 6A—Transportation Systems Planning

SUBCHAPTER 6B—Public Transportation Program

SUBCHAPTER 6C—Division of Aeronautics

SUBCHAPTER 6D—Bicycle and Bikeway Program

## NORTH CAROLINA ADMINISTRATIVE CODE

## TITLE 20

## DEPARTMENT OF STATE TREASURER

*CHAPTER 1—DEPARTMENTAL RULES*

SUBCHAPTER 1A—Organization Rules

SUBCHAPTER 1B—Administrative Services

SUBCHAPTER 1C—Disbursement and Records Section

SUBCHAPTER 1D—The Escheat Fund of North Carolina

SUBCHAPTER 1E—Funds, Investments and Public Debt  
Management

SUBCHAPTER 1F—Procedural Rights

*CHAPTER 2—RETIREMENT AND HEALTH BENEFITS*

SUBCHAPTER 2A—Divisional Rules

SUBCHAPTER 2B—Teachers' and State Employees' Re-  
tirement SystemSUBCHAPTER 2C—Local Governmental Employees' Re-  
tirement System

SUBCHAPTER 2D—Division of Health Benefits

SUBCHAPTER 2E—N.C. Public Employees' Social Security  
AgencySUBCHAPTER 2F—Uniform Judicial Retirement System of  
North Carolina

SUBCHAPTER 2G—Uniform Solicitorial Retirement System

SUBCHAPTER 2H—Uniform Clerks of Superior Court Re-  
tirement System

SUBCHAPTER 2I—The Legislative Retirement Fund

*CHAPTER 3—LOCAL GOVERNMENT COMMISSION**CHAPTER 4—TAX REVIEW BOARD**CHAPTER 5—MUNICIPAL BOARD OF CONTROL**CHAPTER 6—N.C. HOUSING FINANCE AGENCY*

SUBCHAPTER 6A—General Provisions

SUBCHAPTER 6B—Rulemaking and Administrative Hear-  
ing ProceduresSUBCHAPTER 6C—Single Family Mortgage Purchase  
ProgramSUBCHAPTER 6E—Agency Participation in Federal Hous-  
ing Assistance Payments Programs

SUBCHAPTER 6F—Technical Assistance Program

**NORTH CAROLINA ADMINISTRATIVE CODE**

**TITLE 21**

**OCCUPATIONAL LICENSING BOARDS**

**CHAPTER 2—BOARD OF ARCHITECTURE**

**CHAPTER 4—AUCTIONEERS COMMISSION**

**CHAPTER 6—BOARD OF BARBER EXAMINERS**

**SUBCHAPTER 6A—Departmental Rules**

**SUBCHAPTER 6B—Rulemaking Procedures**

**SUBCHAPTER 6C—Contested Cases**

**SUBCHAPTER 6D—Conduct of the Contested Case**

**SUBCHAPTER 6E—Decision in Contested Cases**

**SUBCHAPTER 6F—Barber Schools**

**SUBCHAPTER 6G—Barber School Instructors**

**SUBCHAPTER 6H—Barber School Owners and Managers**

**SUBCHAPTER 6I—Out-of-state Transfers**

**SUBCHAPTER 6J—Apprentice Barbers**

**SUBCHAPTER 6K—Registered Barber**

**SUBCHAPTER 6L—Barber Shops**

**SUBCHAPTER 6M—Barber Shop Inspectors**

**SUBCHAPTER 6N—Forms**

**CHAPTER 8—BOARD OF CERTIFIED PUBLIC ACCOUNTANT  
EXAMINERS**

**SUBCHAPTER 8A—Departmental Rules**

**SUBCHAPTER 8B—Rulemaking Procedures**

**SUBCHAPTER 8C—Contested Cases**

**SUBCHAPTER 8D—Conduct of the Contested Case**

**SUBCHAPTER 8E—Decision in Contested Cases**

**SUBCHAPTER 8F—Examinations for Certified Public Ac-  
countant Applicants**

**SUBCHAPTER 8G—Professional Ethics and Conduct**

**SUBCHAPTER 8H—Reciprocity**

**SUBCHAPTER 8I—Revocation of Certificates**

**SUBCHAPTER 8J—Renewals and Registrations**

**SUBCHAPTER 8K—Professional Corporations**

**SUBCHAPTER 8L—Forms**

**CHAPTER 10—BOARD OF CHIROPRACTIC EXAMINERS**

**CHAPTER 12—LICENSING BOARD FOR CONTRACTORS**

**CHAPTER 14—BOARD OF COSMETIC ART EXAMINERS**

- SUBCHAPTER 14A—Departmental Rules
- SUBCHAPTER 14B—Rulemaking Procedures
- SUBCHAPTER 14C—Contested Cases
- SUBCHAPTER 14D—Conduct of the Contested Case
- SUBCHAPTER 14E—Decision in Contested Cases
- SUBCHAPTER 14F—Rules and Regulations Governing the Licensing of Beauty Salons
- SUBCHAPTER 14G—Requirements for the Establishment of Schools of Cosmetic Art
- SUBCHAPTER 14H—Sanitation
- SUBCHAPTER 14I—Operations of Schools of Cosmetic Art
- SUBCHAPTER 14J—Curriculum
- SUBCHAPTER 14K—Manicurist Training
- SUBCHAPTER 14L—Teaching Staff
- SUBCHAPTER 14M—Forms

**CHAPTER 16—BOARD OF DENTAL EXAMINERS**

- SUBCHAPTER 16A—Organization
- SUBCHAPTER 16B—Licensure Examination; Dentists
- SUBCHAPTER 16C—Licensure Examination; Dental Hygienist
- SUBCHAPTER 16D—Provisional Licensure; Dentists
- SUBCHAPTER 16E—Provisional Licensure; Dental Hygienist
- SUBCHAPTER 16F—Professional Corporations
- SUBCHAPTER 16G—Dental Hygienists
- SUBCHAPTER 16H—Dental Assistants
- SUBCHAPTER 16I—Annual Renewal of Licenses; Dental Hygienist
- SUBCHAPTER 16J—Sanitation
- SUBCHAPTER 16K—Dental School Extension Facilities
- SUBCHAPTER 16L—Board of Dental Elections
- SUBCHAPTER 16M—Fees Payable

**CHAPTER 18—BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS**

**CHAPTER 20—BOARD OF REGISTRATION FOR FORESTERS**

**CHAPTER 22—BOARD OF HEARING AID DEALERS AND FITTERS**

- SUBCHAPTER 22A—Departmental Rules
- SUBCHAPTER 22B—Rulemaking Procedures
- SUBCHAPTER 22C—Contested Cases
- SUBCHAPTER 22D—Conduct of the Contested Case

- SUBCHAPTER 22E—Decision in Contested Cases
- SUBCHAPTER 22F—General Examination and License Provisions
- SUBCHAPTER 22G—Renewals and Registrations
- SUBCHAPTER 22H—Revocation of Licenses
- SUBCHAPTER 22I—Examination of Clients
- SUBCHAPTER 22J—Unethical Conduct
- SUBCHAPTER 22K—Forms

**CHAPTER 24—HOUSE MOVERS LICENSING BOARD**

**CHAPTER 26—BOARD OF LANDSCAPE ARCHITECTS**

**CHAPTER 28—LANDSCAPE CONTRACTORS' REGISTRATION BOARD**

**CHAPTER 30—BOARD OF LAW EXAMINERS**

**CHAPTER 32—BOARD OF MEDICAL EXAMINERS**

- SUBCHAPTER 32A—Organization
- SUBCHAPTER 32B—License to Practice Medicine
- SUBCHAPTER 32C—Professional Corporations
- SUBCHAPTER 32D—Approval of Assistant to Physician
- SUBCHAPTER 32E—Approval of Registered Nurse Performing Medical Acts
- SUBCHAPTER 32F—Biennial Registration
- SUBCHAPTER 32G—Mobile Intensive Care

**CHAPTER 34—BOARD OF MORTUARY SCIENCE**

**CHAPTER 36—BOARD OF NURSING**

**CHAPTER 40—BOARD OF OPTICIANS**

**CHAPTER 42—BOARD OF EXAMINERS IN OPTOMETRY**

- SUBCHAPTER 42A—Organization
- SUBCHAPTER 42B—License to Practice Optometry
- SUBCHAPTER 42C—Professional Corporations
- SUBCHAPTER 42D—Optometric Assistant and Technician
- SUBCHAPTER 42E—Mode of Practice
- SUBCHAPTER 42F—Rulemaking and Administrative Hearing Procedures
- SUBCHAPTER 42G—Forms
- SUBCHAPTER 42H—Preceptorships
- SUBCHAPTER 42I—Preceptors

**CHAPTER 44—BOARD OF OSTEOPATHIC EXAMINATION AND REGISTRATION**

**CHAPTER 46—BOARD OF PHARMACY****CHAPTER 48—EXAMINING COMMITTEE OF PHYSICAL THERAPY****SUBCHAPTER 48A—Organization****SUBCHAPTER 48B—Types of Licenses****SUBCHAPTER 48C—Examinations****SUBCHAPTER 48D—Application for Licensure****SUBCHAPTER 48E—Certificates, Fees, Investigations, Record of Licensees****SUBCHAPTER 48F—Retention of License****SUBCHAPTER 48G—Rulemaking and Administrative Hearing Procedures****CHAPTER 50—BOARD OF EXAMINERS PLUMBING AND HEATING CONTRACTORS****CHAPTER 52—BOARD OF PODIATRY EXAMINERS****CHAPTER 54—BOARD OF EXAMINERS OF PRACTICING PSYCHOLOGISTS****CHAPTER 56—BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS****CHAPTER 58—REAL ESTATE LICENSING BOARD****CHAPTER 60—BOARD OF REFRIGERATION EXAMINERS****CHAPTER 62—SANITARIAN EXAMINERS****CHAPTER 64—BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS****CHAPTER 66—VETERINARY MEDICAL BOARD****CHAPTER 68—BOARD OF WATCHMAKING AND REPAIRING****SUBCHAPTER 68A—Departmental Rules****SUBCHAPTER 68B—Rulemaking Procedures****SUBCHAPTER 68C—Contested Cases****SUBCHAPTER 68D—Conduct of the Contested Case****SUBCHAPTER 68E—Decision in Contested Cases****SUBCHAPTER 68F—General Examination and License Provisions****SUBCHAPTER 68G—Procedures for Revocation of Licenses or Certificates****SUBCHAPTER 68H—Registrations and Renewals****SUBCHAPTER 68I—Forms**



**CHAPTER 70—BOARD OF WATER WELL CONTRACTOR EXAMINERS**

**SUBCHAPTER 70A—Departmental Rules**

**SUBCHAPTER 70B—Rulemaking Procedures**

**SUBCHAPTER 70C—Contested Cases**

**SUBCHAPTER 70D—Conduct of the Contested Case**

**SUBCHAPTER 70E—Decision in Contested Cases**

**SUBCHAPTER 70F—Rules and Regulations of the Board**

**SUBCHAPTER 70G—Revocation of Certificates**

**SUBCHAPTER 70H—Renewals and Registrations**

**SUBCHAPTER 70I —Forms**

## APPENDIX B

## AGENCY RULES UNDER N.C. GEN. STAT. § 150A-17 (1978)

This Appendix contains illustrative examples of rules adopted by state agencies under the declaratory ruling section of the North Carolina Administrative Procedure Act. Arrangement of the examples is from the simpler and less complete to the more comprehensive.

*Index*

Board of Medical Examiners of the State of North Carolina . . . . .	82
(Similar rules have been adopted by the Board of Natural and Economic Resources.)	
North Carolina Auctioneers Commission . . . . .	82
(Similar rules have been adopted by the Board of Chiropractic Examiners, Licensing Board of Contractors, Board of Law Examiners, Board of Mortuary Science, Board of Opticians, Board of Examiners in Optometry, Board of Pharmacy, Examining Committee of Physical Therapy, Board of Registration for Professional Engineers and Land Surveyors, Real Estate Licensing Board, Board of Sanitarian Examiners, Milk Commission, Banking Commission, Board of Examiners for Nursing Home Administrators, Board of Examiners of Electrical Contractors and House Movers Licensing Board.	
North Carolina Board of Architecture . . . . .	84
(Similar rules have been adopted by the Board of Certified Public Accountant Examiners, Board of Chiropractic Examiners, Board of Cosmetic Art Examiners, Board of Dental Examiners, Hearing Aid Dealers and Fitters Board, Board of Landscape Architects, Landscape Contractors Registration Board, Board of Examiners of Plumbing and Heating Contractors, Board of Podiatry Examiners, Board of Examiners of Practicing Psychologists, Board of Refrigeration Examiners, Board of Examiners for Speech and Language Pathologists and Audiologists, Veterinary Medical Board, Board of Examiners in Watchmaking and Repairing and Board	

of Water Well Contractor Examiners.)

North Carolina Board of Alcoholic Control..... 86

*Board of Medical Examiners of the State of North Carolina*

21 N.C. Adm. Code 32A.0007

(hereinafter cited N.C.A.C., the designation to use when requesting copies of rules from the agency issuing them or from the Administrative Procedure Section of the Attorney General's Office. See n.20 *infra*.)

**.0007 DECLARATORY RULINGS**

The board may consider the validity of a rule only when the petitioner shows that circumstances are so changed since adoption of the rule that such a ruling would be warranted, or that the rule making record evidences a failure by the agency to consider specified relevant factors. The petitioner shall state the consequences of a failure to issue a ruling.

History Note: Statutory Authority N.C. Gen. Stat. § 150A-19;  
Eff. February 1, 1976.

*North Carolina Auctioneers Commission*

21 N.C.A.C. 4.0301 to 4.0304

**.0301 PETITION**

Any aggrieved person may petition the board for a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the board or a rule or order of the board.

History Note: Statutory Authority N.C. Gen. Stat. §§ 150A-17 and 85B-3(f);  
Eff. February 1, 1976;  
Readopted Eff. December 19, 1977.

**.0302 FORM AND CONTENTS OF PETITION**

The petition need not be in any special form, but it shall contain:

- (1) a statement of the nature of petitioner's interest, including reasons for the submission of the petition;
- (2) a designation of the specific statutory provisions, rule, or order in question;
- (3) a complete statement of the relevant facts;
- (4) a statement of the interpretation given the statutory provision, rule, or order by the petitioner;
- (5) a memorandum containing the reasons, including any legal authorities, in support of the interpretation of the petitioner;
- (6) the name, address, telephone number, and signature of each petitioner.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 150A-11(1) and 85B-3(f);  
 Eff. February 1, 1976;  
 Readopted Eff. December 19, 1977.

#### .0303 DISPOSITION OF PETITION

The board, through its executive secretary, will within 60 days, either deny the petition, stating the reasons therefor, or issue a declaratory ruling. Upon disposition, the petitioner will be notified. However, the board may for good cause refuse to issue a declaratory ruling.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 150A-17 and 85B-3(f);  
 Eff. February 1, 1976;  
 Readopted Eff. December 19, 1977.

#### .0304 APPLICABILITY OF RULING

A declaratory ruling shall be applicable only to the factual situation alleged in the petition or set forth in the order. It shall not be applicable to different factual situations or where additional facts, not considered in the ruling, exist.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 150A-17 and 85B-3(f);  
 Eff. February 1, 1976;  
 Readopted Eff. December 19, 1977.

*North Carolina Board of Architecture*

21 N.C.A.C. 2.0501 to 2.0505

**.0501 SUBJECTS OF DECLARATORY RULINGS**

Any person substantially affected by a statute administered or rule promulgated by the board may request a declaratory ruling as to either the manner in which a statute or rule applies to a given factual situation, if at all, or whether a particular board rule is valid.

History Note: Statutory Authority N.C. Gen. Stat. §§ 83-4 and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. September 29, 1977.

**.0502 SUBMISSION OF REQUEST FOR RULING**

All requests for declaratory rulings shall be written and mailed to the board. The container of the request should bear the notation: REQUEST FOR DECLARATORY RULING. The request must include the following information:

- (1) name and address of petitioner;
- (2) statute or rule to which petition relates;
- (3) concise statement of the manner in which petitioner is aggrieved by the rule or statute or its potential application to him;
- (4) a statement of whether an oral hearing is desired, and if so, the reason therefor.

History Note: Statutory Authority N.C. Gen. Stat. §§ 83-4 and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. September 29, 1977.

**.0503 DISPOSITION OF REQUESTS**

(a) When the board deems it appropriate to issue a declaratory ruling it shall issue such declaratory ruling within 60 days of receipt of the petition.

(b) A declaratory ruling proceeding may consist of written submissions, an oral hearing, or other procedure as may be appropriate in the circumstances of the particular request.

(c) Whenever the board believes "for good cause" that the issuance of a declaratory ruling is undesirable, it may refuse to issue such ruling. The board will notify the petitioner of its decision

in writing, stating the reasons for the denial of the declaratory ruling.

(d) For purposes of Subpart (c) of this Rule, the board will ordinarily refuse to issue a declaratory ruling for the following reasons:

- (1) unless the petitioner shows that the circumstances are so changed since the adoption of the rule that such a ruling would be warranted;
- (2) unless the petitioner shows that the agency did not give to the factors specified in the request for a declaratory ruling a full consideration at the time the rule was issued;
- (3) where there has been a similar controlling factual determination in a contested case, or where the factual context being raised for a declaratory ruling was specifically considered upon the adoption of the rule or directive being questioned, as evidenced by the rule-making record;
- (4) where the subject matter of the request is involved in pending litigation in any state or federal court in North Carolina.

History Note: Statutory Authority N.C. Gen. Stat. § 83-4 and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. September 29, 1977.

#### .0504 RECORD OF DECISION

A record of all declaratory rule-making proceedings will be maintained in the board office for as long as the ruling is in effect and for five years thereafter. This record will contain: the request, the notice, all written submissions filed in the request, whether filed by the petitioner or any other person, and a record or summary of oral presentations, if any. Records of rule-making proceedings will be available for public inspection during the regular office hours of the board office.

History Note: Statutory Authority N.C. Gen. Stat. §§ 83-4 and 150A-11;  
Eff. February 1, 1976;  
Readopted Eff. September 29, 1977.

#### .0505 EFFECTIVE DATE

For the purposes of Rule .0504 of this Section, a declaratory ruling shall be deemed to be "in effect": until the statute or rule interpreted by the declaratory ruling is amended, altered or re-

pealed; until the board changes the declaratory ruling prospectively for good reasons; or until any court sets aside the ruling in litigation between the board and the party requesting the rule; or until any court of the Appellate Division of the General Court of Justice shall construe the statute or rule which is subject of the declaratory ruling in a manner plainly irreconcilable with the declaratory ruling.

*North Carolina Board of Alcoholic Control*

4 N.C.A.C. 2B.0401 to 2B.0412

**.0401 DEFINITION**

“Aggrieved party” shall mean any person substantially affected by any statute or regulation administered or promulgated by the North Carolina Board of Alcoholic Control and who shall be entitled to request a declaratory ruling in appropriate circumstances.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

**.0402 ISSUANCE: GROUNDS**

Upon request of an aggrieved party, except where the board for good cause finds issuance of a ruling undesirable, the board shall issue a declaratory ruling if the request for such ruling will:

- (1) determine the validity of a regulation previously adopted by the board; or
- (2) determine the applicability of a particular statute, or regulation administered or adopted by the board to a given specific fact situation.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

**.0403 REQUEST FOR DECLARATORY RULING; VALIDITY OF REGULATION**

(a) All requests for a declaratory ruling contesting the validity of a regulation previously adopted by the board shall be written and submitted upon an official “Request for Declaratory Ruling”

form which may be obtained from the Administrator's Office, North Carolina Board of Alcoholic Control, Post Office Box 25249, Raleigh, North Carolina 27611. This form requires the following information:

- (1) name and address of aggrieved party,
- (2) statute or regulation to which the request relates,
- (3) names and addresses of additional third parties known to the aggrieved party who may possibly be affected by the requested ruling,
- (4) statement whether or not the aggrieved party is aware of any pending board action or court action relating to the validity of the regulation,
- (5) a brief statement of the arguments and legal authority supporting the party's contention that the regulation is invalid, and
- (6) statement of whether or not a conference is desired and reasons for requesting a conference.

(b) The completed request form and any supporting materials deemed relevant to the request shall be sent to the administrator, North Carolina Board of Alcoholic Control, Post Office Box 25249, Raleigh, North Carolina 27611.

(c) The administrator shall make an initial determination whether to grant or deny a request for a declaratory ruling. In making this initial determination, the merits of the request and the significance of issues raised shall be considered.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### **.0404 GROUNDS FOR DENIAL OF RULING ON VALIDITY**

A request for a declaratory ruling to determine the validity of a regulation may be denied unless:

- (1) It is shown that since the adoption of the regulation by the board, circumstances have so changed such that a declaratory ruling is warranted; or
- (2) It is shown that in the record of the rule-making hearing which was held upon the regulation in question, the board failed to consider specified relevant matters.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-



15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

**.0405 REQUEST FOR DECLARATORY RULING: SPECIFIC  
FACT SITUATIONS**

(a) All requests for a declaratory ruling to determine the applicability of a particular statute or regulation administered or adopted by the board to a given specific fact situation shall be written and submitted upon an official "Request for Declaratory Ruling" form which may be obtained from the administrator's office, North Carolina Board of Alcoholic Control, Post Office Box 25249, Raleigh, North Carolina 27611. This form requires the following information:

- (1) name and address of aggrieved party;
- (2) statute or regulation to which the request relates;
- (3) a brief statement of the manner in which the aggrieved party is affected or may be affected by the statute or regulation;
- (4) names and addresses of additional third parties known to the aggrieved party who may possibly be affected by the requested ruling;
- (5) complete and accurate statement of all material facts;
- (6) statement whether or not the aggrieved party is aware of any pending board action or court action which may bear on the applicability of the statute, rule or regulation to the party's particular situation;
- (7) brief statement of the arguments and legal authority supporting the party's position on the applicability of this statute, rule or regulation; and
- (8) statement of whether or not a conference is desired and reasons for requesting conference.

The aggrieved party shall sign and verify the request before an officer qualified to administer oaths that the information supplied in the request form is true and accurate.

(b) The completed request form and any supporting materials deemed relevant to the request shall be sent to the administrator, North Carolina Board of Alcoholic Control, Post Office Box 25249, Raleigh, North Carolina 27611.

(c) The administrator shall make an initial determination whether to grant or deny a request for a declaratory ruling. In making this initial determination the merits of the request and the

significance of issues raised shall be considered.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### **.0406 GROUNDS FOR DENIAL; PENDING CONTROVERSY**

The board will not issue a declaratory ruling when the issue or issues presented by the aggrieved party are the subject of a matter pending before the board or in a court of law.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### **.0407 WITHDRAWAL OF REQUEST FOR DECLARATORY RULING**

At any time prior to issuance, the board in its discretion may permit an aggrieved party to withdraw the request for a declaratory ruling, any such request for withdrawal to be in writing.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### **.0408 NOTICE OF DENIAL OF REQUEST**

If the administrator denies a request for a declaratory ruling, the aggrieved party shall be notified promptly in writing, and in no event later than 60 days from receipt of such request. The notice shall state the reasons for denial of the request.

**History Note:** Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted November 1, 1977.

#### **.0409 ISSUANCE OF RULING**

(a) If the administrator grants a request for a declaratory ruling, he may allow relevant written materials and comments, oral arguments and any other evidence which he deems appropriate for a fair determination of the issues in question. The administrator may determine when all materials or arguments are to be filed or made.

(b) Notice of Preliminary Action to Third Parties. Where a ruling will possibly affect third persons the administrator shall notify such persons and allow them an opportunity to present written comments or oral arguments regarding the issuance of a declaratory ruling. However, if the request for a declaratory ruling is merely to determine the applicability of a statute, rule or regulation to a unique factual situation, no notice to third persons shall be necessary.

(c) The administrator, within 10 days of receipt of the request, shall notify the aggrieved party and any third persons of the time for filing and presentation of written comments and oral arguments. Oral arguments shall be made informally before the administrator at the offices of the North Carolina Board of Alcoholic Control in Raleigh, North Carolina.

(d) After hearing oral arguments and reviewing written evidence challenging the validity of a regulation, the administrator shall prepare a statement of the facts and issues. The aggrieved party's request and all supporting comments and materials, together with the administrator's statement of facts and issues shall be presented to the board for consideration and issuance of a ruling. The administrator shall notify the aggrieved party within a reasonable time before the board meeting that he shall be allowed to appear before the board and present additional oral evidence in support of his request.

(e) Where the administrator has received a request for a ruling on the applicability of a statute, rule or regulation to a specific fact situation, and he has heard arguments and reviewed written evidence supporting the request, he shall prepare a statement of the facts and issues and may issue a declaratory ruling which shall be binding without any board action. Provided, however, the administrator may submit any request for a ruling on the applicability of a statute or regulation to the board for issuance of the declaratory ruling.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### .0410 EFFECT OF DECLARATORY RULING

A declaratory ruling shall be binding upon the board in its dealings with the party requesting the ruling unless the board finds a misstatement of a material fact, or the failure to state a material

fact, the omission of which makes the request misleading. However, the board shall not be bound by such declaratory ruling in dealing with third parties where the board, for good cause, believes that a different course of action is justified and that a ruling should be changed with respect to different persons or fact situations.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### .0411 ALTERATION OF DECLARATORY RULING

The board, on its own motion, or upon the motion of any interested person may change or modify a declaratory ruling previously issued, by the adoption of a new or different ruling. Such subsequent ruling shall apply prospectively only.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14),  
150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.

#### .0412 JUDICIAL REVIEW OF DECLARATORY RULINGS

For purposes of judicial review, the board shall preserve any and all requests for rulings, written comments by interested parties, any manuscripts or summaries of oral proceedings, any matter considered by the administrator or board in making the decision, and the decision together with the reasons therefor.

History Note: Statutory Authority N.C. Gen. Stat. §§ 18A-15(14), 150A-11(1) and 150A-17;  
Eff. February 1, 1976;  
Readopted Eff. November 1, 1977.