FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. INTRODUCTION

PURPOSE OF FINDINGS OF FACT ("FOF") AND CONCLUSIONS OF LAW ("COL")

A. Not designed to encourage "ritualistic recitations" (i.e. harass the trial judge) but instead to:

1. Dispose of issues raised by the pleadings;

2. Make definite what was decided for purposes of res judicata and estoppel;

3. Evoke care on the part of the trial judge in ascertaining the facts; and

4. Allow for meaningful appellate review.

State v. Baker, COA 10-98 (7 Dec. 2010); *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001); *Hill v. Lassiter*, 135 N.C. App. 515, 518, 520 S.E.2d 797, 800 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 562, 402 S.E.2d 860, 862 (1991).

See further: Anderson, *Civil Orders: Findings of Fact and Conclusions of Law*, NC SUPERIOR COURT JUDGES' BENCHBOOK (School of Government, UNC 2017)

GENERAL PRINCIPLES

A. If you are evaluating evidence, or the matter involves an appeal that by statute invokes the trial judge's original jurisdiction (i.e. *de novo* review of some clerk of court matters or some administrative agency appeals), be alert to the need for FOF/COL. In some instances, they will be required (as discussed below), in others they will not, except on request of a party.

B. If the matter requires you to accept one party's version of the facts as true (e.g. granting or denying a N.C. R. Civ. P. 12(b)(6) motion), or requires that you accept a lower tribunals findings as conclusive (e.g. reviewing some clerk of court matters and many administrative agency appeals), then FOF/COL normally are not appropriate.

WHAT IS REQUIRED?

Judge must:

A. **Find facts on all issues joined in the pleadings**.

Note that findings of fact are conclusive upon appellate review if supported by competent evidence, even though there may be evidence to the contrary. *Heating & Air Cond. Assoc. v. Myerly,* 29 N.C. App. 85 (1976).

Trial judge is required to find and state ultimate facts only, not evidentiary facts. *State v. Escobar,* 187 N.C. App. 267, 271, 652 S.E.2d 694, 698 (2007). Ultimate fact is the "final resulting effect reached by process of logical reasoning from evidentiary facts." *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983). Evidentiary facts are those "subsidiary facts required to prove the ultimate facts." "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn." *Id.* Furthermore, the Court is only required to make findings of fact to resolve "all *material* factual conflicts" in the evidence. *State v. Vaughn,* 2013 N.C. App. LEXIS 1089, at 10 (2013) (unpublished) citing *State v. Phillips*, 365 N.C. 103, 116, 711 S.E.2d 122, 134 (2011) (noting that "a more detailed order would be the better practice," *Vaughn* at 11).

For further guidance on requirements for adequate findings of fact, compare and contrast these cases: *Farmers Bank v. Michael T. Brown Distr., Inc.,* 307 NC 342 (1983); *Tolbert v. Hiatt*, 95 N.C. App. 380 (1989); and *State v. Baker*, COA 10-98 (7 Dec. 2010); *In the Matter of S.C.R.*, 718 S.E.2d 709 (2011); *State v. Vaughn,* 2013 N.C. App..LEXIS 1089 (2013)(unpublished).

B. **Declare conclusions of law arising from those facts.**

Conclusions of Law are "the court's statement of law which is determinative of the matter at issue between the parties." *Montgomery v. Montgomery*, 32 N.C. App. 154. It is the "application of fixed rules of law." *State v. Freeman,* 307 N.C. App. 357 (1983). The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. *Montgomery, supra.,, citing* 89 C.J.S., Trial, § 615b (1955).

Conclusions of Law must be stated separately from the findings of fact. *Montgomery, supra.* The purpose of requiring that conclusions of law to be stated separately is to enable appellate courts to determine what law the trial court applied. *Hinson v. Jefferson*, 287 N.C. 422 (1975).

C. **Enter judgment accordingly.**

Hilliard v. Hilliard, 146 N.C. App. 709, 710-11, 554 S.E.2d 374, 376 (2001) (quoting *Whitfield v. Todd*, 116 N.C. App. 335, 338, 447 S.E.2d 796, 798 (1994)); *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (citing *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971)).

II. WHEN ARE FOF/COL REQUIRED OR APPROPRIATE?

CRIMINAL CASES

A. **Motions to suppress evidence** (N.C. Gen. Stat. § 15A-977(f)). See thorough discussion of this requirement in *State v. Baker*, COA 10-98 (7 Dec. 2010). General rule: Judge is the finder of fact at the hearing on a motion to suppress evidence and should make written findings of fact and conclusions of law. *State v. Grogan*, 40 N.C. App. 371 (1979). Statute is complied with when the judge announces his/her ruling in open court and later files a written order setting forth the findings of fact and conclusions of law. *State v. Fisher*, 158 N.C. App. 133 (2003).

B. **Proceedings regarding capacity** (N.C. Gen. Stat. § 15A-1002 (Determination of mental capacity) and §15A-1003 (Referral of incapable defendant for civil commitment proceedings).

C. **Mistrials** (N.C. Gen. Stat. § 15A-1064). Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

D. **Motions for Appropriate Relief** (N.C. Gen. Stat. § 15A-1420(c)).
FOF required when the Court holds an evidentiary hearing to resolve disputed issues of fact. COL required when motion is based on an asserted violation of the defendant's rights under the U.S. Constitution or other federal law.

E. **Order allowing remote testimony of child witnesses.** N.C. Gen. Stat. § 15A-1225.1. Order allowing or disallowing shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony requires additional findings as enumerated in 15A-1225.1(d)(1)-(5).

F. **Maintenance of Order in the Courtroom – Custody and restraint of defendant and witnesses.** N.C. Gen. Stat. § 15A-1031.

G. **Order Assuring Attendance of Material Witness**. 15A-803(d).

H. **Sex Offenses.** Bail and Pre-trial release – deviation from standard no-contact provisions. N.C. Gen. Stat. § 15A-534. Issuance of permanent no-contact order at sentencing. N.G. Gen. Stat. § 15A-1340.50. Deviation from structured sentencing for adults found guilty of sex offenses or rape of child. N.C. Gen. Stat. § 14-27.2A and .4A. Determination of satellite-based monitoring requirements. N.C. Gen. Stat. § 14-208.40A and B.

I. **Costs in Criminal Matters.** A 2011 amendment to N.C. Gen. Stat. § 7A-304(a) requires that "written finding of just cause" be made whenever a judge waives any court costs required by § 7A-304(a). Court costs otherwise required under § 7A-304(a) include General Court of Justice fees, SBI lab test fees, impaired driving fee, jail fee and several other miscellaneous fees.

J.. ***Batson* Issues.** *State v. Hood*, 848 S.E.2d 515, 522 (N.C. Ct. App. 2020) "The trial court's summary denial of Defendant's *Batson* challenge precludes appellate review. The trial court was tasked with considering the evidence and determining whether the challenged strike of prospective juror Smith 'was motivated in substantial part by discriminatory intent' on the part of the State. Without specific findings of fact, this Court cannot establish on review that the trial court 'appropriately considered all of the evidence necessary to determine whether [Defendant] proved purposeful discrimination with respect to the State's peremptory challenge' . . . Moreover, the trial court's ruling was deficient in that it 'did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges.'" (Remanded to the trial court with instructions "to conduct a *Batson* hearing . . . [and] to make findings of fact and conclusions of law").

K. **Impact of Delayed Ruling**

1. *See State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005) (granting new trial for defendant where trial court heard motion to suppress during spring term, did not get consent of the parties to enter order out of session and out of term, and did not announce ruling in open court until seven months later, during fall term, and did not enter the order until one year later). *See*, Crowell, *Out-of-term, Out-of-Session, Out-of-County*, Adm. of Justice Bulletin No. 2008/05 (Nov. 2008).

2. When a ruling on a motion to suppress is announced in open court, but not yet reduced to writing, and notice of appeal is given prior to the written order being entered, the trial court apparently continues to have jurisdiction to enter the written order consistent with its prior ruling. *See State v. Oates*, 366 N.C. 264 (2012) (discussing legal effect of notice of appeal given three months prior to entry of written order). See further: *State v. Smith*, 320 N.C. 404, 415, 358 S.E.2d 329, 335 (1993) ("[t]he order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress . . . . It

was inserted in the transcript in place of the verbal order rendered in open court.")

3. *Cf. Dalenko v. Wake County Dep't of Human Servs.,* 157 N.C. App. 49, 58, 578 S.E.2d 599, 605 (2003) (in civil cases, relevant statutes permit a judge to sign judgment or order out of term and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district and no party objects). *See also* N.C.R. Civ. P. 58. *See,* Crowell, *supra.*

4. Note: Recent amendment to N.C.R. Civ. P. 7 now allows motions filed in Superior Court district consisting of more than one county to be heard in any county in that district. *See* N.C.R. Civ. P. 7(b)(4).

CIVIL CASES

A. **N.C.R. Civ. P. 52** sets out general standard:

1. Under Rule 52(a)(1), FOF/COL are required in <u>all actions tried upon the facts without a jury</u> or with an advisory jury.

2. FOF/COL must be entered in bench trials, even absent a request by the parties. Failure to enter proper order will generally result in remand, unless facts are undisputed and lead to only one inference. *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 822-24 (N.C. Ct. App. 2009); *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 16, 657 S.E.2d 673, 683 (2008); *Cumberland Homes, Inc., v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 520-21, 581 S.E.2d 94, 96 (2003) (declaratory judgment action).

3. <u>Dismissal under N.C.R. Civ. P. 41(b)</u> also requires entry of findings and conclusions where Court hears the case <u>without a jury</u> and dismisses the matter on the merits at the close of the plaintiff's evidence.

   a. Test for dismissal under Rule 41(b) differs from that for directed verdict under Rule 50(a). Trial court does not take evidence in the light most favorable to plaintiff, but simply considers and weighs all competent evidence before it. *See Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999) (stating test and reversing trial court for failing to make findings/conclusions required for appellate review).

   b. Court may dismiss the matter and enter findings even though plaintiff has made out prima facie case that would have precluded a directed verdict for defendant in a jury case. *In re Foreclosure of Deed of Trust*, 63 N.C. App. 744, 746, 306 S.E.2d 475, 476 (1983).

c. But better practice is to decline to enter Rule 41(b) dismissals except in the clearest of cases. *See, e.g., In re J.E.C.M.*, No. COA07-1424, 2008 N.C. App. LEXIS 394, at *11 (N.C. Ct. App. 2008)(unpublished) (quoting *Esteel Co. v. Goodman*, 82 N.C. App. 692, 695, 348 S.E.2d 153, 156 (1986)).

4. In all other cases, FOF/COL are necessary only when requested by a party, pursuant to N.C. R. Civ. P. 52, or where otherwise required by statute or case law.

a. *E.g., Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006) (reversing grant of summary judgment where trial court failed to make findings of fact regarding service of process and jurisdiction over defendant after defendant made a motion pursuant to N.C. R. Civ. P. 52(a)(2) requesting that the trial court make such findings).

However, even where requested under Rule 52, the court is not required to make findings of fact on interlocutory orders that are not appealable, such as a denial of a Rule 12(b)(6) motion. *O'Neill v. So. Nat'l Bank*, 40 N.C. App. 227 (1979). *See also* discussion of Summary Judgment orders below.

b. Absent specific request, trial court has discretion whether to make FOF. If court does not do so, appellate courts will presume that the trial court on proper evidence found facts to support its judgment. *Cail v. Cerwin*, 185 N.C. App. 176, 189, 648 S.E.2d 510, 519 (2007); *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (discovery sanctions).

B. **Timing of N.C. R. Civ. P. 52 request**

1. *J.M. Dev. Group v. Glover*, 151 N.C. App. 584, 586, 566 S.E.2d 128, 130 (2002) (request deemed timely if made before entry of written order).

C. **Preparation of Order**

1. Court may request proposed FOF/COL from counsel and may adopt those prepared by a party. *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E. 2d 162, 166 (1984).

2. *But see Bright v. Westmoreland County*, 380 F.3d 729, 732 (3d. Cir. 2004) (reversing trial court for adopting draft opinion submitted by prevailing party, stating, "That practice involves the failure of a trial judge to perform his judicial function" (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288

F.2d 719, 725 (4th Cir. 1961))); s*ee also United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) (vacating intermediate appellate court decision because opinion replicated substantial portions of the government's brief).

D. **Amendment of FOF/COL**

1. Rule 52(b) allows amendment upon motion made not later than 10 days after entry of judgment.
2. So long as motion is otherwise timely, trial court may amend judgment or order even though notice of appeal has been given. *York v. Taylor*, 79 N.C. App. 653, 654-55, 339 S.E.2d 830, 831 (1986).

III. SPECIFIC LEGAL ISSUES

CIVIL MOTIONS & TRIAL MATTERS

A. **TRO/Preliminary Injunction** (N.C.R. Civ. P. 52(a)(2) & N.C.R. Civ. P. 65)

1. Although order must state the reason(s) for granting relief, FOF/COL generally not required unless requested by a party or otherwise required by statute for the remedy being considered. *Pruitt v. Williams*, 25 N.C. App. 376, 378, 213 S.E.2d 369, 371 (1975).

2. Same analysis applies to motions seeking other provisional remedies (i.e., arrest and bail, attachment, claim and delivery, and receivership proceedings).

3. Effect of delay in entering Order on TRO/PI

   a. *See Hassell v. Hassell*, No. COA01-553, 2002 N.C. App. LEXIS 1911, at *5-6 (N.C. Ct. App. 2002)(unpublished) (trial court erred in holding defendant in civil contempt for failing to pay alimony where contempt finding was based on conduct preceding entry of order); *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, (trial court erred in holding defendant in civil contempt for violating a preliminary injunction order where the contempt finding was based on conduct that occurred prior to filing of the order), *rev. denied*, 349 N.C. 361, 525 S.E.2d 453 (1998).

   b. *But see Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431, 438, 57 S.E.2d 803, 807 (1950) (formal service of an preliminary injunction order is not required to hold party accountable for violating the same; all that is necessary is actual notice of the order's existence and contents).

B. **Consent Judgments**

FOF/COL not required even if requested by parties, as these are not judgments in the purest sense, but rather a summary of the parties' agreement. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999); *In re Estate of Peebles*, 118 N.C. App. 296, 300, 454 S.E.2d 854, 857 (1995).

C. **Rule 12(b)(6) Motions to Dismiss**

FOF/COL not required (even if requested)--trial court is deemed to have accepted as true the well-pleaded allegations of the non-moving party. *G & S Bus. Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490, 380 S.E.2d 792, 796 (1989).

D. **Motions for Judgment on the Pleadings** (N.C.R. Civ. P. 12(c))

Same rule applies. *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986) (quoting *J.F. Wilkerson Contracting Co. v. Rowland*, 29 N.C. App. 722, 725, 225 S.E.2d 840, 842 (1976)).

E. **Motions for Summary Judgment** (N.C.R. Civ. P. 56(c))

1. Same rule applies, as summary judgment presupposes that there are no triable issues of material fact. *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (1991) (quoting *Garrison v. Blakeney*, 37 N.C. App. 73, 76, 246 S.E.2d 144, 146 (1978)).

2. While FOF in summary judgment orders generally are "disfavored," *see, e.g., Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 722, 338 S.E.2d 601, 604 (1986) (citing *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E.2d 566 (1977)), where there is no real issue of disputed fact, a factual summary is not error and may be helpful on appeal. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 189, 594 S.E.2d 809, 813 (2004) (quoting *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64-65 (2001)); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292-93, 241 S.E.2d 527, 529 (1978).

F. **Motions for Relief from Judgment** (N.C.R. Civ. P. 60(b))

1. FOF/COL not required unless requested by a party, although it is better practice. *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (2000) (quoting *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993)).

2. But if judge does not make formal FOF/COL, appellate court will determine whether evidence supports judge's conclusions. *Monaghan v. Schilling*, 677 S.E.2d 562, 564-65 (N.C. Ct. App. 2009).

G. **Motions to Compel Arbitration**

Trial court must make FOF/COL as to whether parties had valid arbitration agreement and whether dispute falls within agreement's substantive scope. *U.S. Trust Co., N.A. v. Stanford Group Co.*, 681 S.E.2d 512, 514 (N.C. Ct. App. 2009).

H. **Criminal & Civil Contempt** (N.C. Gen. Stat. §§ 5A-11, 14, 23(e))

1. Statute requires separate FOF/COL sufficient to justify order of contempt. *State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004); *Glesner v. Dembrosky*, 73 N.C. App. 594, 597, 327 S.E.2d 60, 62 (1985).

2. For criminal contempt, be sure that you find relevant facts supporting your order beyond a reasonable doubt or you will see the case again. *See State v. Brill*, No. COA07-1143, 2008 N.C. App. LEXIS 989, at *17 (N.C. Ct. App. 2008); *Ford,* 164 N.C. App. at 569-70, 596 S.E.2d at 849.

3. Exception: FOF/COL not required where there are no factual determinations for the court to make. *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (affirming contempt order where trial court failed to indicate the standard of proof applied in holding the witness in contempt for refusing the trial court's order to answer an attorney's question because "there was simply no factual determination for the trial court to make").

4. For civil contempt, order must be reduced to writing, entered as a judgment and adequate notice given before contempt is proper. *Carter v. Hill,* 186 N.C. App. 464, 466, 650 S.E.2d 843, 845 (2007).

I. **Rule 11 Sanctions**

1. FOF/COL required for appellate review. *Lowry v. Lowry*, 99 N.C. App. 246, 255, 393 S.E.2d 141, 146 (1990).

2. Failure to enter FOF/COL generally results in reversible error unless there is no evidence in the record, considered in the light most favorable to the movant, which could support an award of sanctions. *Lincoln v. Beuche*, 166 N.C. App. 150, 601 S.E.2d 237 (2004).

J. **Award of Attorney Fees**

Order must contain FOF and COL regarding entitlement to attorney fees, *Washington v. Horton*, 132 N.C. App. 347, 351 (1999) and the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993) (award of fees under Chapter 75); *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170 (1975) (award of fees under N.C. Gen. Stat. § 6-21.1 requires court to make some findings of fact supporting award).

K. **Sanctions for Non-attendance at Mediated Settlement Conference**

Order must contain findings explaining the Court's conclusion that the non-attendance was without good cause. *Perry v. GRP Financial Services Corp.,* 196 N.C. App. 41 (2009).

L. **Motion for JNOV on Jury Award of Punitive Damages**

NCGS 1D-15(a) does not require findings of fact, but the trial court "shall state in a 'written opinion' its reasons for upholding or disturbing the finding or award." The trial judge, in doing so, is not determining the truth or falsity of the evidence or weighing the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. *Scarborough v. Dillard's, Inc.*, 363 N.C. 715 (2009); *Hudgins v. Wagoner*, 694 S.E.2d 436 (N.C. App. 2010).

M. **Batson Issues (***see II(J) – Batson Issues, above under Criminal Law issues)*

APPEALS

A. **Appeals from the Clerk**

1. Where judge sits as an appellate court, FOF/COL not appropriate. Example: Petitions to reopen estate under N.C. Gen. Stat. Ch. 28. *See, e.g., In Re Estate of English*, 83 N.C. App. 359, 367, 350 S.E.2d 379, 384 (1986) (on appeal of Clerk's order denying petition to reopen estate, the superior court hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law).

2. But FOF/COL are required where statute requires trial court to hear the matter *de novo* (original jurisdiction). Examples:

   a. Competency determinations (N.C. Gen. Stat. Chapter 35A)

   b. Foreclosure appeals (N.C. Gen. Stat. Chapter 45).

B. **Agency Appeals**

(For further information on the topic of review of agency appeals by the trial court, see *Administrative Appeals* in the Superior Court Judges' Survival Guide.)

1. Rules of Civil Procedure (including Rule 52) generally do not apply to agency appeals under the APA (N.C. Gen. Stat. § 150B-1, *et. seq.*) or other statutory appeal mechanisms.

2. Whether an agency appeal requires FOF/COL depends upon two considerations:

    i. Whether the reviewing court finds that the finding of facts of the agency were not supported by substantial evidence (see 4, *infra*); or

    ii. Whether a specific statute requires a *de novo* hearing (original jurisdiction) of the agency's decision (see 5, *infra*).

3. The requirement of FOF/COL depends upon the statutory bases of the appeal. Many appeals are governed by the Administrative Procedures Act ("APA"). N.C. Gen. Stat. § 150B-51(a1) and (b) of the APA set out the permitted grounds that may be asserted on appeal.

    a. If the grounds for appeal brought under the APA are that the decision was **not supported by substantial evidence** (N.C. Gen. Stat. § 150B-51(b)(5)) or that it was **arbitrary, capricious or an abuse of discretion** (N.C. Gen. Stat. § 150B-51(b)(6)), the standard of review is the "whole record review." The whole record review requires the examination of all competent evidence to determine if the agency's decision is supported by substantial evidence." *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm*., 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Walker v. N.C. Dep't of Human Resources,* 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990). *See also, N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005). In such instances, except where the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, and the COL should simply be whether the decision was supported by substantial evidence and/or whether the decision was arbitrary, capricious or an abuse of discretion**. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E.2d 920 (1976).

b. If the grounds for appeal under APA are that the decision was in **violation of constitutional provisions** (N.C. Gen. Stat. § 150B-51(b)(1)), in **excess of statutory authority or jurisdiction** (N.C. Gen. Stat. § 150B-51(b)(2)), made upon **unlawful procedure** (N.C. Gen. Stat. § 150B-51(b)(3)) or affected by **other error of law** (N.C. Gen. Stat. § 150B-51(b)(4)), the standard of review is *de novo.* However, even though the standard of review is *de novo*, the reviewing court is exercising only its appellate jurisdiction and not its original jurisdiction and therefore is not conducing a "*de novo* hearing" but is required to adopt the agency's findings of fact that are supported by substantial evidence and not make alternate findings. Thus, unless the Court finds that the agency's findings were not supported by substantial evidence (see 4, *infra.),* **FOF are not appropriate, but COL are.** *N.C. Forestry Ass'n v. N.C. Dep't of Env't and Natural Res.*, 162 N.C. App. 467, 475, 591 S.E.2d 549, 555 (2004); *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

4. If, under either the whole record review or *de novo* review described *supra* in (3)(a) and (b) the reviewing court finds that the **agency's FOF are not supported by substantial evidence**, then the reviewing **court should enter FOF on those findings that are at variance with the agency's**. *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530 (2005) citing *Scroggs v. N.C. Justice Standards Com.*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991). However, this is not to be used as a "tool for judicial intrusion; the court is not permitted to replace the agency's judgment with its own even though a different conclusion might be rational." *N.C. Dep't of Crime Control, supra,* citing *Floyd v. N.C. Dep't of Commerce*, 99 N.C. App. 125, 129, 392 S.E.2d 660, 662 (1990).

5. In some instances, **statutes other than the APA govern the appeal** of agency decisions. Sometimes, those statutes require the trial court to "hear the matter *de novo,*" which invokes the trial court's original jurisdiction to hear the matter anew, and in such cases**, FOF and COL of the reviewing court are required.** See, e.g. N.C. Gen. Stat. § 20-25 (appeal of DMV suspension of driver's license). *See Joyner v. Garrett*, 279 N.C. 226, 232, 182 S.E.2d 553, 558 (1971).

However, where a statute other than the APA provides for judicial review of an administrative action, but does not specify that the trial court is to "hear the matter *de novo*" or words to that effect, the review is presumed to be limited to the trial court's appellate jurisdiction and FOF would not be appropriate. See e.g.:

a. Employment Security Commission Appeals (governed by N.C. Gen. Stat. § 96-15): FOF by Commission deemed conclusive if there is any competent evidence to support them; court's review is confined to questions of law.

b. Zoning Board Appeals *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 54-55, 344 S.E.2d 272, 274 (1986) (quoting *In re Campsites Unltd.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975)) (trial court may only determine whether FOF are supported by competent evidence).