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**CUMBERLAND
★ COUNTY ★**
NORTH CAROLINA

BOARD OF COMMISSIONERS

CANDICE WHITE
Clerk to the Board

KELLIE BEAM
Deputy Clerk

MEMORANDUM

TO: Policy Committee Members (Chairman Council, Adams, Evans and Lancaster)

FROM: Kellie Beam, Deputy Clerk to the Board *KB*

DATE: September 29, 2016

SUBJECT: Policy Committee Meeting – October 6, 2016

There will be a regular meeting of the Policy Committee on Thursday, October 6, 2016 at 10:30 AM in Room 564 of the Cumberland County Courthouse.

AGENDA

1. Approval of Minutes – September 1, 2016 Policy Committee Regular Meeting **(Pg. 2)**
2. Consideration of Approval of Contractor Pre-Qualification Policy **(Pg. 15)**
3. Consideration of Approval of Revised Smoking Ordinance **(Pg. 29)**
4. Other Items of Business **(NO MATERIALS)**

cc: Board of Commissioners
Administration
Legal
Communications Manager
County Department Head(s)
Sunshine List

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ITEM NO. 1

CUMBERLAND COUNTY POLICY COMMITTEE
COURTHOUSE, 117 DICK STREET, 5TH FLOOR, ROOM 564
SEPTEMBER 1, 2016 – 10:30 A.M.
MINUTES

MEMBERS PRESENT: Commissioner Jeannette Council
Commissioner Glenn Adams
Commissioner Larry Lancaster

MEMBERS ABSENT:
Commissioner Charles Evans

OTHER COMMISSIONERS
PRESENT: Commissioner Jimmy Keefe
Commissioner Marshall Faircloth
Commissioner Kenneth Edge

OTHERS PRESENT: Amy Cannon, County Manager
James Lawson, Deputy County Manager
Tracy Jackson, Assistant County Manager
Melissa Cardinali, Assistant County Manager for Finance/
Administrative Services
Sally Shutt, Governmental Affairs and Public Information
Officer
Rick Moorefield, County Attorney
Phyllis Jones, Assistant County Attorney
Deborah Shaw, Budget Analyst
Kim Cribb, Budget Analyst
Candice White, Clerk to the Board
Kellie Beam, Deputy Clerk to the Board
Press

Commissioner Council called the meeting to order.

1. APPROVAL OF MINUTES – AUGUST 4, 2016 POLICY COMMITTEE
REGULAR MEETING

MOTION: Commissioner Adams moved to approve the minutes.
SECOND: Commissioner Council
VOTE: UNANIMOUS (3-0)

2. CONSIDERATION OF APPROVAL OF NCACC LEGISLATIVE GOALS
RECOMMENDATIONS

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BACKGROUND

The N. C. Association of County Commissioners (NCACC) has outlined its state legislative goals development process for 2017-2018. September 23, 2016 is the deadline for counties to submit their legislative proposals to the association for consideration.

As part of Cumberland County's process, we asked the Leadership Team to submit their recommendations and have compiled the list recorded below for your consideration. Your recommended goals will go to the full board of Commissioners for approval at the September 19, 2016 meeting.

RECOMMENDATION/PROPOSED ACTION

Consider the goals recorded below and make a recommendation to the full Board of Commissioners for approval of the County's state legislative goals to be forwarded to the NCACC by the September 23, 2016 deadline.

Environment/ General Government

Solid Waste Management Department Goal – *(submitted by interim Solid Waste Management Director Jeffery Brown)*

Repeal the electronics recycling program and the ban on disposing computers, televisions and other electronics in the landfill.

Cumberland County Solid Waste Management supports efforts to end the state's electronics recycling program and a related ban on disposing computers, televisions and other electronics in landfills. Televisions in particular are a drain on the Solid Waste Management budget.

North Carolina banned electronics from going into landfills effective July 1, 2011. In April 2016, the N.C. Department of Environmental Quality released a study of electronics recycling, which stated, "The intention of North Carolina's electronics recycling legislation was to create recycling opportunities for citizens largely through the existing infrastructure of local recycling programs supported through producer responsibility obligations. This study finds that producer support is inadequate to the needs of the system. As a result, local governments are directly bearing a high level of electronics recycling costs."

The report made the following legislative recommendation:

"The General Assembly should consider legislation to repeal Part 2H Discarded Computer Equipment and Television Management of GS Article 9 and to repeal GS 130A-309.10 (14) and (15) based on EPA's acknowledgement that electronics can be safely disposed of in municipal solid waste landfills, the fact that electronics recycling is currently not cost effective, and the fact that electronic wastes constitute such a small percentage (0.2%) of the annual solid waste stream."

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Health & Human Services

Department of Social Services Goal – *(submitted by Social Services Director Brenda Jackson)*

Oppose unfunded mandates and shifts of state responsibilities to counties:
Prevent the *Temporary Financial Assistance for Facilities Licensed to Accept State-County Special Assistance Payments* from becoming a permanent mandate.

Effective October 1, 2016, through June 30, 2017, the State-County Special Assistance rate will increase to \$1,216 for adult care homes. This is a \$34 increase per month per resident, with 50 percent of the \$34 increase coming from the county.

To be eligible for special assistance, individuals must be age 65 or older, or disabled and live in a residential facility approved for special assistance. The facility must agree to accept the state rate for special assistance residents. Individuals who are eligible for special assistance are automatically eligible for Medicaid.

The North Carolina Association of County Directors of Social Services and the North Carolina Association of County Commissioners lobbied against this unfunded mandate; however, the legislation was included in the budget bill.

Based on the point-in-time number of 656 Special Assistance cases, Cumberland County DSS projects the County will pay \$100,368 during the nine-month period (\$17 per person per month.)

Counties can try to prevent this from becoming a permanent assistance payment with a 50 percent county match after the nine-month period expires.

Public Education

School System Goals

- Increase capital funding by allocating 40 percent of the lottery proceeds to counties for school capital needs.
- Oppose any shifting of the state's responsibility for replacing school buses.
- Seek legislation that would place any program administered by the local school system under the Department of Public Instruction's facilities guidance and requirements.

Some school system facilities must meet a different set of standards based on the programs housed in them. For example, pre-K programs fall under the North Carolina Department of Health and Human Services Division of Child Development and Early Education.

Library Goal – *(submitted by Library Director Jody Risacher)*

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Support legislation to restore state aid funding of public libraries to the pre-2011 level of \$15.7 million.

Impact: State Aid for Public Libraries for Cumberland County Public Library is budgeted at \$311,976. These funds are critical for the purchase of materials for residents, including books, audio-visual and electronic resources.

Library Director Jody Risacher noted that the Cumberland County Public Library and Information Center is a member of the N.C. Cardinal Consortium, which means most library materials are now shared across 30 plus counties. The citizens of each participating county are able to access a wider variety of materials and there are efficiencies inherent in the system.

Tax & Finance

Continue to seek legislation to authorize local option revenue sources already given to other jurisdictions.

Work to expand the use of the Article 43 transit tax to all counties for education purposes and provide counties the option to seek up to ½ cent through Article 46, which is currently limited to ¼ cent.

Support legislation that would create a loan fund to assist local economic development organizations and communities with the development of industrial sites and buildings. *(submitted by Russ Rogerson, president of the Fayetteville-Cumberland County Economic Development Corporation)*

HB108 (Site and Building Development Fund) did not pass during the 2016 session. The legislation would create a loan fund to assist local economic development organizations and communities with developing buildings and shovel-ready industrial sites.

Sally Shutt, Governmental Affairs and Public Information Officer, reviewed the background information, recommendation and draft NCACC Legislative Goals Recommendations as recorded above. Ms. Shutt stated the deadline to submit the legislative goals to the NCACC is September 23, 2016.

Ms. Shutt stated Commissioner Adams requested to add a Justice and Public Safety goal to support legislation to raise the age at which first time misdemeanor offenders are treated in the adult criminal justice system from 16 years old to 18 years old.

Ms. Shutt stated the draft legislative goals recorded above and Commissioner Adams request to add the Justice and Public Safety goal will be on the September 19, 2016 Board of Commissioners agenda for approval in order to submit to the NCACC before the September 23, 2016 deadline.

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3. CONSIDERATION OF A MEMORANDUM OF UNDERSTANDING FOR THE MISDEMEANOR DIVERSION PROGRAM

MOTION: Commissioner Adams moved to add “Consideration of a Memorandum of Understanding for the Misdemeanor Diversion Program” to the Policy Committee agenda.

SECOND: Commissioner Lancaster

VOTE: UNANIMOUS (3-0)

Commissioner Adams provided the following draft Memorandum of Understanding (MOU) for the Misdemeanor Diversion Program.

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

MEMORANDUM OF UNDERSTANDING Cumberland County Precharge Misdemeanor Diversion Program

THIS MEMORANDUM OF UNDERSTANDING entered into this 1st day of September, 2016, by and between or among the CHIEF JUDGE OF THE DISTRICT COURT, TWELFTH JUDICIAL DISTRICT, AND THE JUDGES ASSIGNED TO CRIMINAL MISDEMEANOR CASES (“Judges”), THE OFFICE OF THE DISTRICT ATTORNEY, TWELFTH JUDICIAL DISTRICT (“District Attorney), the OFFICE OF THE PUBLIC DEFENDER FOR THE TWELFTH DISTRICT (“Public Defender”), the COUNTY OF CUMBERLAND, the SHERIFF OF CUMBERLAND COUNTY (“Sheriff”), the CITY OF FAYETTEVILLE by and through its POLICE DEPARTMENT (“Fayetteville Police”), the TOWN OF HOPE MILLS by and through its POLICE DEPARTMENT (“Hope Mills Police”), and the TOWN OF SPRING LAKE by and through its POLICE DEPARTMENT (“Spring Lake Police”), hereinafter “The Parties.”

WHEREAS, the State of North Carolina is only one of two states that ordinarily prosecutes all sixteen and seventeen year-olds charged with criminal offenses as adults; and

WHEREAS, the record of arrest follows the youth into adulthood and may create significant impediments to and involve collateral consequences in employment, education, licensing, and rights even in the event that such charges are dismissed; and

WHEREAS, the Parties seek to implement a program designed to reduce the direct and indirect negative consequences of such an arrest; and

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WHEREAS, the Parties agree a Misdemeanor Diversion Program pursuant to which sixteen and seventeen year-olds with no adult criminal record may be diverted from the criminal justice system for eligible misdemeanor charges will serve this goal;

NOW THEREFORE; the Judges, District Attorney, Public Defender, County of Cumberland, Sheriff, Fayetteville Police, Hope Mills Police, and Spring Lake Police agree as follows:

1. **Creation and Establishment of Program.** The Parties in this venture agree to establish the Cumberland County Precharge Diversion Program (“MDP”) subject to the terms and conditions which the Parties may establish and subject to and under the terms of this memorandum of understanding.
2. **Administration.** The County of Cumberland, through its Pretrial Services Department, shall fund to the extent approved by the Board of Commissioners in the annual budget, operate and administer the Cumberland County Precharge Misdemeanor Diversion Program (“MDP”).
3. **Purpose and Overview of the Program.** The purpose of the MDP is to divert first-time arrests or citations of sixteen and seventeen year-olds with no adult criminal record for misdemeanor charges except Class B misdemeanors, and any misdemeanor offenses involving sexual offenses, firearms violations, and traffic offenses.

Where probable cause exists, law enforcement officers may instead of effecting an arrest or issuing criminal process as contemplated under N.C. Gen. Stat. §15A-301 *et seq.* for a person who is 16 or 17 years old at the time of the offense and who is a first-time offender, may issue a referral which will initiate the misdemeanor youth diversionary process by directing the youth to contact the MDP Representative through the contemporaneous completion of an Incident Report and an MDP Referral Form. After the officer confirms that the youth is eligible for MDP, the officer will then submit the information to the MDP Representative within 48 hours. The youth must contact the MDP Representative within 48 hours.

The MDP Representative shall be an employee of Pretrial Services with the responsibility of administration of the MDP program.

The MDP Representative will meet with the youth and prepare a diversion plan and require, among other things, that the youth attend a mandatory Diversion Court session with an assigned Judge, Assistant District Attorney, Public Defender or retained defense counsel. These diversion plans will include programming tailored for the individual youth, such as community service hours, leadership classes, and

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mentoring. After a period of no more than 90 days, the MDP Representative will determine if there has been successful compliance with the diversion plan terms. If the youth referred to the MDP fully complies, no criminal process will be served. In the event, however, the referred youth fails to comply, the MDP Representative will notify the Law Enforcement Officer so that prosecution may be pursued.

4. **Law Enforcement Discretion.** While the law enforcement agencies executing this agreement acknowledge their participation in the MDP, Sheriff's deputies and officers of the Fayetteville, Hope Mills and Spring Lake Police Departments shall have discretion to issue a "youth citation" to a sixteen or seventeen year-old when the deputy or police officer determines there is probable cause to arrest or issue a citation for misdemeanor offenses other than class B misdemeanors or offenses involving sexual offenses, firearms, or traffic offenses. Additionally, as stated in this agreement, if a referred youth fails to comply with the terms of the MDP program, the law enforcement officer may exercise his or her discretion to issue criminal process as that term is contemplated pursuant to N.C. Gen. Stat. §15A-301 *et seq.* Moreover, nothing in this agreement shall limit the authority or the discretion of the head of any law enforcement agency to cause or direct any criminal process to be issued or maintained; nor shall anything in this agreement limit the discretion of a law enforcement officer to cause criminal process to issue against any person, whether before or after referral to the MDP.
5. **Obligations of MDP Administrators.** Cumberland County Pretrial Services shall have the duty and responsibility to establish develop and maintain the misdemeanor precharge diversion program, to maintain all records of or related to such precharge diversion, develop individual diversion plans for MDP participants, provided, however, that consistent with the purposes of the program contemplated under this agreement, each plan must include at least one court appearance before an assigned judge and must be completed successfully within 90 days of referral to the program, and may include a community service requirement, education, training, as well as other diversionary programming based on the participant's needs. The requisites and criteria to be applied by the program include at least the following:
 - a. **Eligibility**

A referred youth in order to be eligible for referral must:

 - (1) Be 16 or 17 years old at time of offense
 - (2) Have no adult criminal record (even if the referred youth may have a juvenile record)
 - (a) Must be potentially subject to a criminal charge for a misdemeanor offense other than a class B offense, or other than sex offenses, firearms offenses, and traffic offenses

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b. Referral Process

Referrals may be made in the following manner when:

- (1) A law enforcement officer determines there is probable cause to arrest or issue criminal process and that an arrest or citation would otherwise occur
- (2) The law enforcement officer believes the youth to be eligible for precharge referral
- (3) The officer gives youth an MDP postcard and explains MDP, particularly including the requirement that the youth contact the MDP Representative within 48 hours
 - (a) The Officer completes an MDP Referral Form and Incident Report (IR) and submits the form within 48 working hours

c. MDP Intake Process

The MDP intake process shall include the following events and conditions:

- (1) MDP Representative receives Referral Forms and IR
- (2) MDP Representative sets up appointment with youth and parent or guardian within 5 days
- (3) At the appointed meeting:
 - (a) the intake interview is completed
 - (b) the Release to Opt-in is signed
 - (c) a general release is signed
 - (d) the Diversion Plan is formulated and entered and
 - (e) the mandatory court date is assigned

d. Elements of the Diversion Plan

The Diversion Plan must:

- (1) include 10 hours of community service, classes or programming based on the individual needs of the youth
- (2) include at least one MDP court session
- (3) be fully and successfully completed within 90 days of being entered
- (4) not permit any repetition of program participation for the same or a substantially similar offense

e. Mandatory MDP Court Session

Every MDP participant will be referred to one Diversion Court session, with an assigned Judge, Assistant District Attorney and Assistant Public Defender or retained defense counsel which shall:

- (1) educate the MDP youth about the direct and collateral consequences of criminal activity

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- (2) be held on a date and at a time which the Cumberland County Pretrial Services will coordinate and arrange with the requisite court officials
- (3) enable law enforcement officers who shall be invited to each session to talk directly with the youth participants

f. MDP Youth Programming

- (1) All MDP programs and diversion requirements are provided to MDP participants without charge to the youth participants
- (2) The MDP Representative will recruit and maintain a list of agencies and entities providing appropriate youth classes or programs for MDP participants
- (3) Programming options will include, but are not limited to:
 - (a) community service
 - (b) teen court
 - (c) leadership and skill-building classes
 - (d) information on collateral consequences and community resources will be provided to every MDP participant and his or her parent or guardian.

g. MDP Compliance

- (1) MDP Diversion Plan compliance will be monitored by the MDP Representative
- (2) Plan requirements and court attendance must be completed by the youth participant within 90 days
- (3) Upon confirmation of compliance, the MDP Representative will release the youth from MDP and notify the referring MDP Law Enforcement Officer
- (4) In the case of non-compliance or new charges for the youth, the Law Enforcement Officer will be notified so that the issuance of criminal process can be considered
- (5) Records of MDP participation and of the participant's compliance or noncompliance will be maintained by the MDP
- (6) No youth previously referred to MDP will be permitted to again participate in the MDP for the same offense or for related or substantially similar offense conduct.

6. Term - Renewal of the Agreement.

This memorandum of agreement is intended to be temporary in nature, and shall initially be valid for a period of two hundred seventy (270) days from the date of its inception, during which the Parties will evaluate the program and make determination concerning its viability, propriety, and effectiveness and may during such period

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modify or adjust the MDP and its rules, conditions, operating procedures or the like.

- a. **Term.** Although subject to renewal, either expressly or as provided and contemplated under this agreement, the express term of this agreement shall be as follows:

(1) **Effective Dates.** This agreement shall be effective from September 1, 2016, through May 29, 2017, but any subsequent terms is intended to and shall be for the period from June 30, 2017 until June 30, 2018 (the fiscal year of each party being defined as the period from July 1 of the current calendar year and June 30 of the next succeeding calendar year), unless renewed, extended or terminated as provided in this agreement. In the event that this agreement is amended or modified during the term of the effective dates, unless otherwise provided, such amendment or modification of this agreement shall be deemed to relate back to the initial effective date of this agreement.

(2) **Renewal.** This agreement may be renewed by an express writing for that purpose executed on or before June 30, 2017, to be effective for the next fiscal year, unless terminated during the contemplated period of the contract as provided in this agreement. Unless and until terminated as provided under the terms of this writing, this agreement shall be deemed to be renewed automatically at the end of the effective expiration date and shall be deemed to continue for the next succeeding fiscal year.

- b. **Amendment or Modification.** This Agreement may be modified or amended by mutual consent of the parties as long as the amendment is executed in the same fashion as this Agreement. Modifications to the operations, regulations or procedures substantially affecting the operation or effect of the MDP shall be presented to the representatives designated by the Parties for consideration of modification or amendment to this agreement. Failure to present such changes in substance or procedure to the Parties and the Parties' inability or unwillingness to agree to such change shall render such change ineffective unless and until this memorandum of understanding shall be formally modified or amended, and any acts taken without such formal alteration or modification shall be *ultra vires*.

- c. **Termination or Withdrawal.** Notwithstanding any other provision of this agreement, any party to this agreement, either with or without cause, upon notice being served in writing to the other parties of not less than 30 days prior to the effective date of such termination, may withdraw from or the parties may agree to terminate this agreement either with or without announcing the cause for such withdrawal or termination. In the event of such withdrawal, then the obligations

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of the withdrawing Parties party under the terms of this agreement shall cease and become unenforceable as to the withdrawing Parties as of the effective date of the termination. In the event of an agreed termination, then the obligations of the Parties party under the terms of this agreement shall cease and become unenforceable as of the effective date of the termination. Unless otherwise expressly provided, an amendment, modification, or agreed alteration of this agreement shall not operate as or shall not be interpreted as a termination of this agreement.

7. **Compliance with Law, Regulations, Policies, Standards, and Directives.** The Parties acknowledge there is no intent to engage the services of any contractor during the initial term of this agreement in the current fiscal year; however; in the event that the MDP shall engage the services of any contractor not a governmental unit, then the MDP shall require such contractor to comply with all applicable laws, rules, ordinances, executive orders or other requirements of any government or subdivision of government which may govern performance of this agreement or the MDP, including , but not limited to, The Fair Labor Standards Act, and the Equal Employment Opportunity Act. The Contractor shall comply with, and insure its subcontractors comply with, all local, state, and federal laws, regulations and policies relating to safety and health and employment. Having due regard to the foregoing, parties to this agreement shall comply with all laws, regulations, and ordinances, directives, executive orders, or other requirements of any governments or agencies thereof which may govern its performance under this Agreement, including, but not limited to, the provisions of Chapters 1, 1A, 14, 15A, 122C , 153A, and 162 of the North Carolina General Statutes, equal employment laws, and other applicable law, all applicable State and Federal laws and regulations as well as applicable ordinances of local government entities who are partners or parties to this memorandum of understanding, and including, but not limited to:
 - a. **ADA Compliance/Non-Discrimination/Anti-Retaliation.** Without limiting the generality of the foregoing, the parties shall comply with Title VI and VII of the Civil Rights Act of 1964, Section 504, of the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 (ADA), Chapter 168 of the North Carolina General Statutes and all requirements imposed by the requisite Federal regulations, rules and guidelines issued pursuant to these Titles with respect to such contractor.
 - b. **E-verify Compliance.** The contractor shall comply with the provisions of Article 2 of Chapter 64 of the North Carolina General Statutes and the terms of N.C. Gen. Stat. § 143-133.3. Without limiting the generality of the foregoing, the contractor as an employer shall comply with and certify that continued compliance with the

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provisions of N.C. Gen. Stat. § 64-26, and verify the work authorization of the contractor's employee through E-Verify. Further, such contractor-employer shall retain the record of the verification of work authorization required by such provision of law while the employee is employed and for one year thereafter, and shall make such certification and offer such proof of compliance as may reasonably be required by the other party to this agreement.

- c. **Iran Divestment Act Certification.** N.C. Gen. Stat. § 143C-6A-5(a) requires that a vendor, contractor, or bidder provide a certification for bids or contracts with the State of North Carolina, a North Carolina local government, or any other political subdivision of the State of North Carolina establishing that the party to the contract, the vendor or bidder is not listed on the Final Divestment List created or maintained by the State Treasurer pursuant to N.C. Gen. Stat. § 143C-6A-4. The certification is required at the following times: (1) when a bid is submitted; (2) when a contract is entered (if the certification was not already made when the vendor made its bid); and (3) when a contract is renewed. Additionally, N.C. Gen. Stat. § 143C-6A-5(b) requires that contractors with the State, a North Carolina local government, or any other political subdivision of the State of North Carolina must not utilize any subcontractor found on the State Treasurer's Final Divestment List, and must so certify. Accordingly, any such contractor shall be obligated to make the required certification, and, in particular, but without limitation, hereby certifies that it is not listed on the Final Divestment List created or maintained by the State Treasurer pursuant to N.C. Gen. Stat. § 143C-6A-4, and has not, does not, will not and must not utilize any subcontractor found on the State Treasurer's Final Divestment List.
8. **Agency and Authority.** The parties represent that they have the authority to enter this agreement.
9. **Severability.** Should any term, duty, obligation or provision of this Agreement be found invalid or unenforceable, such finding shall in no way affect the validity of other terms, duties, obligations, provisions, which shall remain valid and enforceable and in full force and effect.
10. **Applicable Law - Situs.** This Agreement shall be governed by the internal laws of the State of North Carolina without regard to the conflicts of law provisions thereof.
11. **Other and Further Assurances.** In order to give effect to the purposes and terms of this agreement, the parties agree to promulgate and execute such other document or other and further assurances, certificates, agreements, memoranda or the like which may reasonably be required to give effect to this agreement, its terms, conditions,

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covenants, and purposes upon request and within a reasonable time following such request.

In Witness Whereof, the parties hereto have executed this Memorandum of Agreement.

Commissioner Council thanked Commissioner Adams for his work on the draft Memorandum of Understanding for the Misdemeanor Diversion Program. Commissioner Adams and Rick Moorefield, County Attorney, stated there were a few changes that needed to be made to the draft memorandum of understanding but the program components described in the document were final. Ms. Cannon stated she would like to thank Mr. Moorefield and Phyllis Jones, Assistant County Attorney, for the last minute work involved in getting the draft MOU on the Policy Committee agenda today.

The consensus of the Policy Committee was to add the Memorandum of Understanding for the Misdemeanor Diversion Program to the September 6, 2016 Board of Commissioners agenda subject to a few changes. Mr. Moorefield stated he would make the changes and send out the revised MOU to the Board of Commissioners prior to the September 6, 2016 meeting for review.

4. OTHER ITEMS OF BUSINESS

There were no other items of business.

MEETING ADJOURNED AT 11:48 AM

**SOLID WASTE MANAGEMENT****MEMO FOR THE AGENDA OF THE
OCTOBER 6, 2016 MEETING OF THE POLICY COMMITTEE**

TO: POLICY COMMITTEE MEMBERS
FROM: JEFFERY P. BROWN, PE, INTERIM SOLID WASTE DIRECTOR
THROUGH: JAMES E. LAWSON, DEPUTY COUNTY MANAGER
DATE: SEPTEMBER 29, 2016
SUBJECT: CONSIDERATION OF APPROVAL OF CONTRACTOR
PREQUALIFICATION POLICY
Requested by: JEFFERY P. BROWN, PE, INTERIM SOLID WASTE DIRECTOR
Presenter(s): JEFFERY P. BROWN, PE, INTERIM SOLID WASTE DIRECTOR
Estimate of Committee Time Needed: 10 MINUTES

BACKGROUND:

CDM Smith, the Solid Waste Department's consulting engineer, is reaching the final stages in completing the construction drawings as well as the permitting with the Department of Environmental Quality (DEQ) for the construction of cells #9 and #10 at the Ann Street Subtitle D Landfill. In order to ensure that the County gets a well-qualified contractor that has experience in landfill construction, it would be advantageous for the Solid Waste Department to prequalify contractors. In order to prequalify contractors, North Carolina General Statute 143-135.8 requires the unit of local government to adopt an objective prequalification policy as well as an assessment tool that includes the prequalification scoring values and the minimum score required for prequalification.

In conjunction with the County Attorney, the Solid Waste Department has attached a prequalification policy along with assessment tool for this specific project.

RECOMMENDATION/PROPOSED ACTION:

The Interim Solid Waste Director, the County Attorney and County Management recommend that the Policy Committee adopt the attached Prequalification Policy along with the assessment tool for the construction of cells #9 and #10 at the Ann Street Subtitle D Landfill and forward it to the Board of Commissioners for its consideration at their October 17th meeting.

Prequalification Policy Cumberland County, North Carolina

In accordance with North Carolina General Statute 143-135.8, Cumberland County has established this Prequalification Policy which shall be used for construction projects and repair projects for which Cumberland County intends to prequalify bidders. The Contractor Prequalification Policy establishes a process of evaluating and determining whether potential bidders have the skill, judgment, integrity, sufficient financial resources, and ability necessary to faithfully perform a contract for construction or repair. This Prequalification Policy pertains only to projects for which Cumberland County intends to prequalify bidders. The policy is intended to be general in nature and therefore, any prequalification process initiated by Cumberland County will require the preparation of a separate project specific Contractor Prequalification Form (also known as an assessment tool which outlines criteria for that specific project). This Prequalification Policy and the use of the Contractor Prequalification Form shall be applied objectively.

On projects requiring prequalification, only bids from prequalified bidders will be accepted. Bids from non-prequalified firms will be deemed non-responsive and will not be opened.

Contractor Prequalification Form

For each construction or repair project in which the County intends to prequalify bidders, a project specific Contractor Prequalification Form will be adopted by the Cumberland County Board of Commissioners for each project and will be available to all interested firms. The form shall include specific requirements for the project and shall meet all the following criteria:

1. Must be uniform, consistent, and transparent in its application to all bidders.
2. Must allow all bidders who meet the prequalification criteria to be prequalified to bid on the construction or repair work project.
3. Clearly state the prequalification criteria, which must comply with all of the following:
 - a. Be rationally related to the construction or repair work.
 - b. Not require that the bidder has previously been awarded a construction or repair project by Cumberland County.
 - c. Permit bidders to submit history or experience with projects of similar size, scope, and complexity.
4. Clearly state the assessment process of the criteria to be used.
5. Provide a process for a denied bidder to protest the County's determination.
6. Outline a process for notifying a denied prequalified bidder.

Contractor Prequalification Evaluation Process

Cumberland County shall establish a Prequalification Review Committee to review all of the prequalification applications. The Prequalification Review Committee shall, at a minimum, consist of: a representative from the Cumberland County Purchasing Department, a representative from the Cumberland County Engineering & Infrastructure Department, and a

representative from the Cumberland County Department in which the work is being completed for. The committee may also include other pertinent individuals. The committee will evaluate each application and the accompanying scoring matrix using the criteria established in the Project Specific Contractor Prequalification Form to determine whether the applicant is prequalified to bid on the project, based on the information contained in the application. All firms that submitted prequalification applications will be notified, in writing, of the committee's decision.

Protest Procedure

Any firm(s) that is denied prequalification to bid may protest the decision as outlined below:

1. A firm which is denied prequalification may protest the committee's decision by filing a written protest to the County Manager, unless otherwise designated, within three (3) business days of receiving the notice that the firm has been denied prequalification. Specific notification details will be included in the project specific Contractor Prequalification Form.
2. The protest shall clearly state all of the reasons why the firm is contesting the denial and include all documents supporting the firm's position.
3. The Prequalification Review Committee will review the written protest and notify the firm within five (5) business days of their decision.
4. All protest review decisions by the Prequalification Review Committee are final.
5. Such protest process shall be completed prior to opening bids under the provisions of N.C. Gen. Stat. § 143-129 (b) and shall allow sufficient time for a bidder subsequently prequalified pursuant to a protest to submit a bid on the contract for which the bidder is subsequently prequalified.
6. A firm's failure to comply with any requirements of the protest procedures of this section shall result in the firm's protest being terminated and rendered moot.

Notice of Decision

All firms that submitted applications for prequalification shall be promptly notified in writing of the Prequalification Review Committee's decision, including the reason for denial, via e-mail. Notice shall be provided prior to the opening of bids for the project and with sufficient time for the firm to protest the denial of the application. Such notice is available upon request as well.

**Cumberland County
Contractor Prequalification Form**

Pursuant to the statute, this form gathers information about the contractors seeking to qualify for the work and provides a general format for the prequalification criteria. **Completing this questionnaire does not guarantee prequalification.** Evaluation of the submittal shall be performed by the prequalification committee in accordance with GS 143-128.1, 143-135.8 and the Cumberland County Prequalification Policy (attached).

This form must be utilized in order to be considered responsive and reviewed by the Prequalification Committee.

PREQUALIFICATION INFORMATION:

Based on the scoring matrix information provided under each section, all scores totaling 80 points or higher shall be considered prequalified.

Per the Cumberland County Prequalification Policy attached to this form, a firm which is denied prequalification may file a written protest to the Assistant County Manager within three (3) business days of receiving the denial notice. Protests may be sent via email to mcardinali@co.cumberland.nc.us or mailed to the address listed below:

Melissa Cardinali, Assistant County Manager
Cumberland County
PO Box 1829
Fayetteville, NC 28302

PREQUALIFICATION DUE DATE/TIME: _____
(date) (time)

Submitted to: Jeffery P. Brown, PE
Contact Name receiving prequalifying packages

Cumberland County
Agency/Institution

698 Ann Street
Fayetteville, NC 28301
City/State Zip Code

910-321-6830
Phone number

910-321-6840
Fax Number

jbrown@co.cumberland.nc.us
E-mail address

Project: Cumberland County MSW Landfill – Construction of Cells #9 & #10
Name of Project

Cumberland County
Project Owner

698 Ann Street, Fayetteville, NC 28301
Project Location/Address

Cumberland County
Contractor Prequalification Form

Contractor Prequalification Evaluation Process

Cumberland County shall establish a Prequalification Review Committee to review all of the prequalification applications. The Prequalification Review Committee shall, at a minimum, consist of: a representative from the Cumberland County Purchasing Department, a representative from the Cumberland County Engineering & Infrastructure Department and a representative from the Cumberland County Department in which the work is being completed for. The committee may also include other pertinent individuals. The committee will evaluate each application and the accompanying scoring matrix using the criteria established in the Project Specific Contractor Prequalification Form to determine whether the applicant is prequalified to bid on the project, based on the information contained in the application. All firms that submitted prequalification applications will be notified, in writing, of the committee's decision.

Protest Procedure

Any firm(s) that is denied prequalification to bid may protest the decision as outlined below:

1. A firm which is denied prequalification may protest the committee's decision by filing a written protest to the County Manager, unless otherwise designated, within three (3) business days of receiving the notice that the firm has been denied prequalification. Specific notification details will be included in the project specific Contractor Prequalification Form.
2. The protest shall clearly state all of the reasons why the firm is contesting the denial and include all documents supporting the firm's position.
3. The Prequalification Review Committee will review the written protest and notify the firm within five (5) business days of their decision.
4. All protest review decisions by the Prequalification Review Committee are final.
5. Such protest process shall be completed prior to opening bids under the provisions of N.C. Gen. Stat. § 143-129 (b) and shall allow sufficient time for a bidder subsequently prequalified pursuant to a protest to submit a bid on the contract for which the bidder is subsequently prequalified.
6. A firm's failure to comply with any requirements of the protest procedures of this section shall result in the firm's protest being terminated and rendered moot.

Notice of Decision

All firms that submitted applications for prequalification shall be promptly notified in writing of the Prequalification Review Committee's decision, including the reason for denial, via e-mail. Notice shall be provided prior to the opening of bids for the project and with sufficient time for the firm to protest the denial of the application. Such notice is available upon request as well.

**Cumberland County
Contractor Prequalification Form**

CDM Smith
Project Engineer

February 2017
Project Start Date (Approx.)

270 calendar days
Project Duration

December 2016
Anticipated Bid Date

Project Description: (An in-depth narrative of the details of the project, site, trades, LEED, etc.)

Construction of approximately 13 acres of lined landfill, including earthwork, composite liner system, leachate collection system, leachate pumping station and force main, access roads, erosion control, and site stabilization. This is for the construction of cells #9 and #10.

SECTION 1. GENERAL COMPANY INFORMATION

1. a. Primary/Main office location

Company Name

Physical Address

Mailing Address

City/State Zip Code + 4

() _____

Phone number

() _____

Fax number

Primary Contact Name

Secondary Contact Name

Primary Contact Email Address

Secondary Contact Email Address

[Matrix: 0-1 point. If completely filled in give 1 point. If not, give 0 points.]

1. b. Local office location responsible for this project

Company Name

Physical Address

Mailing Address

City/State Zip Code + 4

() _____

Phone number

() _____

Fax number

Primary Contact Name

Secondary Contact Name

Primary Contact Email Address

Secondary Contact Email Address

**Cumberland County
Contractor Prequalification Form**

[Matrix: 0-1 points. If completely filled in give 1 point. If not, give 0 points.]

1. c. Biographical Summaries

Attach names, titles, and brief biographical summaries of all corporate officers, including specific service with the applicant? Have you attached the biographical summaries ☐ Yes ☐ No

[Matrix: 0-2 points. If completely filled in give 2 points. If not, give 0 points.]

1. d. Consistent Operation

Has your firm consistently operated under the company name used herein for at least the last five (5) years, and that all documented experience provided for this prequalification was achieved by personnel working directly for the applicant under the current company name? ☐ Yes ☐ No

[Matrix: 0-5 points. If yes, give 5 points. If no, give 0 points.]

1. e. Licensing Information (Please provide all North Carolina professional licenses required for you to perform your services.)

| <u>NC License number/name of licensee</u> | <u>License Limit/Level</u> | <u>State/County/City Privilege License (provide copy)</u> |
|---|----------------------------|---|
| <hr/> | <hr/> | <hr/> |
| <hr/> | <hr/> | <hr/> |
| <hr/> | <hr/> | <hr/> |

Has any license ever been denied or revoked? ☐ Yes ☐ No If yes, please describe,

[Matrix: 0-2 points. If completely filled in give 2 points. If not, give 0 points. If license has been revoked, give 0-2 points based on explanation provided]

Bonding

1. f.(1) Attach letter, dated within the last 30 days, from your surety company, signed by their Attorney in Fact, verifying their willingness to issue payment and performance bonds for the estimated amount of \$7,500,000 for this project, on behalf of your firm. Surety company bond rating shall be rated "A" or better under the A.M. Best Rating system or The Federal Treasury List.

Have you attached a surety letter? ☐ Yes ☐ No

[Matrix: 0-4 points. If surety letter attached and surety company bond rate is A or better, give 4 points. If surety company bond rate is B, give 2 points. If surety bond company bond rate is less than B, give 0 points]

1.f.(2) Have ad Funds been expended by a Surety Company on your firm's behalf? ☐ Yes ☐ No If yes, explain

[Matrix: 0-4 points. If no funds expended by surety company give 4 points. If not, give 0 points.]

Cumberland County
Contractor Prequalification Form

Equipment

1. g. Attach an equipment list (including make, model, and year) that will be utilized by the applicant for this project. Specify if equipment is owned or leased.

Have you attached the equipment list? ☐ Yes ☐ No

[Matrix: 0-4 points. If yes, give 4 points. If not, give 0 points.]

Insurance

1. h. Firms must indicate that they can provide evidence of insurance coverage, should they be the successful bidder by attaching a copy of their insurance certificate. Have you attached a copy of your insurance certificate? ☐ Yes ☐ No

[Matrix: 0-3 points. If insurance certificate attached, give 3 points. If not, give 0 points.]

Self-Performed Work

1. i. The Contract Documents for this project will require that the employees of the applicant must complete 50% of the work on this project? Will the applicant self-perform 50% or more of the work ☐ Yes ☐ No

[Matrix: 0-3 points. If yes, give 3 points. If not, give 0 points.]

SECTION 2. GENERAL REQUIREMENTS

Experience - Size/Capacity/Workload

2. a. (1) How many projects do you currently have under contract or in progress and what is their total dollar value?

- _____ (# of projects) ;
- \$ _____ (Current projects contract amount);
- \$ _____ (Projects current amount remaining to bill)

[Matrix: 0-2 points. If section completed give 2 points. If not, give 0 points.]

2. a. (2) List the three largest contracts currently under contract or in progress, including for each, the name of the project, owner, architect and/or GC/CMR and contact information below.

| #1 –Project Name | |
|-----------------------------------|--|
| Description of Work Performed | |
| Contract Delivery Method (CM/GC)? | |
| Owner Name/ Representative | |
| Owner Address/Phone #/Email | |
| Engineer Name/Representative | |
| Engineer Address/Phone #/Email | |

**Cumberland County
Contractor Prequalification Form**

| | |
|-------------------------------------|--|
| GC or CM Name/Representative | |
| GC or CM Address/Phone #/Email | |
| Contract Dollar Value | |
| Percentage Complete | |
| Current Anticipated Completion Date | |

| | |
|-------------------------------------|--|
| #2 –Project Name | |
| Description of Work Performed | |
| Contract Delivery Method (CM/GC)? | |
| Owner Name/ Representative | |
| Owner Address/Phone #/Email | |
| Engineer Name/Representative | |
| Engineer Address/Phone #/Email | |
| GC or CM Name/Representative | |
| GC or CM Address/Phone #/Email | |
| Contract Dollar Value | |
| Percentage Complete | |
| Current Anticipated Completion Date | |
| #3 –Project Name | |
| Description of Work Performed | |
| Contract Delivery Method (CM/GC)? | |
| Owner Name/ Representative | |
| Owner Address/Phone #/Email | |
| Engineer Name/Representative | |
| Engineer Address/Phone #/Email | |
| GC or CM Name/Representative | |
| GC or CM Address/Phone #/Email | |
| Contract Dollar Value | |
| Percentage Complete | |
| Current Anticipated Completion Date | |

[Matrix: 0-6 points. For each project above, if information is complete, give 2 points. If information is incomplete, give 0 points.]

Cumberland County
Contractor Prequalification Form

Litigation/Claims

2. b. (1) Has your company ever been involved in any judgments, claims, arbitration or mediation proceedings, or suits, whether resolved or still pending resolution? ☐ Yes ☐ No If yes, state the project name(s), year(s), case number and reason why: _____

[Matrix: 0-2 points. If company has not been involved in any of the above give 2 points. If they have, give 0 to 2 points based on explanation provided.]

2. b. (2) Has your company been involved in a dispute with a project Owner involving claims for liquidated damages or compensation in excess of the bid amount, excluding change orders within the last five years? ☐ Yes ☐ No If yes, state the project name(s), year(s), case number and reason why: _____

[Matrix: 0-2 points. If there are no current judgments, claims, arbitration, suits or mediation pending give 2 points. If there is, give 0 points.]

2. b. (3) Has your company ever failed to complete work awarded to it? ☐ Yes ☐ No If yes, please provide project name(s), year(s), and reason why: _____

[Matrix: 0-5 points. If company has never failed to complete work it has been awarded then given 5 points. If they have failed to complete work then, give 0 points.]

2.b. (4) Has your present company, its officers, owners, or agents ever been convicted of charges relating to conflicts of interest, bribery, or bid-rigging? ☐ Yes ☐ No

[Matrix: 0-3 points. If "Yes" give 0 points. If "No", give 3 points]

2.b. (5) Has your present company, its officers, owners, or agents ever been barred from bidding public work in North Carolina? ☐ Yes ☐ No

[Matrix: 0-3 points. If "Yes" give 0 points. If "No", give 3 points]

SECTION 3. PROJECT SPECIFICS

3.a. The assigned project superintendent for this project shall be: _____.
Include a resume. Have you included a resume? ☐ Yes ☐ No

[Matrix: 0-2 points. If resume included, give 2points. If not, give 0 points.]

3.b. The experience this superintendent has on this specific type of project is: ____ years experience ____ number of landfills with liner system _____ square feet of liner system.

[Matrix: 0-6 points. If 2 years or greater give 2 pts. If 2 landfills or greater give 2 pts. If 400,000 square feet of liner or greater give 2 pts.]

Cumberland County
Contractor Prequalification Form

3.c. The assigned project manager for this project shall be _____.
Include a resume. Have you included a resume? ☐ Yes ☐ No

[Matrix: 0-2 points. If resume included, give 2 points. If not, give 0 points.]

3.d. The experience this project manager has on this specific type of project is: ____ years experience ____ number of landfills with liner system _____ square feet of liner system.

[Matrix: 0-6 points. If 2 years or greater give 2 pts. If 2 landfills or greater give 2 pts. If 400,000 square feet of liner or greater give 2 pts.]

Similar Projects

3.e. The applicant must provide information on previous projects in order to verify that at least two (2) Subtitle D landfills with base liner systems (low permeability soil liner underlying high-density polyethylene liner) totaling at least 2,000,000 square feet have been completed under the applicant's current company name. Three (3) tables have been provided to include this information. If additional projects are needed to demonstrate that the above requirement has been met, please attach the information in the format listed below for the additional projects:

| | |
|--|--|
| #1 –Similar - Project Name | |
| Description of Work Performed (include sizes, quantities, structures, performance specification requirements, i.e. permeability, and equipment utilized) | |
| Square Footage of Liner System | |
| Manufacturer and Installation Contractor for geomembrane liner | |
| Percentage of self-performed work | |
| Original Bid Amount | |
| Final Contract Amount (attach explanation for discrepancy) | |
| Contract Duration | |
| Actual Construction Duration | |
| Contract Delivery Method (CM/GC)? | |
| Owner Name/ Representative | |
| Owner Address/Phone #/Email | |
| Engineer Name/Representative | |
| Engineer Address/Phone #/Email | |
| #2 –Similar - Project Name | |

**Cumberland County
Contractor Prequalification Form**

| | |
|---|--|
| Description of Work Performed (include sizes, quantities, structures, performance specification requirements, i.e. permeability, and equipment utilized) | |
| Square Footage of Liner System | |
| Manufacturer and Installation Contractor for geomembrane liner | |
| Percentage of self-performed work | |
| Original Bid Amount | |
| Final Contract Amount (attach explanation for discrepancy) | |
| Contract Duration | |
| Actual Construction Duration | |
| Contract Delivery Method (CM/GC)? | |
| Owner Name/ Representative | |
| Owner Address/Phone #/Email | |
| Engineer Name/Representative | |
| Engineer Address/Phone #/Email | |

[Matrix: 0-30 points based on requirements of at least two (2) Subtitle D Landfills total 2,000,000 square feet of base liner system. If the requirements are met and all information has been provided, give 15 points for each project. If projects listed above are not a Subtitle D landfill with base liner system, or incomplete information has been provided, give 0 points. In order to 30 points to be granted, the similar projects provided in this section must have been completed under the current company name. A maximum of 5 points will be granted for projects completed by company personnel in a project management role under the operation of a previous employer.

**Cumberland County
Contractor Prequalification Form**

SECTION 4. SIGNATURE

By signing this document, you are acknowledging that all answers are true to the best of your knowledge. **Any answers found to be falsified will bar you from being prequalified on this project.**

Company Name (as licensed in NC)

Physical Address

Mailing Address

a. Dated this day of: _____

Submitted by: _____
Signature By Authorized Officer

Print Title of Authorized Officer

Phone: _____
Contact person's phone number

E-mail: _____
Contact person's E-mail address

b. Notary Certification:

(State)

(County)

I, a Notary Public of the County and State aforesaid, certify that _____, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official seal, this the _____ day of _____, 20____.

(Official Notary Seal or Stamp)

Signature of Notary Public

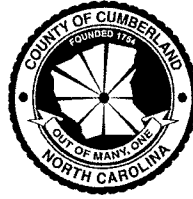
My commission expires _____, 20____

[Matrix: 0-2 points. If signature section fully executed with notary give 2 points. If not, 0 points.]

Cumberland County Contractor Prequalification Form

| Cumberland County - Contractor Prequalification Ratings Matrix | | | | | | | | | | |
|--|---|------------|-----|-----|-----|-----|-----|-----|-----|-----|
| Date: | | | | | | | | | | |
| Project Name: | Cumberland County Landfill Construction; Cells #9 and #10 | | | | | | | | | |
| | | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| | | | | | | | | | | |
| Form # | Description | Max Pts | Pts | Pts | Pts | Pts | Pts | Pts | Pts | Pts |
| 1. GENERAL COMPANY INFORMATION | | | | | | | | | | |
| 1.a. | Primary/Main Office Location | 1 | | | | | | | | |
| 1.b. | Local Office Location | 1 | | | | | | | | |
| 1.c. | Biographical Summaries | 2 | | | | | | | | |
| 1.d. | Consistent Operation | 5 | | | | | | | | |
| 1.e. | Licensing Information | 2 | | | | | | | | |
| 1.f.(1) | Bonding - Surety letter attached | 4 | | | | | | | | |
| 1.f.(2) | Bonding - Funds expended by Surety Co. on firm's behalf | 4 | | | | | | | | |
| 1.g. | Equipment List Attached | 4 | | | | | | | | |
| 1.h. | Insurance Certificate Attached | 3 | | | | | | | | |
| 1.i. | Self Performed Work | 3 | | | | | | | | |
| | Subtotal | 29 | | | | | | | | |
| 2. GENERAL REQUIREMENTS | | | | | | | | | | |
| 2.a.(1) | Experience - Number of current projects under contract | 2 | | | | | | | | |
| 2.a.(2) | Experience - Selected Contract 1 | 2 | | | | | | | | |
| 2.a.(2) | Experience - Selected Contract 2 | 2 | | | | | | | | |
| 2.a.(2) | Experience - Selected Contract 3 | 2 | | | | | | | | |
| 2.b.(1) | Litigation/Claims | 2 | | | | | | | | |
| 2.b.(2) | Liquidated Damages/Compensation Claims - Last 5 years | 2 | | | | | | | | |
| 2.b.(3) | Failed to complete construction contract | 5 | | | | | | | | |
| 2.b.(4) | Convicted of Conflicts of Interest/Bribery/Bid-Rigging | 3 | | | | | | | | |
| 2.b.(5) | Barred from Public Work in North Carolina | 3 | | | | | | | | |
| | Subtotal | 23 | | | | | | | | |
| 3. PROJECT SPECIFIC REQUIREMENTS | | | | | | | | | | |
| 3.a. | Project Superintendent included resume | 2 | | | | | | | | |
| 3.b. | Project Superintendent Experience | 6 | | | | | | | | |
| 3.c. | Project Manager included resume | 2 | | | | | | | | |
| 3.d. | Project Manager Experience | 6 | | | | | | | | |
| 3.e.(1) | Similar Project Information 1 | 15 | | | | | | | | |
| 3.e.(2) | Similar Project Information 2 | 15 | | | | | | | | |
| | Subtotal | 46 | | | | | | | | |
| 4. SIGNATURE | | | | | | | | | | |
| 4 | Fully executed including notary | 2 | | | | | | | | |
| | Subtotal | 2 | | | | | | | | |
| | | | | | | | | | | |
| TOTAL POINTS | | 100 | | | | | | | | |
| All scores 80 and above will be prequalified. | | | | | | | | | | |

RICKEY L. MOOREFIELD
County Attorney



ITEM NO. 3

PHYLLIS P. JONES
Assistant County Attorney

ROBERT A. HASTY, JR.
Assistant County Attorney

OFFICE OF THE COUNTY ATTORNEY

5th Floor, New Courthouse • P.O. Box 1829 • Suite 551 • Fayetteville, North Carolina 28302-1829
(910) 678-7762

**MEMO FOR THE AGENDA OF THE OCTOBER 6, 2016,
MEETING OF THE POLICY COMMITTEE**

TO: Policy Committee; Deputy Co. Manager James Lawson; Health Director
Buck Wilson
FROM: Co. Atty. *R. Moorefield*
DATE: September 29, 2016
SUBJECT: Revised Smoking Ordinance

Requested by Health Director and County Manager
Estimate of Time Needed: 15 minutes
Attachments: Draft Revised Smoking Ordinance

BACKGROUND:

The draft of the revised smoking ordinance is attached. It expands the coverage of the existing ordinance by adding all county facilities located anywhere, all privately-owned public places that are not located in any city, and e-cigarettes. The additional coverage of all county facilities and public places was requested by the Health Director and proposed to the April 2016 Policy Committee. The addition of e-cigarettes was requested by the county manager and was not presented at the April Policy Committee. The recent explosion of an e-cigarette carried by a person in front of the elevators on the first floor of the courthouse brought attention to an explosion hazard that had not been considered before.

The draft ordinance is in the form of the model ordinance developed by the North Carolina Department of Health and Human Services. It was obtained by Ms. Ashley Curtice, Regional Tobacco Control Manager at the Health Department. The model incorporates a substantial portion of the language in the enabling statute. Neither the enabling statute nor the model ordinance regulates e-cigarettes; however, on March 2, 2016, the U. S. Dept. of Transportation banned e-cigarettes from all commercial flights, treating them the same as regular cigarettes. (See DOT-OST-2011-0044). E-cigarettes have also been banned from being carried on commercial flights in checked luggage since late 2015. (See 80 FR 66817). Even without being addressed in the enabling statute, the reasons given for the development of these federal regulations provides a sufficient public policy basis for the county to prohibit these devices from county facilities and privately owned public places as a public health and safety matter.

The proposed ordinance proposes three distinct areas to which the prohibition of smoking would be expanded. Those are the county facilities not presently covered, privately-owned businesses

not located in a city, and e-cigarettes. The county facilities that are not presently covered are the Crown Complex, J. P. Riddle Stadium and county parks and recreation facilities. The ordinance proposes an effective date of April 1, 2017, to afford those facilities and businesses that are affected a generous amount of time to implement it. The enforcement provisions of the ordinance are dictated by the enabling statute. Enforcement outside those county buildings where security is provided by the Sheriff's Office will be difficult.

RECOMMENDATION/PROPOSED ACTION:

The Committee may recommend the ordinance as proposed or may choose not to expand it to all three areas.

**AN ORDINANCE OF THE CUMBERLAND COUNTY BOARD OF COMMISSIONERS
REPEALING CHAPTER 9.5 ARTICLE VIII. SMOKING, OF THE CUMBERLAND
COUNTY CODE AND ADOPTING A REVISED CHAPTER 9.5, ARTICLE VIII.
SMOKING, OF THE CUMBERLAND COUNTY CODE**

WHEREAS, Cumberland County adopted an ordinance on March 17, 2014 (Cumberland County Code §9.5-91-98) prohibiting smoking within all county-owned or leased buildings, grounds and motor vehicles except certain entertainment and recreation facilities; and,

WHEREAS, on January 2, 2010, “An Act To Prohibit Smoking In Certain Public Places And Certain Places Of Employment, North Carolina Session Law 2009-27, became effective, authorizing local governments to adopt and enforce ordinances “that are more restrictive than State law and that apply in local government buildings, on local government grounds, in local vehicles, or in public places;” and

WHEREAS, Cumberland County is committed to providing a safe and healthy workplace in all County facilities for its employees and a safe and healthy environment for the public; and

WHEREAS, Cumberland County provides resources to its employees and residents who want to quit the use of tobacco products and encourages employees and residents to talk to their health care provider about quitting, ask about appropriate pharmacotherapy available through their health insurance plan and use the free quitting support services of the North Carolina Tobacco Use Quitline at 1-800-QUIT-NOW (1-800-784-8669); and

WHEREAS, Cumberland County wishes to minimize the harmful effects of smoking among County employees and eliminate secondhand smoke exposure for employees and the public in public places, in county buildings, and on public grounds; and

WHEREAS, the Cumberland County Smoking Ordinance has been codified as Chapter 9.5, Article VIII, Sections 9.5-90-99 of the Cumberland County Code; and

Whereas, the Board of Commissioners wishes to make a comprehensive revision of Chapter 9.5, Article VIII. Smoking. of the Cumberland County Code by the repeal of Chapter 9.5, Article VIII. Smoking, of the Cumberland County Code and the adoption of the Revised Chapter 9.5, Article VIII. Smoking, of the Cumberland County Code as set forth below; and

WHEREAS, the Board of Commissioners finds the comprehensive revision of Chapter 9.5, Article III. Smoking, of the Cumberland County Code to be in the public interest and to promote the public health, safety, and welfare,

NOW, THEREFORE, BE IT ORDAINED by the Cumberland County Board of Commissioners that:

Chapter 9.5, Article VIII. Smoking, of the Cumberland County Code is hereby repealed in its entirety and a revised Chapter 9.5, Article VIII. Smoking, of the Cumberland County Code is hereby adopted.

Sec. 9.5-90. Authority.

This ordinance is enacted pursuant to N.C. Gen. Stat. 130A-498 and 153A-121.

Sec. 9.5-91. Purpose and intent.

According to the Centers for Disease Control and Prevention (CDC), tobacco use and secondhand smoke exposure are leading preventable causes of illness and premature death in North Carolina and the nation.¹ A 2006 report issued by the United States Surgeon General stated that the scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke, and that secondhand smoke has been proven to cause cancer, heart disease, and asthma attacks in both smokers and nonsmokers.² The CDC advises that all individuals with coronary heart disease or known risk factors for coronary heart disease should avoid all indoor environments that permit smoking.³ In 2009, the United States Food and Drug Administration (FDA) announced that an analysis of e-cigarette samples indicated that the e-cigarettes contained not only nicotine but also detectable levels of known carcinogens and toxic chemicals, including tobacco-specific nitrosamines and diethylene glycol, a toxic chemical used in antifreeze.⁴ The purpose and intent of this article is to promote the public health, safety and general welfare by prohibiting smoking within all county leased or owned buildings and vehicles, on all county grounds, in all common areas of multi-unit residential facilities/buildings and in all indoor office, retail, and other commercial establishments where the public is invited or permitted in the unincorporated areas of the county.

Sec. 9.5-92. Definitions.

The following terms, words, and phrases as used in this article are hereby defined as follows:

- a. *Bus Stop.* A designated area, whether enclosed or unenclosed, where buses stop for passengers to board or exit a bus. This term shall include areas at bus stops and shelters, beginning at the bus stop sign and extending for a radius of one hundred (100) feet around the bus stop sign. This area expressly excludes any private property that may fall within the one hundred foot radius of the bus stop sign. .

¹ Centers for Disease Control and Prevention, Smoking and Tobacco Use Fast Facts, http://www.cdc.gov/tobacco/data_statistics/facts_sheets/fast_facts/#toll (last visited Oct. 7, 2010).

² U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 11, 14-16 (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report/index.html>.

³ See *id.* at 15; Centers for Disease Control and Prevention, Smoking and Tobacco Use Health Effects of Secondhand Smoke, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/index.htm (last visited March 25, 2011).

⁴ Memorandum from B.J. Westenberg, Deputy Director, CDER/OPS/OTR, Division of Pharmaceutical Analysis to Michael Levy, Supervisor Regulatory Counsel, CDER, Office of Compliance Division of New Drugs and Labeling Compliance (May 4, 2009), available at <http://www.fda.gov/downloads/Drugs/ScienceResearch/UCM173250.pdf>; see also Press Release, United States Food and Drug Administration, FDA & Public Health Experts Warn About Electronic Cigarettes (July 22, 2009), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm>.

- b. *County*. Cumberland County and any of its constituent local government departments, agencies and facilities.
- c. *County building*. A building owned, leased as lessor, or the area leased as lessee and occupied by the County.
- d. *County Grounds*. All unenclosed property owned, leased or occupied by the County.
- e. *County vehicle*. A passenger-carrying vehicle owned, leased, or otherwise controlled by Cumberland County and assigned to its employees, agencies, institutions, or facilities for official County business.
- f. *E-cigarette*. Any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, which provides a vapor of nicotine or any other substances, and the use or inhalation of which simulates smoking. The term shall include any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptor. An e-cigarette does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product, as a tobacco dependence product, or for other medical purposes, and is being marketed and sold solely for such an approved purpose.
- g. *Employee*. A person who is employed by the County, or who contracts with the County or a third person who performs services for the County, or who otherwise performs services for the County, with or without compensation.
- h. *Enclosed area*. – An area with a roof or other overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one.
- i. *International 'No Smoking' symbol*. Symbol consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.
- j. *Lodging establishment*. – An establishment that provides lodging for pay to the public.
- k. *Private club*. A country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member's guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1).
- l. *Private residence*. A private dwelling that is not a child care facility, as defined in G.S. 110-86(3), and not a long-term care facility, as defined in G.S. 131E-114.3(a)(1).
- m. *Private vehicle*. A privately owned vehicle that is not used for commercial or employment purposes.

- n. *Public place.* An enclosed area to which the public is invited or in which the public is permitted.
- o. *Sidewalk* refers to any sidewalk that is located upon any premises owned, leased or occupied by the County.
- p. *Smoke* or *smoking* shall refer to:
 - (1) The carrying or holding of a lighted pipe, cigar or cigarette of any kind or any other lighted smoking equipment or device, including an e-cigarette; or
 - (2) The possession of any burning tobacco, weed or other plant product; or
 - (3) The lighting of, emitting of, exhaling of the smoke of a pipe, cigar or cigarette of any kind or the vapor of an e-cigarette.
- q. *Tobacco shop.* – A business establishment, the main purpose of which is the sale of tobacco, tobacco products, and accessories for such products, that receives no less than seventy-five percent (75%) of its total annual revenues from the sale of tobacco, tobacco products, and accessories for such products, and does not serve food or alcohol on its premises.

Sec. 9.5-93. Where smoking is prohibited.

- a. Smoking is prohibited in all of the following:
 - (1) All County buildings;
 - (2) All County grounds, including playgrounds, trails, and athletic fields;
 - (3) All County vehicles;
 - (4) Sidewalks; and
 - (5) Bus stops.
- b. Smoking is prohibited in County buildings and on County grounds at all times, even if being used for private events, and regardless whether such County buildings or County grounds are located within the corporate limits of any city.
- c. Except as provided in Section 9.5-94, smoking is prohibited in all public places within the County not located within the corporate limits of a city, including but not limited to:
 - (1) Polling places;
 - (2) Child care facilities;
 - (3) Shopping malls;
 - (4) Public restrooms;
 - (5) Elevators;
 - (6) Galleries and museums;
 - (7) Entertainment and sports arenas;
 - (8) Gaming facilities;

- (9) Bingo halls;
- (10) Indoor office; retail and other commercial establishments where the public is invited or permitted; and
- (11) Common areas of multi-unit residential facilities and buildings.

Sec. 9.5-94. Exceptions: Where Smoking is Not Regulated By This Ordinance.

- a. In accordance with G.S. 130A-498(b1), smoking is not prohibited by this ordinance in the following places.
 - (1) A private residence.
 - (2) A private vehicle.
 - (3) A tobacco shop if smoke from the business does not migrate into an enclosed area where smoking is prohibited pursuant to Article 23 of the North Carolina General Statutes. A tobacco shop that begins operation after July 1, 2009, may only allow smoking if it is located in a freestanding structure occupied solely by the tobacco shop and smoke from the shop does not migrate into an enclosed area where smoking is prohibited pursuant to Article 23 of the North Carolina General Statutes.
 - (4) All of the premises, facilities, and vehicles owned, operated, or leased by any tobacco products processor or manufacturer, or any tobacco leaf grower, processor, or dealer.
 - (5) A designated smoking guest room in a lodging establishment. No greater than twenty percent (20%) of a lodging establishment's guest rooms may be designated smoking guest rooms.
 - (6) A cigar bar if smoke from the cigar bar does not migrate into an enclosed public place where smoking is prohibited pursuant to Article 23 of the North Carolina General Statutes. A cigar bar that begins operation after July 1, 2009, may only allow smoking if it is located in a freestanding structure occupied solely by the cigar bar and smoke from the cigar bar does not migrate into an enclosed area where smoking is prohibited pursuant to Article 23 of the North Carolina General Statutes.
 - (7) A private club.
 - (8) A motion picture, television, theater, or other live production set. This exemption applies only to the actor or performer portraying the use of tobacco products during the production.
- b. This ordinance shall not apply to any property owned, leased, or maintained by the State of North Carolina or the United States.
- c. Except as to County buildings and County grounds, this ordinance shall not apply within the corporate limits of any cities within the county unless adopted by the city pursuant to G.S. 153A-122.

Sec. 9.5-95. Posting of signs required.

"No smoking" signs with letters of not less than one inch in height or the international "no smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every building or other place where smoking is prohibited by this article, by the owner, tenant, public

official or other person having control of such building or other place. No person shall remove or deface any sign required to be posted by or under the authority of this article.

Sec. 9.5-96. Implementation Requirements.

A person, who manages, operates, or controls a building or grounds in which smoking is prohibited by this ordinance shall:

- (1) Post signs that meet all the requirements in Section 9.5-95 of this ordinance;
- (2) Remove all ashtrays and other smoking receptacles from the area in which smoking is prohibited, except for ashtrays and receptacles for sale and not intended for use on the premises;
- (3) Direct a person who is smoking in a prohibited area to extinguish the lighted cigarette or other smoking device, cease smoking, and, if the person does not comply, ask the person to leave the premises; and
- (4) Contact the County Sheriff's Office if a person in violation refuses to leave the premises.

Sec. 9.5-97. Enforcement and Penalties.

- a. *Violations by persons smoking in prohibited areas.* Following oral or written notice by the person in charge of an area in which smoking is prohibited or his or her designee, failure to cease smoking constitutes an infraction punishable by a fine of not more than fifty dollars (\$50.00). A citation may be issued by a sworn law enforcement officer. Conviction of an infraction under this section has no consequence other than payment of a penalty, and no court costs may be assessed.
- b. *Violations by persons who manage, operate, or control a public place.* The local health director may take the following actions and may impose the following administrative penalty on a person who manages, operates, or controls a public place and fails to comply with the provisions of this ordinance:
 - (1) First violation – Written notice of the person's first violation and notification of action to be taken in the event of subsequent violations.
 - (2) Second violation – Written notice of the person's second violation and notification of administrative penalties to be imposed for subsequent violations.
 - (3) Third and subsequent violations – Impose an administrative penalty of not more than two hundred dollars (\$200.00).
- c. Each day on which a violation of this ordinance occurs may be considered a separate and distinct violation.

- d. *Additional sanctions for County employees.* In addition to any penalty under subsection (a), employees of the County who violate this ordinance shall be subject to disciplinary action consistent with the County's personnel ordinance

Sec. 9.5-98. Declaration of Establishment as Nonsmoking and Prohibiting E-Cigarettes.

Nothing in this ordinance shall be construed to prevent the owner, operator, manager, or other person in control of an establishment, facility, or outdoor area from declaring that the entire establishment, facility, or outdoor area shall be smoke free, or from declaring that the use of e-cigarettes is not permitted in the establishment, facility, or outdoor area.

Sec. 9.5-99. Effective Date.

This ordinance shall be effective on April 1, 2017.

Adopted this ____ day of October, 2016.

Marshall Faircloth, Chairman
Cumberland County Board of Commissioners

ATTEST:

_____ Clerk to the Board of Commissioners

Approved as to Form:

County Attorney