

No.

TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

ASHE COUNTY, NORTH)
CAROLINA,)

Petitioner,)

v.)

From Ashe County
No. COA 18-253

ASHE COUNTY PLANNING)
BOARD and APPALACHIAN)
MATERIALS, LLC,)

Respondents.)

PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. § 7A-31

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INDEX

TABLE OF AUTHORITIES	iii
PROCEDURAL HISTORY AND THE SLIP OPINION	2
FACTS	4
A. County Law.	4
B. AM’s Request for a PIDO Permit	5
C. New Information and the Moratorium.....	6
D. AM’s Demand for a Permit and the Final Decision.	7
E. AM’s Appeal, Judicial Review, and the Slip Opinion	8
REASONS WHY CERTIFICATION SHOULD ISSUE.....	9
I. THE CREATION OF A NEW SYSTEM OF INTERLOCUTORY APPEALS TO LOCAL LAY BOARDS AFFECTS SIGNIFICANT PUBLIC INTEREST, INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE, AND CONFLICTS WITH DECISIONS OF THIS COURT	9
A. The New System affects the public interest.	11
B. The New System is of major significance to the jurisprudence of the State.	13
C. The New System conflicts with the decisions of this Court.....	14
II. THE SLIP OPINION’S ADVISORY OPINIONS CONFLICT WITH THIS COURT’S DECISIONS, AFFECT SIGNIFICANT PUBLIC INTEREST, AND INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.....	16
III. THE QUESTION OF LAW CONCERNING THE PERMIT CHOICE STATUTE AND THE MORATORIUM STATUTE AFFECTS SIGNIFICANT PUBLIC INTEREST AND INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.....	17

IV.	THE QUESTION OF LAW CONCERNING ADMINISTERING POLICE POWER LAWS AT LOCAL GOVERNMENTS AFFECTS SIGNIFICANT PUBLIC INTEREST, INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE, AND THE SLIP OPINION CONFLICTS WITH DECISIONS OF THIS COURT.	19
V.	THE SLIP OPINION'S REVIEW OF THE FINAL ADMINISTRATIVE PERMIT DECISION AFFECTS SIGNIFICANT PUBLIC INTEREST, INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE, AND CONFLICTS WITH THE DECISIONS OF THIS COURT.	22
	A. Changing this Court's framework governing final administrative permit decisions affects significant public interest	26
	B. Changing this Court's framework governing final administrative permit decisions involves legal principles of major significance to the jurisprudence of the State	26
	C. The Slip Opinion's rules governing administrative permit decisions conflict with this Court's decisions.	28
	ISSUES TO BE BRIEFED	28
	CONCLUSION.....	29
	APPENDIX.....	App. 1
	A. Slip Opinion.....	App. 1
	B. County Zoning Map.....	App. 27
	C. C.L. § 153 <i>et seq.</i>	App. 28
	D. C.L. § 159 <i>et seq.</i>	App. 34

TABLE OF AUTHORITIES

Cases

Bd. of Adjustment of Town of Swansboro v. Town of Swansboro,
334 N.C. 421, 432 S.E.2d 310 (1993).....20

Boswell v. Boswell,
241 N.C. 515, 85 S.E.2d 899 (1955)..... 16

Candler v. City of Asheville,
247 N.C. 398, 101 S.E.2d 470 (1958)..... 15, 23, 28

Cogdell v. Taylor,
264 N.C. 424, 142 S.E.2d 36 (1965).....21

County of Lancaster v. Mecklenburg County,
334 N.C. 496, 434 S.E.2d 604 (1993)..... passim

Helms v. City of Charlotte,
255 N.C. 647, 122 S.E.2d 817 (1961)..... 16

King v. Town of Chapel Hill,
367 N.C. 400, 758 S.E.2d 364 (2014)..... 15, 20

Lanvale Properties, LLC v County of Cabarrus,
366 N.C. 142, 731 S.E.2d 800 (2012)..... 15, 20

Lee v. Bd. of Adjustment of City of Rocky Mount,
226 N.C. 107, 37 S.E.2d 128 (1946)..... passim

Meier v. City of Charlotte,
206 N.C. App 102, 698 S.E.2d 704 (2010)12

Morningstar Marinas/Eaton Ferry, LLC v. Warren County,
368 N.C. 360, 777 S.E.2d 733 (2015).....2

City of Raleigh v. Fisher,
232 N.C. 629, 61 S.E.2d 897 (1950)..... 16, 23, 28

Robins v. Town of Hillsborough,
361 N.C. 193, 639 S.E.2d 421 (2007).....17

S.T. Wooten Corp. v. Bd. of Adjustment of Town of Zebulon,
210 N.C. App. 633, 711 S.E.2d 158 (2011).....15

Three Guys Real Estate v. Harnett County,
345 N.C. 468, 489 S.E.2d 681 (1997).....21

Tri County Paving, Inc. v. Ashe County,
281 F.3d 430 (2002)16

Veazey v. City of Durham,
231 N.C. 357, 57 S.E.2d 377 (1950).....13

Ashe County Law

C.L. § 153.03.....5
C.L. § 153.04.....5, 14, 19, 25
C.L. § 159.06.....4, 5

Statutes

N.C.G.S. § 6-21.712, 13
N.C.G.S. § 7A-319
N.C.G.S. § 143-7557
N.C.G.S. §§ 153A-76, -77.....20
N.C.G.S. § 153A-1214, 20
N.C.G.S. § 153A-320.17
N.C.G.S. § 153A-3407, 20
N.C.G.S. § 160A-420
N.C.G.S. § 160A-17420
N.C.G.S. § 160A-3885, 15, 19
An Act to Reform North Carolina’s Approach to Integration of
Renewable Electricity Generation,
2017 N.C. Sess. Law 19218

Constitutional Provisions

N.C. CONST. art. 1, § 18;.....13

Other Authorities

David Owens, *County Zoning*, UNC SCHOOL OF GOVERNMENT
(Aug. 2016), <https://www.sog.unc.edu/resources/legal-summaries/county-zoning>3

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioner-Appellant Ashe County, North Carolina (the "County"), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals, filed on 21 May 2019 in this cause, *Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC*, No. COA18-253, Slip Opinion (2019 WL 2179980) ("*Slip Opinion*") (Attached as Appendix p 1-26), on the grounds that the subject matter of this appeal has significant public interest, the cause involves legal principles of major significance to the jurisprudence of the State, and the decision of the Court of Appeals is in conflict with various decisions of this Court.

In support of this Petition, the County shows the following:

PROCEDURAL HISTORY AND THE SLIP OPINION

This cause arises out of the Ashe County Planning Director's (Director) final decision denying Respondent Appalachian Materials, LLC's (AM) request for a permit to establish a hot asphalt plant facility. The permit is required by the County's Polluting Industries Development Ordinance (PIDO), a general police power ordinance.

In June 2015, AM filed an incomplete request for a PIDO permit. Beginning in February 2016, AM demanded that the Director issue the permit. In April 2016, AM sued the County requesting the Superior Court to order issuance of the permit, and assess damages and legal fees. Given these threats, the Director applied his understanding of this Court's established standard of review¹ and issued the final written decision detailing the reasons for denying AM's request for a PIDO permit. AM did not address the deficiencies identified in the final decision and re-apply. AM maintained its civil action, appealed the final decision to the Ashe County Planning Board (PB), and sought a variance of PIDO's permitting standards from the PB.

The PB reversed the final decision and ordered the Director to issue the permit. The County reviewed the PB's order and sought judicial review. The Superior Court affirmed the PB's order. The County appealed the Superior Court's order to the North Carolina Court of Appeals.

The Slip Opinion declares that the Superior Court "was correct":

¹ See, e.g., *Lee v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 37 S.E.2d 128 (1946); *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993); *Morningstar Marinas/Eaton Ferry, LLC v. Warren County*, 368 N.C. 360, 777 S.E.2d 733 (2015).

And

1. Announces a new system of interlocutory appeals to local government lay boards of portions of preliminary evaluations or communications by local government staff (the “New System”) and issues an unfunded mandate to local governments to restructure their operations. (Slip Op. p 15). The New System alters local government operations drastically and imposes a tax against all North Carolina citizens. The New System excludes citizens who cannot afford to hire lawyers to advocate for their interests in a system of piecemeal litigation.
2. Announces advisory opinions answering four abstract questions. (Slip Op. pp 5-15). Two advisory opinions address a new County ordinance. (Slip Op. pp 5-8). The Director did not apply the new County ordinance in the final decision. Two advisory opinions treat PIDO as a zoning law. (Slip Op. pp 8-15). Like twenty percent (20%) of North Carolina counties,² there is no zoning in the County. These advisory opinions conflict with this Court’s precedent, affect every local government, and mischaracterize two substantial and important questions of law in the cause.

But

3. Fails to answer two questions of law affecting local government operations and the pocketbook of every North Carolina citizen. The *first* question is: *how must governmental staff respond when an applicant demands*

² The abstract and map attached shows the counties that have adopted zoning, have partial zoning, and have no zoning. (App. p 27); David Owens, *County Zoning*, UNC SCHOOL OF GOVERNMENT (Aug. 2016), <https://www.sog.unc.edu/resources/legal-summaries/county-zoning>.