

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

2013 JAN -9 AM 10:06

SUPERIOR COURT DIVISION

FILE NO.: _____

CHRISTINA KELLEY GALLEGOS- WAKE COUNTY, C.S.C.

MERRILL, as Candidate for Buncombe)

County Commissioners, District 2,)

Plaintiff,)

vs.)

GARY O. BARTLETT, in his official)
 capacity as Executive Director of the North)
 Carolina State Board of Elections; LARRY)
 LEAKE, in his official capacity as Chairman)
 of the North Carolina State Board of)
 Elections; ROBERT CORDLE, in his)
 official capacity as Secretary of the North)
 Carolina State Board of Elections;)
 CHARLES WINFREE, RONALD G.)
 PENNY and JAY HEMPHILL, in their)
 official capacity as Members of the North)
 Carolina State Board of Elections; NORTH)
 CAROLINA STATE BOARD OF)
 ELECTIONS; as an agency of the State of)
 North Carolina, TRENA PARKER, in her)
 official capacity as Director of the)
 Buncombe County Board of Elections;)
 JONES BYRD, in his official capacity as)
 Chairman of the Buncombe County Board)
 of Elections; LUCY SMITH, in her official)
 capacity as Secretary of the Buncombe)
 County Board of Elections; ROBERT VAN)
 WAGNER, in his official capacity as)
 Member of the Buncombe County Board of)
 Elections; BUNCOMBE COUNTY)
 BOARD OF ELECTIONS, as an agency of)
 the North Carolina State Board of Elections)
 and, thus, the North Carolina State Board of)
 Elections; and MIKE FRYAR, ELLEN)
 FROST and CAROL WEIR PETERSON,)
 as Candidates for Buncombe County)
 Commissioners, District 2,)

Defendants.)

**COMPLAINT FOR:
 APPEAL OF FINAL DECISION
 STAY OF ELECTION CERTIFICATION
 DECLARATORY JUDGMENT
 WRIT OF MANDAMUS**

NOW COMES the Plaintiff, Christina Kelley Gallegos-Merrill, by and through the undersigned counsel, and alleges and says as follows:

INTRODUCTION:

1. The Plaintiff, pursuant to N.C.G.S. § 163-182.14, appeals the Final Decision of the North Carolina State Board of Elections upholding the dismissal of the Plaintiff's Election Protest by the Buncombe County Board of Elections for lack of probable cause and the denial of the Plaintiff's request for an evidentiary hearing. The Plaintiff seeks a review and reversal of the Final Decision of the North Carolina State Board of Elections, a review and reversal of the Protest Order of the Buncombe County Board of Elections, a stay of the Certification of Election for 1 of the 2 seats in the District 2, Buncombe County, Commissioners election pending a ruling in this Action, and a full evidentiary hearing.

2. The Plaintiff, pursuant to N.C.G.S. § 7A-245 and the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253 to § 1-267, seeks a Declaratory Judgment determining the rights of the respective parties, determining the respective duties and obligations of certain of the Defendants and an injunction requiring certain of the Defendants to perform their respective duties and obligations as required by law.

3. The Plaintiff, pursuant to Article IV, § 1, of the North Carolina Constitution, seeks a writ of mandamus compelling certain of the Defendants to perform their respective duties and obligations as required by law.

JURISDICTION AND VENUE:

4. The Plaintiff has exhausted all administrative remedies prior to the filing of this Action.

5. This Court has subject matter jurisdiction and venue is proper in Wake County, North Carolina.

PARTIES:

6. The Plaintiff is a citizen and resident of Buncombe County, North Carolina, and is a tax payer, registered voter and candidate for County Commissioner in District 2 of Buncombe County, North Carolina. Additionally, the Plaintiff is an aggrieved party, having had her rights directly and adversely affected by the improper actions of certain of the Defendants, as more particularly described hereinafter. The Plaintiff has standing.

7. The Defendant, Gary O. Bartlett ("Bartlett"), is the Executive Director of the North Carolina State Board of Elections. He is being sued in his official capacity.

8. The Defendant, Larry Leake ("Leake"), is the Chairman of the North Carolina State Board of Elections. He is being sued in his official capacity.

9. The Defendant, Robert Cordle ("Cordle"), is the Secretary of the North Carolina State Board of Elections. He is being sued in his official capacity.

10. The Defendant, Charles Winfree ("Winfree"), is a member of the North Carolina State Board of Elections. He is being sued in his official capacity.

11. The Defendant, Ronald G. Penny ("Penny"), is a member of the North Carolina State Board of Elections. He is being sued in his official capacity.

12. The Defendant, Jay Hemphill ("Hemphill"), is a member of the North Carolina State Board of Elections. He is being sued in his official capacity.

13. The Defendant, the North Carolina State Board of Elections ("NCBOE"), is an agency of the State of North Carolina and has overall responsibility for administration of the election process in North Carolina.

14. The Defendant, Trena Parker ("Parker"), is the Director of the Buncombe County Board of Elections. She is being sued in her official capacity.

15. The Defendant, Jones Byrd ("Byrd"), is the Chairman of the Buncombe County Board of Elections. He is being sued in his official capacity.

16. The Defendant, Lucy Smith ("Smith"), is the Secretary of the Buncombe County Board of Elections. She is being sued in her official capacity.

17. The Defendant, Robert Van Wagner ("Van Wagner"), is a member of the Buncombe County Board of Elections. He is being sued in his official capacity.

18. The Defendant, the Buncombe County Board of Elections ("BCBOE"), is an agency of the North Carolina State Board of Elections, and thus the State of North Carolina, existing under and by virtue of N.C.G.S. 163-30. Said Defendant has those powers and duties enumerated in N.C.G.S. 163-33 which include, but are not limited to: investigating irregularities, nonperformance of duties and violations of law; determining the eligibility of applicants; and holding hearings on challenges to voters and on election protests.

19. The Defendant, Mike Fryar ("Fryar"), is a citizen and resident of Buncombe County, North Carolina. He is being sued in his capacity as a candidate in the District 2, Buncombe County, Commissioners election.

20. The Defendant, Ellen Frost ("Frost"), is a citizen and resident of Buncombe County, North Carolina. She is being sued in her capacity as a candidate in the District 2, Buncombe County, Commissioners election.

21. The Defendant, Carol Weir Peterson ("Peterson"), is a citizen and resident of Buncombe County, North Carolina. She is being sued in her capacity as a candidate in the District 2, Buncombe County, Commissioners election.

PROCEDURAL BACKGROUND:

22. On November 20, 2012, the Plaintiff duly filed with the Defendant, BCBOE, her Election Protest in the form required by N.C.G.S. § 163-182.9(c) and within the timeframe required by N.C.G.S. § 163-182.9(b)(4). A true copy of the Election Protest is attached hereto as "Exhibit A" and incorporated herein by reference.

23. On November 28, 2012, the Defendant, BCBOE, by and through the Defendants, Byrd, Smith, and Van Wagner, held a "Probable Cause Hearing".

24. On December 3, 2012, the Defendant, BCBOE, by and through the Defendant, Byrd, filed its Protest Order dismissing the Plaintiff's Election Protest for failing to establish probable cause to believe that a violation of election law or irregularity or misconduct has occurred. A true copy of the Protest Order is attached hereto as "Exhibit B" and incorporated herein by reference.

25. On December 4, 2012, the Plaintiff duly filed with the Defendant, BCBOE, her Appeal of Election Protest to State Board of Elections ("Appeal") in the form and within the timeframe required by N.C.G.S. § 163-182.11. Additionally, the Plaintiff deposited in the mail, addressed to the Defendant, NCBOE, her Appeal within the timeframe required by N.C.G.S. § 163-182.11. A true copy of the Appeal is attached hereto as "Exhibit C" and incorporated herein by reference.

26. On December 13, 2012, the Defendant, NCBOE, by and through the Defendants, Leake, Cordle, Winfree, Penny, and Hemphill, held a "Hearing" on the Plaintiff's Appeal.

27. On December 31, the Defendant, NCBOE, by and through the Defendant, Leake, entered its Order denying the Plaintiff's Appeal and affirming the Protest Order of the Defendant, BCBOE, which, in accordance with N.C.G.S. § 163-182.14(a), was served on January 2, 2013. A true copy of the Order is attached hereto as "Exhibit D" and incorporated herein by reference.

28. The Plaintiff, within the timeframe required by N.C.G.S. § 163-182.14(b), hereby files this Complaint.

SUMMARY OF BACKGROUND FACTS:

29. The Plaintiff and the Defendants, Pryor, Frost and Peterson, are candidates for the two seats of District 2 of the Buncombe County Board of Commission.

30. Prior to the November 6, 2012, election (the "Election"), the Buncombe County commissioners were elected at-large, or county wide, and not from specific precincts.

31. Prior to the Election, precincts 66.1 and 65.1 had existed for numerous years. Warren Wilson Road had always been a dividing line between precincts 66.1 and 65.1

32. Precinct 66.1 is in Buncombe County Commission District 1. Precinct 65.1 is in Buncombe County Commission District 2.

33. Warren Wilson College (the "College") is a small college located in Swannanoa, Buncombe County, North Carolina. Warren Wilson Road runs through the College campus. Thus, the College campus includes portions of precincts 66.1 and 65.1.

34. Upon information and belief, approximately 1,000 students attend the College, of which approximately 900 students are traditional undergraduates. Upon information and belief, the student body is comprised of students from 45 different States of the United States and 20 different countries. Upon information and belief, approximately 20%, or 200, of the students are from the State of North Carolina.

35. The College campus has numerous dormitories, which house students during academic sessions. Several of the dormitories are located on the north side of Warren Wilson Road, and are in Precinct 66.1 and Buncombe County Commission District 1. Several additional dormitories are located on the south side of Warren Wilson Road, and are in Precinct 65.1 and Buncombe County Commission District 2.

36. Upon information and belief, Cathy Kramer, Dean of Service for the College, has stated, in essence, that the district split does not work well for the campus of the College because students often move from dorm to dorm. In fact, she was quoted by a local newspaper as stating: "By next week they could live in a different district because it's all on campus."

37. The College mail facility is in a building located at 701 Warren Wilson Road. 701 Warren Wilson Road is not, and has not been, a residential address. Students do not reside or otherwise sleep at that address. It is located in Precinct 66.1 and Buncombe County District 1.

38. Voters residing on the north side of Warren Wilson Road were to receive Ballot Style G007. Voters residing on the south side of Warren Wilson Road were to receive Ballot Style G003.

39. Prior to the Election and, more specifically, during the one-stop absentee voting through on or about December 31, 2012, many students completed registration forms listing only "701 Warren Wilson Road" in response to the section requesting "ADDRESS WHERE YOU NOW LIVE (Number and Street/Road/Dorm)".

40. Those students completed the registration forms with the 701 Warren Wilson Road address despite the fact that each registration form specifically requested the "ADDRESS WHERE YOU NOW LIVE (Number and Street/Road/Dorm)", requested the "ADDRESS WHERE YOU RECEIVE YOUR MAIL, IF DIFFERENT FROM ABOVE (include zip code)", and provided an attestation, under penalty of perjury, that "I shall have been a resident of North Carolina, this county, precinct, or other election district for 30 days before the next election in which I intend to vote."

41. Upon information and belief, on or about October 31, 2012, and after many students had already voted, the Defendant, BCBOE, through its staff, became aware that students were using the 701 Warren Wilson Road address to register to vote, despite the fact that it was not a residence address.

42. Therefore, on October 31, 2012, the Defendant, BCBOE, through its staff, sent a directive (the "Directive") to its one-stop absentee voting officials instructing them to show a map, which was attached to the Directive, to any future voters using the 701 Warren Wilson Road address, and to inquire as to which side of the road they claimed to live on. Further, the Directive instructed those officials to require future voters attempting to utilize the 701 Warren Wilson Road address to vote a provisional ballot and to provide the voter with a ballot style reflective of the voter's answer. A true copy of the Directive is attached as "Exhibit A" to the Election Protest.

43. Additionally, upon information and belief, after October 31, 2012, the Defendant, BCBOE, through its staff, pulled the ballots of those students that had previously voted utilizing the 701 Warren Wilson Road address.

44. Upon information and belief, pursuant to a directive and instructions from the Defendant, NCBOE, the Defendant, BCBOE, and its staff were required to use all available information to unilaterally decide the residency of each student that utilized the 701 Warren Wilson Road address, without the consent, authorization or input from each such student. Further, upon information and belief, if the available information appeared to place such a student on the south side of Warren Wilson Road, then, in essence, the Defendant, BCBOE, was required to unilaterally re-register the voter, move the voter from precinct 66.1 to precinct 65.1 and send the voter a Ballot Style G003 to cast a new vote.

45. Upon information and belief, the Defendant, BCBOE, obtained a list of students from the College and, based upon the addresses (dorms) contained in the list, unilaterally decided the residency (precinct and district) of the students who had previously registered to vote and voted utilizing the 701 Warren Wilson Road address.

46. Upon information and belief, the list initially obtained by the Defendant, BCBOE, from the College was unsworn and without any affirmation as to its integrity. Further, upon information and belief, the Defendant, BCBOE, failed to make any inquiry about the accuracy of the list, how the list was maintained and how often the list was updated.

47. Upon information and belief, 136 provisional ballots were pulled by the Defendant, BCBOE, through its staff, relating to students that had utilized the 701 Warren Wilson Road address to register and vote. Upon information and belief, of those provisional ballots pulled, the Defendant, BCBOE, through its staff, unilaterally decided that 75 voters resided in Precinct 65.1 and Buncombe County Commission District 2, and unilaterally decided that 61 voters resided in Precinct 66.1 and Buncombe County Commission District 1.

48. Upon information and belief, in rendering its decision regarding the residence of the students utilizing 701 Warren Wilson Road as their address for registration and voting, the

Defendant, BCBOE, through its staff, utilized the aforementioned list and, if actually present on the registration form or provisional envelope, the student's indication of the dorm, or "North" or "South". Upon information and belief, discrepancies existed between certain of the information provided on the aforementioned list and certain of the information provided by some of the students. In that situation, the Defendant, BCBOE, unilaterally and without any other information for verification, gave priority to the student's indication.

49. Additionally, upon information and belief, if there was no indication by a student of the dorm, or "North" or "South", present on the registration form or provisional envelope, then the Defendant, BCBOE, in rendering its decision regarding the residence of students, utilized only the aforementioned list and had its staff add a notation of the relevant dorm, or "North" or "South", on the registration form or provisional envelope.

50. Upon information and belief, after making its unilateral decision that 75 students resided in Precinct 65.1 and Buncombe County Commission District 2, the Defendant, BCBOE, mailed Ballot Style G003 ballots to many of those students so that they could cast their vote a second time, and replace their prior ballot. Upon information and belief, 3 of the students that were not sent the Ballot Style G003 ballots had previously indicated to the Defendant, BCBOE, through its staff, that they would vote, in person, again, either during the one-stop absentee voting period or during the Election.

51. Upon information and belief, the Defendant, BCBOE, at the direction of the Defendant, NCBOE, extended the deadlines for the students to return the Ballot Style G003 ballots and vote a second time.

52. Upon information and belief, many of the students that were mailed the Ballot Style G003 ballots to vote a second time, returned their completed ballots with differing defects and deficiencies including, but not limited to, unsigned provision envelopes or attestations, postmarks dated after the Election, and, again, only listing the 701 Warren Wilson Road address.

53. Upon information and belief, despite the actions of the Defendant, BCBOE, approximately 44 students, listed only the 701 Warren Wilson Road address in response to the section requesting "ADDRESS WHERE YOU NOW LIVE (Number and Street/Road/Dorm)" and/or on the provisional ballot envelope, with no other indication of where they actually reside on the College campus.

54. Upon information and belief, upon receipt of a return Ballot Style G003 ballot (a second vote) from a student, the first ballot voted by the student was cancelled and not counted in the Election by the Defendant, NCBOE.

55. Upon information and belief, substantially more than 18 votes of students were cancelled and not counted in the Election by the Defendant, BCBOE.

56. Upon information and belief, the cancelling of the respective students' first ballot, upon receipt of the second ballot, and not counting the first ballot in the Election by the

Defendant, BCBOE, constituted a withdrawal of an absentee ballot after such ballot had been returned to the county board of elections.

57. Immediately after the Election, it was declared that the Defendant, Fryar, was the 1st Seat winner (approximately 100 votes ahead of the Plaintiff) and the Plaintiff was the 2nd Seat winner (nearly 100 votes ahead of the Defendant, Frost) of the Buncombe County Commission District 2 election.

58. Upon information and belief, during Canvas, a member of the staff of the Defendant BCBOE, expressed to one or more of the Defendants, Byrd, Smith, Van Wagner and/or Parker, that many of the student's returned Ballot Style G003 ballots were questionable and should not be counted. Despite those expressions, the Defendant, BCBOE, counted the Ballot Style G003 ballots returned by the students including, but not limited to, those not signed, those postmarked after the Election and those 44 that only listed the students' residence address as 701 Warren Wilson Road.

59. Immediately after the Canvas, the Defendant, Frost, became the 2nd seat winner of the Buncombe County Commission District 2 election, leading the Plaintiff by 13 votes.

60. A subsequent hand-to-eye count was performed by the Defendant, BCBOE, at the request of the Plaintiff, for the Buncombe County Commission District 2 election, resulting in the Defendant, Frost, leading the Plaintiff by 18 votes.

61. On November 28, 2012, the Plaintiff's Election Protest came before the Defendant, BCBOE, for preliminary consideration (the "Probable Cause Hearing"). The Defendant, Byrd, began the Probable Cause Hearing by stating that no evidence (testimony or documents) would be considered. The Defendant, Byrd, then began reviewing the Plaintiff's Election Protest and asking questions of the Plaintiff's counsel regarding the contents of the Plaintiff's Protest and taking comments from counsel representing the Defendant, Frost. Thereafter, the Defendant, Byrd, reviewed written statements from election officials and took statements from certain people including, but not limited to, students and the Interim Director of Residence Life of the College. Those people making statements were not sworn and were not subject to cross examination. The written statements reviewed were not verified or authenticated.

62. During the Probable Cause Hearing, the Interim Director of Residence Life of the College specifically stated that the aforementioned list was as of November 1, 2012, and accurate through the Election, only a total of 6 days.

63. Additionally, during the Probable Cause Hearing, the Defendant, Byrd, questioned and took statements from the Defendant, Parker, and other staff members of the Defendant, BCBOE, and reviewed certain documents. The Defendant, Parker, and the other staff members of the Defendant, BCBOE, that provided statements were not sworn and were not subject to cross examination. Additionally, the documents reviewed were not verified or authenticated.

64. During the Probable Cause Hearing, the Defendant, BCBOE, discovered that no information whatsoever was available pertaining to the residency, or even the existence, of a purported student voter. Upon information and belief, the Ballot Style G003 ballot of that purported student voter was counted in the Buncombe County Commission District 2 election. That particular vote should not have been counted in the Buncombe County Commission District 2 election.

65. On December 3, 2012, despite not taking any evidence, the Defendant, BCBOE, entered its Protest Order, including "Findings of Fact" and, based thereon, included "Conclusions of Law" and an order dismissing the Plaintiff's Election Protest.

66. On December 13, 2012, the Plaintiff's Appeal came before the Defendant, NCBOE, for consideration (the "Appeal Hearing"). The Defendant, Leake, began the Appeal Hearing by requesting a statement from and asking questions of counsel for the Plaintiff regarding the Plaintiff's Election Protest. Other Defendants on the Board of the Defendant, NCBOE, also asked questions of counsel for the Plaintiff. Thereafter, the Defendant, Leake, requested comments from and asked questions of counsel for the Defendant, Frost. Other Defendants on the Board of the Defendant, NCBOE, also asked questions of counsel for the Defendant, Frost.

67. Additionally, during the Appeal Hearing, the Defendant, Leake, and other Defendants on the Board of the Defendant, NCBOE, questioned and took statements from the Defendant, Parker, and another staff member of the Defendant, BCBOE, and reviewed certain documents. The Defendant, Parker, and the other staff member of the Defendant, BCBOE, were not sworn and were not subject to cross examination. Additionally, the documents reviewed were not verified or authenticated.

68. During the Appeal Hearing, the Defendant, NCBOE, discovered that 2 of the students' returned Ballot Style G003 Ballots were postmarked after the Election and had been counted in the Buncombe County Commission District 2 election. Those 2 particular votes should not have been counted in the Buncombe County Commission District 2 election.

69. On January 2, 2013, despite not taking any evidence, the Defendant, NCBOE, entered its Order, which included "Findings of Fact" and, based thereon, included "Conclusions of Law" and an order dismissing the Plaintiff's Appeal and affirming the Protest Order of the Defendant, BCBOE.

APPLICABLE LAW:

QUALIFICATION OF VOTERS

70. N.C.G.S. § 163-54, "Registration a prerequisite to voting.", specifically provides: "Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter."

71. N.C.G.S. § 163-55, "Qualifications to vote; exclusion from electoral franchise.", in relevant part, provides:

(a) Residence Period for State Elections - Every person born in the United States, and every person who has been naturalized, and who shall have resided in the State of North Carolina and in the precinct, ward, or other election district in which the person offers to vote for 30 days next preceding an election, shall, if otherwise qualified as prescribed in this Chapter, be qualified to vote in any election held in this State.

(b) Precincts and Election Districts - For purposes of qualification ... a person's residence in a precinct, ward, or election district shall be determined in accordance with G.S. 163-57.

72. N.C.G.S. § 163-57, "Residence defined for registration and voting.", in relevant part, provides:

All election officials in determining the residence of a person offering to register or vote, shall be governed by the following rules, so far as they may apply:

(1) That place shall be considered the residence of a person in which that person's habitation is fixed, and to which, whenever that person is absent, that person has the intention of returning.

...
c. In the event that a person's residence is not a traditional residence associated with real property, then the location of the usual sleeping area for that person shall be controlling as to the residency of that person. Residence shall be broadly construed to provide all persons with the opportunity to register and to vote, including stating a mailing address different from residence address.

...
(3) A person shall not be considered to have gained a residence in any county, municipality, precinct, ward, or other election district of this State, into which that person comes for temporary purposes only, without the intention of making that county, municipality, precinct, ward, or other election district a permanent place of abode.

(4) If a person removes to another state or county, municipality, precinct, ward, or other election district within this State, with the intention of making that state, county, municipality, precinct, ward, or other election district a permanent residence, that person shall be considered to have lost residence in the state, county, municipality, precinct, ward, or other election district from which that person has removed.

(5) If a person removes to another state or county, municipality, precinct, ward, or other election district within this State, with the intention of remaining there an indefinite time and making that state, county, municipality, precinct, ward, or other election district that person's place of residence, that person shall be considered to have lost that person's place of residence in this State, county, municipality, precinct, ward, or other election district from which

that person has removed, notwithstanding that person may entertain an intention to return at some future time.

(6) If a person goes into another state, county, municipality, precinct, ward, or other election district, or into the District of Columbia, and while there exercises the right of a citizen by voting in an election, that person shall be considered to have lost residence in that State, county, municipality, precinct, ward, or other election district from which that person removed.

(11) So long as a student intends to make the student's home in the community where the student is physically present for the purpose of attending school while the student is attending school and has no intent to return to the student's former home after graduation, the student may claim the college community as the student's domicile. The student need not also intend to stay in the college community beyond graduation in order to establish domicile there. This subdivision is intended to codify the case law.

REGISTRATION OF VOTERS

73. N.C.G.S. § 163-82.1, "General principles of voter registration.", in relevant part, provides:

(a) Prerequisite to Voting. - No person shall be permitted to vote who has not been registered under the provisions of this Article or registered as previously provided by law.

(b) County Board's Duty to Register. - A county board of elections shall register, in accordance with this Article, every person qualified to vote in that county who makes an application in accordance with this Article.

74. N.C.G.S. § 163-82.3, "Voter registration application forms.", in relevant part, provides:

(a) Form Developed by State Board of Elections. - The State Board of Elections shall develop an application form for voter registration. Any person may use the form to apply to do any of the following:

- (1) Register to vote.
- (2) Change party affiliation or unaffiliated status.
- (3) Report a change of address within a county.
- (4) Report a change of name.
- (5) Preregister to vote.

75. N.C.G.S. § 163-82.4, "Contents of application form.", in relevant part, provides:

(a) Information Requested of Applicant. - The form required by G.S. 163-82.3(a) shall request the applicant's:

- (1) Name,
- (2) Date of birth,
- (3) Residence address,
- (4) County of residence,
- (5) Date of application,

- (6) Gender,
- (7) Race,
- (7a) Ethnicity,
- (8) Political party affiliation, if any, in accordance with subsection (c) of this section,

(9) Telephone number (to assist the county board of elections in contacting the voter if needed in processing the application),

(10) Drivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number, and any other information the State Board finds is necessary to enable officials of the county where the person resides to satisfactorily process the application.

(b) Notice of Requirements, Attestation, Notice of Penalty, and Notice of Confidentiality. – The form required by G.S. 163-82.3(a) shall contain, in uniform type, the following:

(1) A statement that specifies each eligibility requirement (including citizenship) and an attestation that the applicant meets each such requirement, with a requirement for the signature of the applicant, under penalty of a Class I felony under G.S. 163-275(13).

(2) A statement that, if the applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes.

(3) A statement that, if the applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

...

e) Correcting Registration Forms. – If the voter fails to complete any required item on the voter registration form but provides enough information on the form to enable the county board of elections to identify and contact the voter, the voter shall be notified of the omission and given the opportunity to complete the form at least by 5:00 P.M. on the day before the county canvass as set in G.S. 163-182.5(b). If the voter corrects that omission within that time and is determined by the county board of elections to be eligible to vote, the board shall permit the voter to vote. If the information is not corrected by election day, the voter shall be allowed to vote a provisional official ballot. If the correct information is provided to the county board of elections by at least 5:00 P.M. on the day before the county canvass, the board shall count any portion of the provisional official ballot that the voter is eligible to vote.

76. N.C.G.S. § 163-82.6A, "In-person registration and voting at one-stop sites.", in relevant part, provides:

(a) Who May Register in Person. – In accordance with the provisions of this section, an individual who is qualified to register to vote may register in person and then vote at a one-stop voting site in the person's county of residence during the period for one-stop voting

(b) Both Attestation and Proof of Residence Required. – To register and vote under this section, the person shall do both of the following:

(1) Complete a voter registration form as prescribed in G.S. 163-82.4, including the attestation requirement of G.S. 163-82.4(b) that the person meets the eligibility requirement. Such attestation is signed under penalty of a class I felony under G.S. 163-275(13); and

(2) Provide proof of residence by presenting any of the following valid documents that show the person's current name and current residence address: a North Carolina drivers license, a photo identification from a government agency, or any of the documents listed in G.S. 163-166.12(a)(2)

(d) Verification of Registration; Counting of Ballot. – Within two business days of the person's registration under this section, the county board of elections in conjunction with the State Board of Elections shall verify the North Carolina drivers license or Social Security number in accordance with G.S. 163-82.12, ... search for possible duplicate registrations, and proceed under G.S. 163-82.7 to verify the person's address. The person's vote shall be counted unless the county board determines that the applicant is not qualified to vote in accordance with the provisions of this Chapter.

77. N.C.G.S. § 163-82.7, "Verification of qualifications and address of applicant; denial or approval of application.", in relevant part, provides:

(a) Tentative Determination of Qualification. – When a county board of elections receives an application for registration submitted pursuant to G.S. 163-82.6, the board either:

(1) Shall make a determination that the applicant is not qualified to vote at the address given, or

(2) Shall make a tentative determination that the applicant is qualified to vote at the address given, subject to the mail verification notice procedure outlined in subsection (c) of this section within a reasonable time after receiving the application.

(b) Denial of Registration. – If the county board of elections makes a determination pursuant to subsection (a) of this section that the applicant is not qualified to vote at the address given, the board shall send, by certified mail, a notice of denial of registration. The notice of denial shall contain the date on which the registration was denied, and shall be mailed within two business days after denial. The notice of denial shall inform the applicant of alternatives that the applicant may pursue to exercise the franchise. If the applicant disagrees with the denial, the applicant may appeal the decision under G.S. 163-82.18.

78. N.C.G.S. § 163-82.15, "Change of address within the county.", in relevant part, provides:

a) Registrant's Duty to Report. – No registered voter shall be required to re-register upon moving from one precinct to another within the same county.

Instead, a registrant shall notify the county board of the change of address by the close of registration for an election as set out in G.S. 163-82.6©. In addition to any other method allowed by G.S. 163-82.6, the form may be submitted by electronic facsimile, under the same deadlines as if it had been submitted in person. The registrant shall make the notification by means of a voter registration form as described in G.S. 163-82.3, or by another written notice, signed by the registrant, that includes the registrant's full name, former residence address, new residence address, and the registrant's attestation that the registrant moved at least 30 days before the next primary or election from the old to the new address.

(b) Verification of New Address by Mail. – When a county board of elections receives a notice that a registrant in that county has changed residence within the same county, the county board shall send a notice, by nonforwardable mail, to the registrant at the new address. The notice shall inform the registrant of any new precinct and voting place that will result from the change of address, and it shall state whether the registrant shall vote at the new voting place during the upcoming election or at a later election. If the Postal Service returns the county board's notice to the registrant as undeliverable, the county board shall either:

(1) Send a second notice by nonforwardable mail to the new address and, if it is returned as undeliverable, send to the registrant's old address a confirmation notice as described in G.S. 163-82.14(d)(2); or

(2) Send to the registrant's old address a confirmation notice as described in G.S. 163-82.14(d)(2) without first sending a second nonforwardable notice to the new address.

In either case, if the registrant does not respond to the confirmation notice as described in G.S. 163-82.14(d)(2), then the county board shall proceed with the removal of the registrant from the list of voters in accordance with G.S. 163-82.14(d).

...

(e) Unreported Move to Another Precinct Within the County. – If a registrant has moved from an address in one precinct to an address in another precinct within the same county more than 30 days before an election and has failed to notify the county board of the change of address before the close of registration for that election, the county board shall permit that person to vote in that election. The county board shall permit the registrant described in this subsection to vote at the registrant's new precinct, upon the registrant's written affirmation of the new address, or, if the registrant prefers, at a central location in the county to be chosen by the county board. If the registrant appears at the old precinct, the precinct officials there shall send the registrant to the new precinct or, if the registrant prefers, to the central location, according to rules which shall be prescribed by the State Board of Elections. At the new precinct, the registrant shall be processed by a precinct transfer assistant, according to rules which shall be prescribed by the State Board of Elections. Any voter subject to this subsection may instead vote a provisional ballot according to the provisions of G.S. 163-166.11.

VOTING

79. N.C.G.S. § 163-166.7, "Voting procedures.", in relevant part, provides:

(a) Checking Registration. – A person seeking to vote shall enter the voting enclosure through the appropriate entrance. A precinct official assigned to check registration shall at once ask the voter to state current name and residence address. The voter shall answer by stating current name and residence address. In a primary election, that voter shall also be asked to state, and shall state, the political party with which the voter is affiliated or, if unaffiliated, the authorizing party in which the voter wishes to vote. After examination, that official shall state whether that voter is duly registered to vote in that precinct and shall direct that voter to the voting equipment or to the official assigned to distribute official ballots. If a precinct official states that the person is duly registered, the person shall sign the pollbook, other voting record, or voter authorization document in accordance with subsection (c) of this section before voting.

(b) Distribution of Official Ballots. – If the voter is found to be duly registered and has not been successfully challenged, the official assigned to distribute the official ballots shall hand the voter the official ballot that voter is entitled to vote, or that voter shall be directed to the voting equipment that contains the official ballot. No voter in a primary shall be permitted to vote in more than one party's primary. The precinct officials shall provide the voter with any information the voter requests to enable that voter to vote as that voter desires.

80. N.C.G.S. § 163-166.11, Provisional voting requirements.", provides:

If an individual seeking to vote claims to be a registered voter in a jurisdiction as provided in G.S. 163-82.1 and though eligible to vote in the election does not appear on the official list of eligible registered voters in the voting place, that individual may cast a provisional official ballot as follows:

(1) An election official at the voting place shall notify the individual that the individual may cast a provisional official ballot in that election.

(2) The individual may cast a provisional official ballot at that voting place upon executing a written affirmation before an election official at the voting place, stating that the individual is a registered voter in the jurisdiction as provided in G.S. 163-82.1 in which the individual seeks to vote and is eligible to vote in that election.

(2a) A voter who has moved within the county more than 30 days before election day but has not reported the move to the board of elections shall not be required on that account to vote a provisional ballot at the one-stop site, as long as the one-stop site has available all the information necessary to determine whether a voter is registered to vote in the county and which ballot the voter is eligible to vote based on the voter's proper residence address. The voter with that kind of unreported move shall be allowed to vote the same kind of absentee ballot as other one-stop voters as provided in G.S. 163-227.2(e2).

(3) At the time the individual casts the provisional official ballot, the election officials shall provide the individual written information stating that

anyone casting a provisional official ballot can ascertain whether and to what extent the ballot was counted and, if the ballot was not counted in whole or in part, the reason it was not counted. The State Board of Elections or the county board of elections shall establish a system for so informing a provisional voter. It shall make the system available to every provisional voter without charge, and it shall build into it reasonable procedures to protect the security, confidentiality, and integrity of the voter's personal information and vote.

(4) The cast provisional official ballot and the written affirmation shall be secured by election officials at the voting place according to guidelines and procedures adopted by the State Board of Elections. At the close of the polls, election officials shall transmit the provisional official ballots cast at that voting place to the county board of elections for prompt verification according to guidelines and procedures adopted by the State Board of Elections.

(5) The county board of elections shall count the individual's provisional official ballot for all ballot items on which it determines that the individual was eligible under State or federal law to vote.

81. 08 NCAC 10B.0103, "VOTING PROCEDURES", in relevant part, provides:

(b) A person seeking to vote shall enter the voting enclosure at the voting place through the designated entrance and shall clearly communicate the person's name and place of residence to one of the judges of election. In some cases, the precinct judge may prompt the voter to provide this information. In a primary election, the voter shall also state the political party with which the voter affiliates and in whose primary the voter desires to vote, or if the voter is an unaffiliated voter permitted to vote in the primary of a particular party, the voter shall state the name of the authorizing political party in whose primary the voter wishes to vote. This information, including the political party's primary in which the voter elected to participate, provided by the voter shall be recorded in the precinct pollbook or on the voter authorization slip. The judge or assistant to whom the voter gives this information shall announce the name and residence of the voter so that the information may be heard by the necessary officials and observers. After examining the precinct registration records, the judge or assistant shall state whether the person seeking to vote is registered. The precinct judge or assistant shall not presume the identity/name, address, or party affiliation of any person seeking to vote.

...

(d) If the person is found to not be registered to vote in the precinct, the responsible judge of election shall inform the person of the fail-safe voting process. First, based on information provided by the person the responsible judge shall determine whether or not the person may be eligible to vote an official provisional ballot. The person is eligible to vote an official provisional ballot if the person resides in the precinct and either:

(1) is a registered voter in the county and has moved into the precinct 30 days or more prior to the election and has not reported the change to the board of elections; or

(2) claims to have applied for voter registration in the county but there is no record of the person's name on the registration records; or

(3) was removed from the list, but the person maintains continuous eligibility within the county; or

(4) disputes the voting districts (and ballots) to which the person has been assigned.

(e) If the person is found to not be registered to vote in the precinct and the responsible judge of election learns from the person that the person resides in a different precinct, the responsible judge shall provide the person with adequate information in order to direct the person to the proper voting place.

82. N.C.G.S. § 163-166.12, "Requirements for certain voters who register by mail.", in relevant part, provides:

(a) Voting in Person. – An individual who has registered to vote by mail on or after January 1, 2003, and has not previously voted in an election that includes a ballot item for federal office in North Carolina, shall present to a local election official at a voting place before voting there one of the following:

(1) A current and valid photo identification.

(2) A copy of one of the following documents that shows the name and address of the voter: a current utility bill, bank statement, government check, paycheck, or other government document.

(b) Voting Mail-In Absentee. – An individual who has registered to vote by mail on or after January 1, 2003, and has not previously voted in an election that includes a ballot item for federal office in North Carolina, in order to cast a mail-in absentee vote, shall submit with the mailed-in absentee ballot one of the following:

(1) A copy of a current and valid photo identification.

(2) A copy of one of the following documents that shows the name and address of the voter: a current utility bill, bank statement, government check, paycheck, or other government document.

(b1) The county board of elections shall note the type of identification proof submitted by the voter under the provisions of subsection (a) or (b) of this section and may dispose of the tendered copy of identification proof as soon as the type of proof is noted in the voter registration records.

...

(c) The Right to Vote Provisionally. – If an individual is required under subsection (a), (b), or (b2) of this section to present identification in order to vote, but that individual does not present the required identification, that individual may vote a provisional official ballot. If the voter is at the voting place, the voter may vote provisionally there without unnecessary delay. If the voter is voting by mail-in absentee ballot, the mailed ballot without the required identification shall be treated as a provisional official ballot.

83. N.C.G.S. § 163-226, "Who may vote an absentee ballot.", in relevant part, provides:

(a) Who May Vote Absentee Ballot; Generally. — Any qualified voter of the State may vote by absentee ballot in a statewide primary, general, or special election on constitutional amendments, referenda or bond proposals, and any qualified voter of a county is authorized to vote by absentee ballot in any primary or election conducted by the county board of elections, in the manner provided in this Article.

84. N.C.G.S. § 163-227.2, "Alternate procedures for requesting application for absentee ballot; "one-stop" voting procedure in board office.", in relevant part, provides:

(a) Any voter eligible to vote by absentee ballot under G.S. 163-226 may request an application for absentee ballots, complete the application, and vote under the provisions of this section and of G.S. 163-82.6A, as applicable.

...

(b) Not earlier than the third Thursday before an election, in which absentee ballots are authorized, in which a voter seeks to vote and not later than 1:00 P.M. on the last Saturday before that election, the voter shall appear in person only at the office of the county board of elections, except as provided in subsection (g) of this section. A county board of elections shall conduct one-stop voting on the last Saturday before the election until 1:00 P.M. and may conduct it until 5:00 P.M. on that Saturday. That voter shall enter the voting enclosure at the board office through the appropriate entrance and shall at once state his or her name and place of residence to an authorized member or employee of the board. In a primary election, the voter shall also state the political party with which the voter affiliates and in whose primary the voter desires to vote, or if the voter is an unaffiliated voter permitted to vote in the primary of a particular party under G.S. 163-119, the voter shall state the name of the authorizing political party in whose primary he wishes to vote. The board member or employee to whom the voter gives this information shall announce the name and residence of the voter in a distinct tone of voice. After examining the registration records, an employee of the board shall state whether the person seeking to vote is duly registered. If the voter is found to be registered that voter may request that the authorized member or employee of the board furnish the voter with an application form as specified in G.S. 163-227. The voter shall complete the application in the presence of the authorized member or employee of the board, and shall deliver the application to that person.

(c) If the application is properly filled out, the authorized member or employee shall enter the voter's name in the register of absentee requests, applications, and ballots issued and shall furnish the voter with the ballots to which the application for absentee ballots applies. The voter thereupon shall vote in accordance with subsection (e) of this section.

All actions required by this subsection shall be performed in the office of the board of elections, except that the voting may take place in an adjacent room as provided by subsection (e) of this section. The application under this subsection shall be signed in the presence of the chair, member, director of elections of the board, or full-time employee, authorized by the board who shall sign the application and certificate as the witness and indicate the official title

held by him or her. Notwithstanding G.S. 163-231(a), in the case of this subsection, only one witness shall be required on the certificate.

(d) Only the chairman, member, employee, or director of elections of the board shall keep the voter's application for absentee ballots in a safe place, separate and apart from other applications and container-return envelopes. If the voter's application for absentee ballots is disapproved by the board, the board shall so notify the voter stating the reason for disapproval by first-class mail addressed to the voter at that voter's residence address and at the address shown in the application for absentee ballots; and the board shall enter a challenge under G.S. 163-89.

...

(e2) A voter who has moved within the county more than 30 days before election day but has not reported the move to the board of elections shall not be required on that account to vote a provisional ballot at the one-stop site, as long as the one-stop site has available all the information necessary to determine whether a voter is registered to vote in the county and which ballot the voter is eligible to vote based on the voter's proper residence address. The voter with that kind of unreported move shall be allowed to vote the same kind of absentee ballot as other one-stop voters.

85. N.C.G.S. § 163-229, "Absentee ballots, applications on container-return envelopes, and instruction sheets.", in relevant part, provides:

(a) Absentee Ballot Form. — In accordance with the provisions of G.S. 163-230.1, persons entitled to vote by absentee ballot shall be furnished with official ballots.

(b) Application on Container-Return Envelope. — In time for use not later than 60 days before a statewide general election in an even-numbered year, and not later than 50 days before a statewide primary, other general election or county bond election, the county board of elections shall print a sufficient number of envelopes in which persons casting absentee ballots may transmit their marked ballots to the county board of elections. However, in the case of municipal elections, sufficient container-return envelopes shall be made available no later than 30 days before an election. Each container-return envelope shall have printed on it an application which shall be designed and prescribed by the State Board of Elections, the voter's certification of eligibility to vote the enclosed ballot and of having voted the enclosed ballot in accordance with this Article, a space for identification of the envelope with the voter, and a space for approval by the county board of elections. The envelope shall allow reporting of a change of name as provided by G.S. 163-82.16. The container-return envelope shall be printed in accordance with the instructions of the State Board of Elections.

86. N.C.G.S. § 163-230.1, "Simultaneous issuance of absentee ballots with application.", in relevant part, provides:

(a) A qualified voter who is eligible to vote by absentee ballot under G.S. 163-226(a) or that voter's near relative or verifiable legal guardian, shall request in writing an application for absentee ballots, so that the county board of

elections receives the request not later than 5:00 P.M. on the Tuesday before the election. That written request shall be signed by the voter, the voter's near relative, or the voter's verifiable legal guardian. The county board of elections shall enter in the register of absentee requests, applications, and ballots issued the information required in G.S. 163-228 as soon as each item of that information becomes available. Upon receiving the application, the county board of elections shall cause to be mailed to that voter in a single package:

(1) The official ballots the voter is entitled to vote;

(2) A container-return envelope for the ballots, printed in accordance with G.S. 163-229; and

(a2) Delivery of Absentee Ballots and Container-Return Envelope to Applicant. - When the county board of elections receives a request for applications and absentee ballots, the board shall promptly issue and transmit them to the voter in accordance with the following instructions:

(1) On the top margin of each ballot the applicant is entitled to vote, the chair, a member, officer, or employee of the board of elections shall write or type the words "Absentee Ballot No. ___" or an abbreviation approved by the State Board of Elections and insert in the blank space the number assigned the applicant's application in the register of absentee requests, applications, and ballots issued. That person shall not write, type, or print any other matter upon the ballots transmitted to the absentee voter. Alternatively, the board of elections may cause to be barcoded on the ballot the voter's application number, if that barcoding system is approved by the State Board of Elections.

(2) The chair, member, officer, or employee of the board of elections shall fold and place the ballots (identified in accordance with the preceding instruction) in a container-return envelope and write or type in the appropriate blanks thereon, in accordance with the terms of G.S. 163-229(b), the absentee voter's name, the absentee voter's application number, and the designation of the precinct in which the voter is registered. If the ballot is barcoded under this section, the envelope may be barcoded rather than having the actual number appear. The person placing the ballots in the envelopes shall leave the container-return envelope holding the ballots unsealed.

(3) The chair, member, officer, or employee of the board of elections shall then place the unsealed container-return envelope holding the ballots together with printed instructions for voting and returning the ballots, in an envelope addressed to the voter at the post office address stated in the request, seal the envelope, and mail it at the expense of the county board of elections: Provided, that in case of a request received after 5:00 p.m. on the Tuesday before the election under the provisions of subsection (a1) of this section, in lieu of transmitting the ballots to the voter in person or by mail, the chair, member, officer, or employee of the board of elections may deliver the sealed envelope containing the instruction sheet and the container-return envelope holding the ballots to a near relative or verifiable legal guardian of the voter.

(b) The application shall be completed and signed by the voter personally, the ballots marked, the ballots sealed in the container-return envelope, and the certificate completed as provided in G.S. 163-231.

(c) At its next official meeting after return of the completed container-return envelope with the voter's ballots, the county board of elections shall determine whether the container-return envelope has been properly executed. If the board determines that the container-return envelope has been properly executed, it shall approve the application and deposit the container-return envelope with other container-return envelopes for the envelope to be opened and the ballots counted at the same time as all other container-return envelopes and absentee ballots.

(c1) Required Meeting of County Board of Elections. – During the period commencing on the third Tuesday before an election, in which absentee ballots are authorized, the county board of elections shall hold one or more public meetings each Tuesday at 5:00 p.m. for the purpose of action on applications for absentee ballots. At these meetings, the county board of elections shall pass upon applications for absentee ballots.

If the county board of elections changes the time of holding its meetings or provides for additional meetings in accordance with the terms of this subsection, notice of the change in hour and notice of the schedule of additional meetings, if any, shall be published in a newspaper circulated in the county at least 30 days prior to the election.

At the time the county board of elections makes its decision on an application for absentee ballots, the board shall enter in the appropriate column in the register of absentee requests, applications, and ballots issued opposite the name of the applicant a notation of whether the applicant's application was "Approved" or "Disapproved".

The decision of the board on the validity of an application for absentee ballots shall be final subject only to such review as may be necessary in the event of an election contest. The county board of elections shall constitute the proper official body to pass upon the validity of all applications for absentee ballots received in the county; this function shall not be performed by the chairman or any other member of the board individually.

87. N.C.G.S. § 163-231, "Voting absentee ballots and transmitting them to the county board of elections.", in relevant part, provides:

(a) Procedure for Voting Absentee Ballots. – In the presence of a person who is at least 18 years of age, and who is not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(b1), the voter shall:

(1) Mark the voter's ballots, or cause them to be marked by that person in the voter's presence according to the voter's instruction;

(2) Fold each ballot separately, or cause each of them to be folded in the voter's presence;

(3) Place the folded ballots in the container-return envelope and securely seal it, or have this done in the voter's presence;

(4) Make the application printed on the container-return envelope according to the provisions of G.S. 163-229(b) and make the certificate printed on the container-return envelope according to the provisions of G.S. 163-229(b).

The person in whose presence the ballot is marked shall at all times respect the secrecy of the ballot and the privacy of the absentee voter, unless the voter requests the person's assistance and the person is otherwise authorized by law to give assistance. The person in whose presence the ballot was marked shall sign the application and certificate as a witness and shall indicate that person's address. When thus executed, the sealed container-return envelope, with the ballots enclosed, shall be transmitted in accordance with the provisions of subsection (b) of this section to the county board of elections which issued the ballots.

88. N.C.G.S. § 163-233.1, "Withdrawal of absentee ballots not allowed.", provides: "No person shall be permitted to withdraw an absentee ballot after such ballot has been mailed to or returned to the county board of elections."

89. N.C.G.S. § 163-234, "Counting absentee ballots by county board of elections.", in relevant part, provides:

All absentee ballots returned to the county board of elections in the container-return envelopes shall be retained by the board to be counted by the county board of elections as herein provided.

(1) Only those absentee ballots returned to the county board of elections no later than 5:00 p.m. on the day before election day in a properly executed container-return envelope or absentee ballots received pursuant to G.S. 163-231(b)(ii) or (iii) shall be counted, except to the extent federal law requires otherwise.

(10) The county board of elections shall meet after election day and prior to the date of canvass to determine where the container-return envelopes for absentee ballots received pursuant to G.S. 163-231(b)(ii) or (iii) has been properly executed. The county board of elections shall comply with the requirements of G.S. 163-230.1 for approval of applications.

ELECTION PROTEST

90. N.C.G.S. § 163-182.10, "Consideration of protest by county board of elections." in relevant part, provides:

a) Preliminary Consideration. – The following principles shall apply to the initial consideration of election protests by the county board of elections:

(1) The county board shall, as soon as possible after the protest is filed, meet to determine whether the protest substantially complies with G.S. 163-182.9 and whether it establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred. If the

board determines that one or both requirements are not met, the board shall dismiss the protest. The board shall notify both the protester and the State Board of Elections. The protester may file an amended protest or may appeal to the State Board. If the board determines that both requirements are met, it shall schedule a hearing.

(2) If a protest was filed before the canvass and concerns the counting and tabulating of votes, the county board shall resolve the protest before the canvass is completed. If necessary to provide time to resolve the protest, the county board may recess the canvass meeting, but shall not delay the completion of the canvass for more than three days unless approved by the State Board of Elections. Resolution of the protest shall not delay the canvass of ballot items unaffected by the protest. The appeal of a dismissal shall not delay the canvass.

(3) If a protest concerns an irregularity other than the counting or tabulating of votes, that protest shall not delay the canvass.

c) Conduct of Hearing. – The following principles shall apply to the conduct of a protest hearing before the county board of elections:

(1) The county board may allow evidence to be presented at the hearing in the form of affidavits or it may examine witnesses. The chair or any two members of the board may subpoena witnesses or documents. Each witness must be placed under oath before testifying.

(2) The county board may receive evidence at the hearing from any person with information concerning the subject of the protest. The person who made the protest shall be permitted to present allegations and introduce evidence at the hearing. Any other person to whom notice of hearing was given, if present, shall be permitted to present evidence. The board may allow evidence by affidavit. The board may permit evidence to be presented by a person to whom notice was not given, if the person apparently has a significant interest in the resolution of the protest that is not adequately represented by other participants.

(3) The hearing shall be recorded by a reporter or by mechanical means, and the full record of the hearing shall be preserved by the county board until directed otherwise by the State Board.

(d) Findings of Fact and Conclusions of Law by County Board. – The county board shall make a written decision on each protest which shall state separately each of the following:

(1) Findings of fact. – The findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them.

(2) Conclusions of law. – The conclusions the county board may state, and their consequences for the board's order, are as follows:

a. "The protest should be dismissed because it does not substantially comply with G.S. 163-182.9." If the board makes this conclusion, it shall order the protest dismissed.

b. "The protest should be dismissed because there is not substantial evidence of a violation of the election law or other irregularity or misconduct." If the county board makes this conclusion, it shall order the protest dismissed.

c. "The protest should be dismissed because there is not substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election." If the county board makes this conclusion, it shall order the protest dismissed.

d. "There is substantial evidence to believe that a violation of the election law or other irregularity or misconduct did occur, and might have affected the outcome of the election, but the board is unable to finally determine the effect because the election was a multicounty election." If the county board makes this conclusion, it shall order that the protest and the county board's decision be sent to the State Board for action by it.

e. "There is substantial evidence to believe that a violation of the election law or other irregularity or misconduct did occur and that it was sufficiently serious to cast doubt on the apparent results of the election." If the county board makes this conclusion, it may order any of the following as appropriate:

1. That the vote total as stated in the precinct return or result of the canvass be corrected and new results declared.

2. That votes be recounted.

3. That the protest and the county board's decision be sent to the State Board for action by it.

4. Any other action within the authority of the county board.

(3) An order. — Depending on the conclusion reached by the county board, its order shall be as directed in subdivision (c)(2). If the county board is not able to determine what law is applicable to the Findings of Fact, it may send its findings of fact to the State Board for it to determine the applicable law.

DECLARATORY JUDGMENT

91. N.C.G.S. § 7A-245, "Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.", in relevant part, provides

(a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is

(1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;

(2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;

(3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or

(4) The enforcement or declaration of any claim of constitutional right.

92. N.C.G.S. § 1-253, "Consideration of protest by county board of elections." provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

93. N.C.G.S. § 1-254, "Courts given power of construction of all instruments.", in relevant part, provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder....

94. N.C.G.S. § 1-256, "Enumeration of declarations not exclusive.", provides: "The enumeration in G.S. 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in G.S. 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

95. N.C.G.S. § 1-259, "Supplemental relief.", provides:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

WRIT OF MANDAMUS

96. A writ of mandamus is an extraordinary remedy to provide a swift enforcement of a party's already-established legal rights. See *Holroyd v. Montgomery County*, 167 N.C. App. 539, 543 (2004); *Steele v. Locke Cotton Mills*, 231 N.C. 636, 639 (1950). "Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law." *Buckland v. Town of Haw River*, 141 N.C. App. 460, 462 (2000); see also *Moody v. Transylvania County*, 271 N.C. 384, 390 (1967); *Holroyd*, 167 N.C. App. at 543. A writ of mandamus is proper where there is no other legal remedy. See *Young v. Roberts*, 252 N.C. 9, 17 (1960); *Northfield Development Co., Inc. v. City of Burlington*, 165 N.C. App. 885 (2004).

97. Mandamus utilizes the *in personam* contempt power of the Court to coerce public officers to perform a plain duty. See *Ragan v. County of Alamance*, 98 N.C. App. 636, 639 (1990) (overturned on other grounds); *Orange County v. N.C. Dept. of Transp.*, 46 N.C. App. 350, 384-385 (1980). The power of the Courts to issue such orders is bestowed by Article IV, § 1, of the North Carolina Constitution. See *Ragan*, 98 N.C. App. at 639; *Orange County*, 46 N.C. App. at 385.

FIRST CLAIM FOR RELIEF:

98. The Plaintiff adopts and incorporates by reference the allegations contained in Paragraphs 1 through 97 of her Complaint as if set forth verbatim herein.

99. Upon information and belief, the Defendant, BCBOE, by and through the Defendants, Byrd, Smith, Van Wagner and/or Parker:

- a. Failed to properly consider the Plaintiff's Election Protest to determine whether probable cause existed;
- b. Reviewed documents (including unverified written statements) and considered the statements of employees and others, who were not sworn and not subject to cross examination, in making its determination;
- c. Denied the Plaintiff the right to present testimony of witnesses and other documentary evidence;
- d. Denied the Plaintiff the right to cross examine those employees and others that presented statements;
- e. Exceeded its authority;
- f. Failed to act in a fair and impartial manner;
- g. Denied the Plaintiff her constitutional rights;
- h. Utilized the wrong standard of proof in determining whether probable cause existed;
- i. Dismissed the Plaintiff's Election Protest on the grounds of lack of probable cause when, in fact, probable cause existed;
- j. Denied the Plaintiff her right to an evidentiary hearing;
- k. Failed to comply with, or otherwise enforce, the Applicable Law including, but not limited to, withdrawing or allowing the withdrawal of absentee ballots after such ballots had been returned to the Defendant, BCBOE;
- l. Made Findings of Fact and Conclusions of Law without taking any evidence and which are not substantiated or supported by any evidence;
- m. Entered a Protest Order dismissing the Plaintiff's Election Protest when certain Findings of Fact contained in the Protest Order establish the existence of probable cause; and
- n. Treated a specific group of students differently than the other voting members of the public.

100. Upon information and belief, that the Defendant, NCBOE, by and through the Defendants, Leake, Cordle, Winfree, Penny, Hemphill, and/or Bartlett:

a. Failed to properly consider the Plaintiff's Appeal and Election Protest to determine whether probable cause existed;

b. Reviewed documents and considered the statements of the Defendant, Parker, and an employee of the Defendant, BCBOE, who were not sworn and not subject to cross examination, in making its determination;

c. Denied the Plaintiff the right to present testimony of witnesses and other documentary evidence;

d. Denied the Plaintiff the right to cross examine the Defendant, Parker, and employee of the Defendant, BCBOE, that presented statements;

e. Exceeded its authority;

f. Failed to act in a fair and impartial manner;

g. Denied the Plaintiff her constitutional rights;

h. Utilized the wrong standard of proof in determining whether probable cause existed;

i. Dismissed the Plaintiff's Appeal on the grounds of lack of probable cause when, in fact, probable cause existed;

j. Dismissed the Plaintiff's Appeal on the grounds that only two ballots should not have been counted, which would not have affected the outcome of the Buncombe County Commission District 2 election;

j. Denied the Plaintiff her right to an evidentiary hearing;

k. Failed to comply with, or otherwise enforce, the Applicable Law including, but not limited to, withdrawing or allowing the withdrawal of absentee ballots after such ballots had been returned to the Defendant, BCBOE;

l. Made Findings of Fact and Conclusions of Law without taking any evidence and which are not substantiated or supported by any evidence;

m. Entered an Order dismissing the Plaintiff's Election Protest when certain Findings of Fact contained in the Order establish the existence of probable cause; and

n. Treated a specific group of students differently than the other voting members of the public.

101. Pursuant to N.C.G.S. § 163-182.14(b), the Plaintiff, as an aggrieved party, has the right to appeal the Order of the Defendant, NCBOE, to this Court.

102. Based upon the foregoing, the Plaintiff is entitled to have the Order of the Defendant, NCBOE, reversed and to proceed to an Evidentiary Hearing.

SECOND CLAIM FOR RELIEF:

103. The Plaintiff adopts and incorporates by reference the allegations contained in Paragraphs 1 through 102 of her Complaint as if set forth verbatim herein.

104. The Plaintiff has herein appealed the Order of the Defendant, NCBOE.

105. The Plaintiff is an aggrieved party.

106. The Plaintiff is likely to prevail in the appeal.

107. Pursuant to N.C.G.S. § 163-182.14(b), the Plaintiff may request a stay of the Certification of Election for the relevant seat in the District 2, Buncombe County, Commissioners election pending a determination of the issues in this Action.

108. Based upon the foregoing, the Plaintiff is entitled to a stay of the Certification of Election for the relevant seat in the District 2, Buncombe County, Commissioners election pending a determination of the issues in this Action.

THIRD CLAIM FOR RELIEF:

109. The Plaintiff adopts and incorporates by reference the allegations contained in Paragraphs 1 through 108 of her Complaint as if set forth verbatim herein.

110. The Applicable Law imposes on the Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, Bartlett, BCBOE, Byrd, Smith, Van Wagner and/or Parker, certain duties and obligations towards the Plaintiff and members of the public.

111. These duties and obligations include, but are not limited to, complying with and enforcing the Applicable Law and rules promulgated by the Defendant, NCBOE, and treating all members of the public in the same manner.

112. The Defendants, BCBOE, Byrd, Smith, Van Wagner and/or Parker, failed to fulfill their respective duties and obligations owed to the Plaintiff and members of the public by failing to comply with and enforce the Applicable Law including, but not limited to:

- a. Failing to comply with and enforce the qualification of voter requirements set forth in Article 6 of Chapter 163 of the North Carolina General Statutes;
- b. Failing to comply with and enforce the registration of voter requirements set forth in Article 7A of Chapter 163 of the North Carolina General Statutes;
- c. Failing to comply with and enforce the registration of voter requirements set forth in Article 7A of Chapter 163 of the North Carolina General Statutes;
- d. Failing to comply with and enforce the voting procedures set forth in 08 NCAC 10B.0103;
- e. Failing to comply with and enforce the laws governing protests set forth in Article 15A of Chapter 163 of the North Carolina General Statutes;
- f. Committing those acts and/or omissions more specifically set forth in Paragraph 99, above; and
- g. Committing other acts and/or omissions not specifically enumerated herein.

113. Additionally, the Defendants, BCBOE, Byrd, Smith, Van Wagner and/or Parker, failed to fulfill their respective duties and obligations owed to the Plaintiff and members of the public by treating the students differently than other members of the public.

114. The Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, and/or Bartlett failed to fulfill their respective duties and obligations owed to the Plaintiff and members of the public by failing to comply with and enforce the Applicable Law including, but not limited to:

- a. Failing to comply with and enforce the qualification of voter requirements set forth in Article 6 of Chapter 163 of the North Carolina General Statutes;
- b. Failing to comply with and enforce the registration of voter requirements set forth in Article 7A of Chapter 163 of the North Carolina General Statutes;
- c. Failing to comply with and enforce the voting requirements set forth in Article 7A of Chapter 163 of the North Carolina General Statutes;
- d. Failing to comply with and enforce the voting procedures set forth in 08 NCAC 10B.0103;
- e. Failing to comply with and enforce the laws governing protests set forth in Article 15A of Chapter 163 of the North Carolina General Statutes;
- f. Committing those acts and/or omissions more specifically set forth in Paragraph 100, above; and
- g. Committing other acts and/or omissions not specifically enumerated herein.

115. Additionally, the Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, and/or Bartlett failed to fulfill their respective duties and obligations owed to the Plaintiff and members of the public by treating the students differently than other members of the public.

116. Despite the foregoing, upon information and belief, the Defendants enumerated in this Third Claim for Relief contend that they fulfilled their respective duties and obligations owed to the Plaintiff and members of the public.

117. An actual controversy and dispute exists between the Plaintiff and the Defendants enumerated in this Third Claim for Relief concerning the Applicable Law, their compliance with the Applicable Law and their enforcement of the Applicable Law.

118. The interests of the parties concerning the controversy and dispute are real and adverse, and the issues are ripe for adjudication, due to the fact that the rights and obligations of the parties and the public are at issue in this Action.

119. Based upon the foregoing, the Plaintiff is entitled have the Court enter an order declaring the following:

- a. The appropriate standard of proof applicable to the Preliminary Consideration of the Plaintiff's Election Protest regarding probable cause is do the four corners of the Election Protest cause a reasonable, fair and impartial person to believe that a violation of election law or irregularity or misconduct has occurred;
- b. The information that may be utilized in the Preliminary Consideration of the Plaintiff's Election Protest regarding probable cause is limited to the four corners of the Election Protest;

c. The Election Protest meets the appropriate standard of proof and establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred;

d. The appropriate Defendants shall conduct an Evidentiary Hearing on the Plaintiff's Election Protest; and

e. Such other matters as the Court deems just and proper.

120. Additionally, or in the alternative, the Plaintiff is entitled have the Court enter an order declaring the law applicable to certain of the facts and circumstances of this Action including, but not limited to, the following:

a. The casting of ballots by the students during one-stop absentee voting constituted voting an absentee ballot;

b. The cancelling of the respective students' first ballot, upon receipt of the second ballot, and not counting the first ballot in the Election by the Defendant, BCBOE, constituted a withdrawal of an absentee ballot after such ballot had been returned to the Defendant, BCBOE;

c. The withdrawal of the students' absentee ballots was in violation of N.C.G.S. § 163-233.1;

d. A violation of election law or irregularity or misconduct has occurred;

e. The second ballots cast by the students and counted by the Defendant, BCBOE, are invalid and shall not be counted;

f. The first ballots cast by the students during one-stop absentee voting shall be deemed a provisional ballot and counted for all ballot items on which the students were eligible to vote; and

f. The votes in the election for the relevant seat in the District 2, Buncombe County, Commissioners election shall be recounted.

FOURTH CLAIM FOR RELIEF:

121. The Plaintiff adopts and incorporates by reference the allegations contained in Paragraphs 1 through 120 of her Complaint as if set forth verbatim herein.

122. The Plaintiff has been denied substantial justice through the actions and/or omissions of the Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, Bartlett, BCBOE, Byrd, Smith, Van Wagner and/or Parker, in failing to determine that the Election Protest establishes probable cause that a violation of election law or irregularity or misconduct has occurred and in not proceeding with a formal Evidentiary Hearing.

123. Additionally, the Plaintiff has been denied substantial justice through the actions and/or omissions of the Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, Bartlett, BCBOE, Byrd, Smith, Van Wagner and/or Parker, in allowing the withdrawal of absentee ballots after such ballots had been returned to the Defendant, BCBOE, and certain students to thereafter vote a second time.

124. The Court must intervene to vindicate the rights of the Plaintiff, protect the public and correct the violation of the laws of the State of North Carolina.

125. The Plaintiff is entitled to a writ of mandamus to compel the Defendants, NCBOE, Leake, Cordle, Winfree, Penny, Hemphill, Bartlett, BCBOE, Byrd, Smith, Van Wagner and/or Parker, to proceed with a formal Evidentiary Hearing, to cancel the second ballots cast by the students, to deem the first ballots cast by the students a provisional ballot, to count said ballots for all ballot items on which each student was eligible to vote and to recount the votes for the relevant seat in the District 2, Buncombe County, Commissioners election.

WHEREFORE, the Plaintiff respectfully prays Judgment of the Court as follows:

1. That the Court reverse the Order of the Defendant, NCBOE, and order that the matter proceed to an Evidentiary Hearing, pursuant to the Plaintiff's First Claim for Relief;
2. That the Court conduct an expedited hearing and stay the Certification of Election for the relevant seat in the District 2, Buncombe County, Commissioners election pending a determination of the issues in this Action, pursuant to the Plaintiff's Second Claim for Relief;
3. That the Court enter an Order declaring the rights and obligations of the respective parties, as requested in Paragraphs 119 and 120 of the Plaintiff's Third Claim for Relief;
4. That the Court issue a writ of mandamus to compelling the relevant Defendants to perform certain actions, as requested in Paragraph 125 of the Plaintiff's Fourth Claim for Relief;
5. That, if applicable, the Plaintiff be awarded her costs and reasonable attorney's fees; and
6. For such other and further relief as to the Court seems just an proper.

THIS, the 9th day of January, 2013.

JOHNSON LAW FIRM, P.A.

BY: 

GENE R. JOHNSON

State Bar No. 15917

Attorneys for Plaintiff

P.O. Box 1288

Arden, NC 28704

828-650-0859 (Telephone)

828-650-0913 (Facsimile)

Exhibit A 20
NOV 20 2012

ELECTION PROTEST

(Use of this form is required by G.S. 163-182.9(c))

This form must be filed with the county board of elections within the timeframes set out in G.S. 163-182.9 (b)(4). Please print or type your answers. Feel free to use and attach additional sheets if needed to fully answer the questions below. You may also attach relevant exhibits and documents. Please number the pages of such additional sheets and attachments.

1. Full name and mailing address of person(s) filing the protest.

Christina Kelley Gallegos-Merrill
10 Merrill's Rd.
Fletcher, NC 28732

2. Home and business phone number, fax number, and e-mail address.

Christina Kelley Gallegos-Merrill
828-423-6190
kelleycoproductions@yahoo.com

3. Are you either a candidate or registered voter eligible to vote in the protested election. If a candidate, for what office?

Christina Kelley Gallegos-Merrill is a candidate for the office of Buncombe County Board of Commissioners District 2 and is a registered voter in Buncombe County eligible to vote in the protested election and who did vote in the protested election.

4. List the date, location, and exact nature of the election protested. Name all candidates in the election and the number of votes each received. Note the winning candidate(s) elected or nominated.

The election protested is the November 6, 2012, general election for the office of the Buncombe County Board of Commissioners District 2.

Candidates	Votes
Mike Fryar	19,993
Ellen Frost	19,904
Christina Kelley Gallegos-Merrill	19,891
Carol Peterson	19,870

5. Does this protest involve an alleged error in vote count or tabulation? If so, please explain in detail. No.

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6. Does this protest involve an irregularity or misconduct not described in number 5 above? If so, please give a detailed description of such misconduct or irregularity and name those who committed such action.

This protest concerns several hundred voters who are purportedly students at Warren Wilson College. Warren Wilson College (hereinafter the "College") is a small college located in Buncombe County, North Carolina.

The College campus includes portions of precincts 66.1 and 65.1 of Buncombe County. Precinct 66.1 is in county commission district 1 and Precinct 65.1 is in county commission district 2. There are dormitories in both precincts.

The College has a mail facility located at 701 Warren Wilson Road which address is in Precinct 66.1 and District 1. Upon information and belief 701 Warren Wilson Road is not a residential address. Warren Wilson Road is the dividing line between Precincts 66.1 and 65.1.

The Buncombe County Board of Elections (hereinafter the "Board") staff determined that there were voters who were registered to vote in Precinct 66.1 who reside in Precinct 65.1.

Upon information and belief many of the voters have previously voted in Precinct 66.1.

Upon information and belief the residency of the individuals attending the College changes frequently.

The Board, by and through its staff, sent out a directive (hereinafter the "Directive") to its early voting officials to inquire of each voter registered at 701 Warren Wilson Road which "side of the road they live on." See Exhibit A attached hereto. The Directive further instructed the early voting officials to have all voters with a 701 Warren Wilson Rd. address of registration vote a provisional ballot and provide the voter with a ballot style reflective of the voter's answer.

136 provisional ballots were obtained as a result of the Directive. 19 of which were Same Day registrants (9 in precinct 65.1 and 10 in precinct 66.1.) The Board obtained a list of students from the College and based upon the addresses (dorms) in the list determined which district and precinct each of the provisional voter resided. Upon information and belief the list provided by the College is unsworn and without any affirmation as to its integrity. Upon information and belief no inquiry was made about the accuracy of the list or how it is maintained or how often updated.

Of the 136 provisional ballot voters 75 were determined to live District 2 ballot style (ballot style G003) and 61 were determined to live in District 1 (ballot style G007.)

Of the 75 provisional voters determined to reside in Precinct 65.1 (District 2), 44 voters reaffirmed their 701 Warren Wilson Road (District 1) while completing the provisional ballot envelope which solicits the voter's residence including the "dorm."

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Pursuant to the Board's determination of voter residency, there should have been 75 style G003 ballots and 61 style G007 ballots; however the Board, upon opening the provisional ballot envelopes at canvas, determined that incorrect ballot styles were presented to the voters in some instances.

Using notations marked in writing on the provisional ballot envelope such as "north" and "south" the Board, during canvas, approved many of the provisional ballots. The Board relied upon these notations in determining whether a voter received the correct ballot style. It is unclear who made the notations on the envelopes.

The Board erred in that it determined that voters intended to register in precincts and districts contrary to the intentions stated by the voters on the provisional ballot envelope.

Some voters failed, after repeated opportunity, to provide their residential address as was their obligation. The Board erred in failing to ascertain the correct address and in counting ballots of voters which are not lawfully registered.

The Board erred by providing provisional ballots to ineligible voters contrary to NCGS 163-166.11 in that the voter must execute "a written affirmation" stating that the individual is a registered voter in the jurisdiction in which the individual seeks to vote and is eligible to vote in that election. At least 44 individuals affirmed that they resided in Precinct 66.1 (District 1) and the Board attempted to provide them with precinct 65.1 style ballots.

The Board erred by removing voters from their registered precinct without authority and in disregard to the NCGS 163-82.1.

The Board erred in using unsworn, unreliable information in attempting to determine the residency of individuals for voting purposes.

7. Please set out all election laws or regulations that you allege were violated in your responses to 5 or 6 above. State how each violation occurred. Please provide the names, addresses, and phone numbers of those who you allege committed such violations.

The election laws violated and the nature of the violations have been specified above. The violations were committed during the course of counting and canvassing of votes by the Buncombe County Board of Elections.

8. Please provide the names, addresses, and phone numbers of any witnesses to any misconduct alleged by you in this protest, and specify what each witness listed saw or knows.

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Mark Delk, of 20 Spring Valley Drive, Arden NC 28704 was a witness to the official acts complained of in this protest. Mr. Delk observed the deliberations and voting of the Buncombe County Board of Elections during the course of the violations complained of herein.

Trena Parker is the Director of the Buncombe County Board of Elections and was responsible for the administration of the election the subject of this protest.

Rachel Rathbone is an employee of the Buncombe County Board of Election and the author of the aforesaid Directive.

9. What action do you desire the county board of elections to take in this matter?

The illegal votes which were counted, tabulated and included in the canvass in violation of state law, as described and complained of herein, should be removed from the official count and canvass of votes. The returns in the election for the office of Buncombe County Commission should be corrected in accordance with law.

10. Do you contend the allegations set out by you are sufficient to have affected or cast doubt upon the results of the protested election? If your answer is yes, please state the factual basis for your opinion.

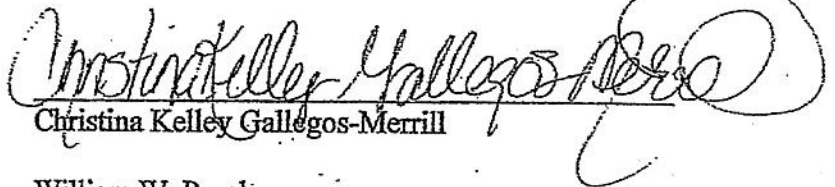
The question of whether the irregularities complained of herein are sufficient to have affected or cast doubt upon the results of the protested election cannot be determined at this time, based upon existing evidence. However, there is a 13 vote margin and hundreds of votes in question.

11. Have you read and reviewed the North Carolina law pertaining to election protests as set out in G.S. 163-182.9 through G.S. 163-182.14 and current North Carolina State Board of Elections regulations pertaining to election protests?

The Protesters and their legal counsel are familiar with North Carolina law pertaining to election protests and current North Carolina State Board of Elections regulations pertaining to election protests.

12. How many pages of additional answer are attached to this protest? None. How many pages of attachments are attached? One

This the 20th day of November, 2012.


Christina Kelley Gallegos-Merrill

William W. Peaslee
WILLIAM W. PEASLEE ATTORNEY AT LAW PLLC

30
NOV 20 2012

North Carolina Bar #17922

102-K Commonwealth Ct.

Cary, NC 27511

Telephone: (919) 481-1992

Facsimile: (919) 481-2919

Attorney for Protester Christina Kelley Gallegos-Merrill

Date/Time Filed with County Board

11/20/12
(to be filled out by the county board)

DP
NOV 20 2012

NOTE: The county board must provide the State Board with a complete copy of a filed protest within one business day after it is filed. In addition, the county board shall provide a copy of the election audit with this copy of the protest.

Please direct any questions to your county board of elections or the North Carolina State Board of Elections, PO Box 27255, Raleigh, NC 27611-7255, (919) 733-7173.

History Note: Authority G.S. 163-22; 163-182.9; Temporary Adoption Eff. April 15, 2002; *Eff. August 1, 2004.*

CERTIFICATE OF SERVICE ATTACHED

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CERTIFICATE OF SERVICE

I certify that the foregoing ELECTION PROTEST was served this day by hand delivery thereof to the offices of the Buncombe County Board of Elections at its offices located at:

35 Woodfin St.
Asheville, NC
Greensboro NC 28801

I further certify that a copy of the foregoing ELECTION PROTEST was served this day by facsimile transmission as follows:

North Carolina State Board of Elections
Attention Mr. Gary Bartlett
Fax number: (919) 715-0135

This the 20th day of November, 2012.

William W. Peaslee

William W. Peaslee
WILLIAM W. PEASLEE ATTORNEY AT LAW PLLC

EXHIBIT A

NOV 20 2012

Rachel Rathbone

From: Rachel Rathbone
Sent: Wednesday, October 31, 2012 10:22 AM
To: BOEAGCC; BOEAVML; BOEBCTC; BOEBMBL; BOEBSML; BOEBTFD; BOEFVBL;
BOEJPF; BOEKEN; BOELCBL; BOELUCH; BOEMHBC; BOENABL; BOESBBL;
BOEUHFR; BOEUNCA; BOEWABL; BOEWVTH
Cc: Trena Parker; Jennifer Sparks; John Noce; Barbara Bowers;
Kathryn.Home@buricombecounty.org; Tracy Cannon; Rebekah Barlow; Joyce A. Kanavel
Subject: Urgent! Print out this map!
Attachments: Warren Wilson.pdf

*As always, please print the email below and make certain that every worker at your site
(both shifts)
reads and signs it.*

Print out the map attached above!

Hello All! We have identified a particular area at Warren Wilson that requires additional address information from the voters to ensure that they receive the correct ballot style. From this point forward, if you have a voter with an address of 701 Warren Wilson Rd., show them the map attached above and ask them which side of the road they live on. Use the map to determine which ballot style to give them and vote them provisionally. They must vote a provisional ballot.

If they live on the SOUTH side of the road, ask them to fill out a voter registration form so that their residential address can be updated. They should receive ballot G007.

If they live on the NORTH side, give them ballot style G003. Ask them to list their residential address on the provisional envelope.

If you recognize that you have already had voters in your precinct who are registered at the 701 Warren Wilson Road address, please know that we have communicated with the State Board of Elections and are in the process of sending out a memorandum to these voters to address the issue.

If you have any questions regarding these instructions please call us.

Thank you!

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

Exhibit B

BEFORE THE BUNCOMBE COUNTY
BOARD OF ELECTIONS

IN THE MATTER OF
PROTEST FILED BY:

PROTEST ORDER

CHRISTINA KELLEY G. MERRILL

THIS MATTER CAME BEFORE THE BUNCOMBE COUNTY BOARD OF ELECTIONS on November 28, 2012, upon preliminary consideration of an alleged election protest filed by Christina Kelley G. Merrill with the Buncombe County Board of Elections ("BCBOE") alleging errors in voter addresses in determining which ballot type was appropriate for individuals who indicated on provisional ballots that they lived at 701 Warren Wilson Road. Present for this Board were Jones Byrd, Lucy Smith and Robert Van Wagner as well as Election Services staff. Ms. Merrill was present and represented at this meeting by Gene Johnson. The BCBOE opened the meeting on November 28, 2012 at 5:30 p.m.

Based upon the review of information, the Protest and arguments presented to the Board in this matter by interested parties and counsel, the BCBOE hereby makes the following:

FINDINGS OF FACT

1. Christina Kelley G. Merrill is a candidate for Buncombe County Commission District 2 and she has caused documents ("Protest") to be filed with the BCBOE on November 20, 2012 a copy of which is attached hereto and marked Exhibit "A" and the content of which speaks for itself.
2. The Protest was timely filed and appears to substantially comply with GS §163-182.9.
3. The Protest alleges irregularity or misconduct and the possibility of a violation of law concerning several hundred voters who are at Warren Wilson College ("College").
4. The College includes portions of precincts 66.1 and 65.1. Precinct 66.1 is in Buncombe County Commission District 1 and Precinct 65.1 is in Buncombe County Commission District 2. The College mail facility is located at 701 Warren Wilson Road. The building located at 701 Warren Wilson Drive is not a residential address and is located in District 1.
5. Warren Wilson Road now is the dividing line between Precincts 66.1 and 65.1.

6. BCBOE sent an email to early voting officials instructing them to ask voters with an address of 701 Warren Wilson Road to provide additional address information. The voters were asked to indicate on an attached map which side of Warren Wilson Road they lived on. Those living on the south side of the road were to receive ballot style G007 and those on the north side of the road were to receive ballot style G003. Those voters were asked to fill out a voter registration, to list their residential address on a provisional envelope, and to vote provisionally. Provisional ballots were obtained from 136 individuals through this process.

7. Of the 136 provisional ballots, 75 voters were determined to live in District 2 (ballot style G003) and 61 voters were determined to live in District 1 (ballot style G007). Of the 75 provisional voters determined to live in District 2, 44 voters indicated the 701 Warren Wilson Road as their residential address despite the fact that no one lives at that address.

8. In accordance with State Board of Elections directive and instructions, the BCBOE made determinations of residency and proper ballot style at Canvass by using the official housing list for student dorm assignments provided by Joyce Milling, the Interim Director of Residence Life at Warren Wilson College. During the Canvass meeting there were provisional envelopes having student indications of North or South as to where the students resided, and if the school list indicated that the student lived on the North side, but the student had indicated that they lived on the South side, priority was given to the student's indication. Further, if no indication was given, the determination was made based on the school list. Thereafter, when the BCBOE looked at the ballots, if it was determined that the student was not eligible for certain races, the ballot became a partial ballot and only eligible races were counted.

9. In making a determination of whether the provisional ballots in question were partial provisional ballots, where there was no indication of North or South on the envelope and if the student's name did not appear on the list, it would have been a partial provisional.

10. The Protest alleges that the 44 provisional ballot envelopes did not have the dorm names or an indication of North or South on them, and further alleges that the Board violated state statutes by unilaterally changing the student's addresses.

11. The BCBOE had received State Board Memo 2012-28 instructing the BCBOE to rely upon all available information to use at Canvass. Staff sought the State Board's advice all along the way and fulfilled their policies.

12. At Canvass the BCBOE centered its inquiry on where the individual sleeps at night to determine residency for purposes of ballot style

13. The preliminary consideration applicable to the initial consideration of election protests by a county board of elections as set forth in GS §163-182.10(a) requires a determination of whether the protest "establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred."

14. The Protest alleges that 44 ballots did not have a dorm name and that information was added to the envelope after the fact.

15. The BCBOE takes notice that GS §163-57 gives the BCBOE the authority to determine the residence of a person offering to register or vote and provides the rules applicable thereto.

16. The BCBOE has an indication of residence for these voters of either North or South on the map, or from a list the housing office for all but one student voter.

17. The BCBOE reviewed all the provisional ballots at issue during Canvass and determined that all ballots were properly counted in the correct precinct in which the relevant voters were allowed to vote and for the offices for which they were entitled to vote.

Based upon the foregoing Findings of Fact, the BCBOE hereby makes the following:

CONCLUSION OF LAW

In this preliminary hearing on the Protest, there appears to be no probable cause to believe a violation of election law, irregularity, or misconduct has occurred.

Base upon the foregoing Findings of Fact and Conclusions of Law, the Buncombe County Board of Elections hereby Orders as follows:

ORDER

It is therefore ORDERED, ADJUDGED and DECREED:

The said Protest of Christina Kelley G. Merrill filed with the Buncombe County Board of Elections on November 20, 2012 be, and the same is, hereby dismissed.

This 3rd day of December, 2012.



Jones Byrd, Chair
Buncombe County Board of Elections

All appeals of a county board of election protest decision must use the following form:

APPEAL OF ELECTION PROTEST TO STATE BOARD OF ELECTIONS

(Use of this form is required by G. S. 163-182.11 (a))

A copy of this appeal must be given to the county board of elections within 24 hours (weekends and holidays excluded) after the county board files its written decision at its office. The same appeal must be filed with or mailed to the State Board of Elections by the end of the second day following the county board decision if the protest involves a first primary. As to a protest of any other election, this appeal must be filed or deposited in the mail by the end of the fifth day following the county board decision. See 163-182.11 (a). A copy of the original election protest form with attachments must be filed with this appeal. A copy of the county board decision must be filed with this appeal. The county board will provide the record on appeal. As many additional sheets as are necessary to answer the questions below may be attached, but they must be numbered. Please print or type your answers.

1. Full name, mailing address, home and business phone, fax number, and e-mail address of undersigned.

Full Name: Christina Kelley Gallegos-Merrill
Mailing Address: 10 Merrills Road
Fletcher, NC 28732
Home Phone: 828-423-6190
Business Phone: 828-423-6190
Fax Number: 828-628-1575
E-Mail Address: kelleycoproductions@yahoo.com

2. Are you the person who filed the original protest, a candidate or office holder adversely affected by the county decision, or someone else whose interest has been adversely affected by the county decision?

Christina Kelley Gallegos-Merrill filed the original protest. She is a candidate for the office of Buncombe County Board of Commissioners, District 2, and has been adversely affected by the county decision.

3. State the date, place, kind of election, and results of the election protested (if different from the information on the election and its results as set out in the attached original protest form).

The information is set out in the attached original protest form, which is adopted and incorporated herein.

4. State the name, mailing address, home phone, and business phone of all candidates involved in the protested election.

Mike Fryar
2 Lakeview Drive, Fairview, NC 28730
828-628-1060

Ellen Frost
1420 North Fork Road, Black Mountain, NC 28711
828-275-8662

Christina Kelley Gallegos-Merrill
10 Merrills Road, Fletcher, NC 28732
828-423-6190

Carol Peterson
230 Brush Creek Road, Fletcher, NC 28732
828-628-1349

Received 12:56
D. Kelley
Exhibit C

5. State the date of the county board hearing: November 28, 2012.

6. State the legal and factual basis for your appeal.

- a. The BCBOE failed to properly consider the protest to determine whether probable cause existed;
- b. The BCBOE reviewed documents (including non-verified written statements) and listened to the statements of employees and others, who were not sworn and not subject to cross examination, in making its determination;
- c. The BCBOE denied the Protester the right to present testimony of witnesses and other documentary evidence;
- d. The BCBOE denied the Protester the right to cross examine those employees and others that presented statements;
- e. The BCOE did not allow those ballots in question to be examined;
- f. The BCOE failed, despite several requests, to provide the Protester's representatives with relevant documents in a timely fashion prior to the Hearing, thereby prohibiting the Protester and her representatives from being able to review those documents prior to the Hearing;
- g. The BCBOE exceeded its authority;
- h. The BCBOE, as a quasi-judicial board, failed to fulfill its duties in a fair and impartial manner;
- i. The BCBOE denied the Protester her constitutional rights;
- j. The BCBOE utilized the wrong standard of proof in determining whether probable cause existed;
- k. The BCBOE dismissed the protest on the grounds of lack of probable cause when, in fact, probable cause existed;
- l. The BCBOE denied the Protester her right to an evidentiary hearing;
- m. The BCBOE failed to comply with, and otherwise enforce, relevant provisions of Chapter 163 of the North Carolina General Statutes;
- n. The Findings of Fact contained in the BCBOE's Order are not substantiated or supported by any evidence;
- o. The Findings of Fact contained in the BCOE's Order do not support or otherwise substantiate the Conclusion of Law contained therein;
- p. The Conclusion of Law contained in the BCOE's Order does not support or otherwise substantiate the Order contained therein; and
- q. Certain Findings of Fact contained in the BCBOE's Order establish the existence of probable cause.

7. Is there any material submitted with this appeal that was not presented to and considered by the county board? If so, please identify and state why it was not presented to the county board. Why do you think the State Board of Elections should consider it?

No such material is submitted with this appeal. The BCBOE refused to accept any materials (evidence) from the Protester or her representative.

8. Normally the State Board will make its decision in an appeal based upon the record from the county board. If you desire the record in this matter to be supplemented, additional evidence to be considered, or a completely new hearing, please state such desire and why it should be allowed on appeal. See 163-182.14 (b).

The Protester desires that the State Board of Elections hold a completely new Preliminary Hearing to determine whether probable cause exists from the written protest. If the State Board considers matters (evidence) outside the written protest, then the Protester desires to supplement the record and that the State Board consider additional evidence. In the alternative, should the State Board refuse to hold a completely new Preliminary Hearing, then the Petitioner requests the State Board to remand the matter to the county board for further proceedings in compliance with an appropriate order of the State Board. The Protester's desire should be allowed due to the legal and factual basis for the appeal set forth in 6, above.

9. What relief do you seek? Why?

The Protester seeks the following relief:

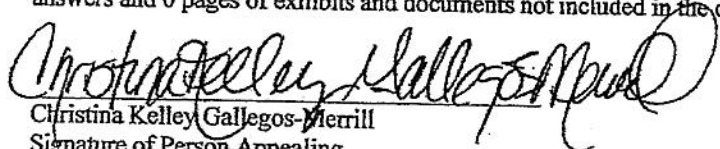
- a. a reversal of the BCBOE's dismissal of the protest;
- b. the protest proceed to an Evidentiary Hearing; and
- c. for the relief requested in the protest.

The Protester seeks the aforementioned relief because there was an initial vote margin of 13 votes and hundreds of votes in question. Additionally, the irregularities complained of in the Protest are sufficient to have affected or cast doubt upon the results of the protested election. Also see the legal and factual basis for the appeal set forth in 6, above.

10. Have you read and reviewed G.S. 163-182.11 through 163-182.14 and the current North Carolina State Board of Elections regulations on appeals of election protests?

Yes.

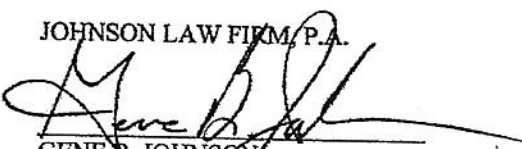
11. Besides a copy of the original protest and the county board decisions, this appeal includes 3 pages of answers and 0 pages of exhibits and documents not included in the original protest.


Christina Kelley Gallegos-Merrill
Signature of Person Appealing

12/4/12
Date Appeal Signed

JOHNSON LAW FIRM, P.A.

BY:


GENE R. JOHNSON
State Bar No.: 15917
Attorneys for Protester
P.O. Box 1288
Arden, NC 28704
828-650-0859 (Telephone)

Date appeal received by State Board of Elections

(To be entered by the State Board of Elections staff)

Send your appeal to, or if you have questions contact: North Carolina State Board of Elections, P.O. Box 27255, Raleigh, NC 27611-7255, (919) 733-7173.

History Note: Authority G.S. 163-22; 163-182.11
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

Exhibit D

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN THE MATTER OF
THE NOVEMBER 6, 2012
BUNCOMBE COUNTY DISTRICT 2
COMMISSIONER ELECTIONORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS on December 13, 2012, upon the appeal of candidate Christina Kelley G. Merrill of the December 3, 2012 Protest Order of the Buncombe County Board of Elections ("BCBE"). Present at the hearing were Gene Johnson, attorney for candidate Christina Kelley G. Merrill, who was also present; Robert Deutsch, attorney for candidate Ellen Frost, who was also present; Lucy Smith, Secretary of the BCBE, Trena Parker, Director of the BCBE, and Jennifer Sparks, Election Information Specialist of the BCBE.

Upon review of the Protest Order, the protest appeal, information in the file and copies of information provided to the BCBE at its hearing, specifically including a detailed chart of the BCBE's handling of the ballots at issue, the State Board rules as follows:

UNDISPUTED FACTS

1. Christina Kelley G. Merrill is a candidate for Buncombe County Commission District 2 and timely filed an election protest on November 20, 2012 concerning the Buncombe County Commission District 2 race. The protest alleged an irregularity involving voters in District 2 who are students at Warren Wilson College ("College").
2. The Buncombe County Commission District 2 was an election with four candidates for two seats. This contest was the subject of a machine recount, a partial hand-to-eye recount, and a full hand-to-eye recount under the provisions of GS 163-182.7 and GS 163-182.7A. The final count for these seats was:

Mike Fryar	20,007
Ellen Frost	19,918
Christiana Kelly G. Merrill	19,900
Carol Weir Peterson	19,880
3. The protest was dismissed by the BCBE at a preliminary hearing held on November 28, 2012, with the order of dismissal signed on December 3, 2012.

4. The College includes portions of precincts 66.1 and 65.1. Precinct 66.1 is in Buncombe County Commission District 1 and Precinct 65.1 is in Buncombe County Commission District 2. The building used as the College mailing facility is located at 701 Warren Wilson Drive, but is not a residential address. It is located in District 1. Warren Wilson Road has been the dividing line between precincts 66.1 and 65.1 for a number of years, but is also now the dividing line of the newly-created County Commission Districts 1 & 2.

5. On October 31, 2012, during the one-stop absentee voting period, BCBE discovered that many student voters had listed their residential address as 701 Warren Wilson Road, and had not provided the address where they resided on the campus.

6. After consultation with staff of the State Board, the BCBE sent an email to early voting officials instructing them to ask voters with an address of 701 Warren Wilson Road to provide additional address information. The voters were asked to indicate on an attached map which side of Warren Wilson Road they lived on. Those living on the south side of the road were to receive ballot style G007, which included the race for Buncombe County Commission District 1, and those on the north side of the road, which included Buncombe County Commission District 2 were to receive ballot style G003. The voters also were asked to fill out a voter registration form, to list their residential address on a provisional envelope, and to vote provisionally.

7. For the absentee voters who indicated 701 Warren Wilson Road as their residential address, the BCBE staff attempted to contact them to ascertain their correct assignment. Four students indicated that they would return on election day to vote, and their absentee ballot was cancelled. Six students instructed the BCBE to count only those races for which the student was eligible. One student informed the BCBE that she had moved out of N. C., and she was removed from the voter registration database. The BCBE was unable to contact five students to determine their correct assignment so their absentee ballot was counted for all races other than for District 1 or 2 County Commission seats. Twenty-seven voters were correctly issued ballots for District 1. Thirty-one voters were mailed new ballots, but the new ballots were not returned so their absentee ballot was partially counted for the races for which they were eligible and not for the District 1 or 2 Buncombe County Commission races. Eighteen voters were issued new ballots; their incorrect ballot was pulled, and the newly submitted correct ballot was counted.

8. Of the 18 voters who returned correct replacement ballots, all but two of the ballots were postmarked on or before election day, November 6, 2012.

9. In accordance with the State Board's Executive Director's Directive 2012-28 and staff instructions, the BCBE made determinations of residency and proper ballot style at its canvass by using the official housing list for student dorm assignments provided by Joyce Milling, the Interim Director of Residence Life at Warren Wilson College. If the College list indicated that the student lived on the north side of the dividing line, but the voter indicated that they lived on the south side, priority was given to the voter's statement of residence. A notarized copy of this list was provided to the BCBE for the preliminary hearing on November 28, 2012.

10. The BCBE reviewed all the ballots at issue during canvass and determined that all ballots were properly counted in the correct precinct in which the relevant voters were allowed to vote and for the offices for which they were entitled to vote. The BCBE made this determination after specifically reviewing 44 provisional ballot applications that did not have a dorm name written on them, but did have information added to the envelope by elections officials based on information collected from the voter or the housing list of the College.

CONCLUSIONS OF LAW

1. Of the 18 correct ballots returned two were postmarked after election day, and should not have been counted by the BCBE. However, these two ballots were insufficient to affect the outcome of the election, since the difference between the second and third place candidates was 18 votes.

2. The protest was properly dismissed at the preliminary hearing held by the BCBE, pursuant to N.C. Gen. Stat. § 163-182.10(a), as there was no probable cause to believe any violation of election law, irregularity, or misconduct had occurred with respect to the Buncombe County Commission District 2 race sufficient to have changed its outcome.

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED, by unanimous vote, that the appeal of Christina Kelley G. Merrill be, and the same is, hereby **DENIED**, and the protest order of the BCBE be, and the same is, hereby affirmed.

This the 31st day of December, 2012.


Larry Leake, Chairman
North Carolina State Board of Elections

VERIFICATION

CHRISTINA KELLEY GALLEGOS-MERRILL, being first duly sworn, deposes and says that she is the Plaintiff in the above-entitled Action, that she has read the foregoing Complaint and knows the contents thereof, and that the same is true of her own personal knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things, she believes them to be true.

Christina Kelley Gallegos-Merrill
CHRISTINA KELLEY GALLEGOS-MERRILL



AND SUBSCRIBED before me this the 9th day of January, 2013.

Marc B. Johnson
NOTARY PUBLIC