No. TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ASHE COUNTY, NORTH CAROLINA, Petitioner, v. ASHE COUNTY PLANNING BOARD and APPALACHIAN MATERIALS, LLC, Respondents.	)	From Ashe County No. COA 18-253

****

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

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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 review[1] 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":

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[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.

issuance of a permit in violation of a moratorium? The second question is: *must counties without zoning administer their police power laws as if they had adopted zoning*? Not answering these questions affects local government operations and exposes public coffers to endless expenditures defending and, potentially, paying claims.

4. Fails to recognize and apply this Court's rules of law governing local government staff decision-makers and lay boards. The heart of this cause is whether the final administrative decision denying a permit to a polluting industry complies with the framework established by this Court. The Slip Opinion fails to recognize and apply this Court's rules, muddying them beyond recognition.

The Slip Opinion is law unless the North Carolina Supreme Court certifies this cause for review.

FACTS

A. County Law.

Ashe County has not adopted zoning, opting for a series of stand-alone police power laws regulating some land uses uniformly across the County. *See* N.C.G.S. § 153A-121. PIDO authorizes County planning staff to make only one decision—issue or not issue a PIDO permit and mandates: "No permit from the planning department shall be issued until *appropriate* Federal and State permits have been issued." (emphasis added) (R p 2029, C.L. § 159.06(A)(2016)).

To administer its police power laws governing land usage, the County created its administrative process. C.L. § 153 *et seq.*[3] The County created the PB and granted it the power to act as a board of adjustment holding quasi-judicial hearings for variances and appeals. C.L. § 153.04(J). The County did not grant itself a right to appeal from staff decisions, *see* C.L. § 153.04(J)(3), because all PB decisions are reviewed by the Board of Commissioners. C.L. § 153.03. Unlike zoning, the County did not grant the PB authority to "make any order, requirement, decision or determination that ought to be made" or "all the powers of the official who made the decision." *Compare* N.C.G.S. § 160A-388(B1)(8), *with* C.L § 153.04(J)(3)(f).

B. AM's Request for a PIDO Permit.

In June 2015, AM's land surveyor delivered a letter and documents to the Director, requesting issuance of a PIDO permit for a new hot asphalt plant facility. (R pp 320-478). These documents contained various maps and surveys, but lacked the State air quality permit required by PIDO. *Id.*; (R p 2029, C.L. § 159.06(A) (2016) (Permitting Standards)).

The Director and land surveyor engaged in various cordial communications concerning the request, the Director's preliminary evaluation of it, his lack of authority to issue a PIDO permit conditionally, and the Director's willingness to write a letter describing his preliminary evaluation of the request. (R pp 936-45). In every communication, the Director limited his communications to "this site"—the site of the asphalt plant shown on the maps and surveys provided by to him by AM.

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[3] Citation to the Code of Ashe County will be shorted to "C.L. § __". Certified copies of relevant ordinances are contained in the Record on Appeal beginning at page 1998 and are attached (App. pp 28-37).

In his 22 June 2015 Letter, the Director stated the site had "no physical address," and while "the proposed site [met] the requirements of [PIDO] . . . the county ordinance [required] all state and federal permits be in hand prior to a local permit being issued." (R p 944). The Letter stated the stormwater and mining permits "for this site" were on file and once the County received an air quality permit, the local permit "can be issued for this site." *Id.* As the Slip Opinion noted, the Director informed AM, "I will write up a permit *for the site* assuming the *new plans* meet the requirements [of PIDO]." (emphasis added) (Slip Op. p 9).

C. New Information and the Moratorium.

From August to September 2015, County citizens opposing the asphalt plant presented information to the Director. The Director investigated this information and discovered, contrary to his understanding in June 2015, a quarry related to AM had completed grading of the proposed asphalt plant site without necessary State or local permits. (R pp 1344-52, 1663-67). In September 2015, the Director restated to AM's land surveyor that (1) the application was still under review, (2) new information had come to the Director's attention contradicting the documents given to him in June, (3) based upon discussions with State officials, the "state permits" given to him for this site "have been or are being amended", and (4) no decision on the request had been made. (R p 482). AM did not attempt to appeal these communications or rebut this information.

In October 2015, the County adopted a moratorium on issuance of PIDO permits—but not on accepting PIDO applications (the Moratorium). (R pp 1340-41);

see N.C.G.S. § 153A-340(h) (authorizing temporary moratoria on "any" non-residential "county development approval required by law"). A week later, a Department of Environmental Quality Hearing Officer published a report, detailing years of non-compliance with State and Federal laws by the quarry related to AM and stated "the quarry disturbed acreage for site grading for the asphalt plant" that had not been authorized by the State. (R p 1350).

D. AM's Demand for a Permit and the Final Decision.

In February 2016, AM's attorney sent a letter to the Director transmitting a State air quality permit. (R pp 484-500). The letter acknowledged the Moratorium but claimed that N.C.G.S. § 153A-320.1 and N.C.G.S. § 143-755 required immediate issuance of a PIDO permit and asserted failure to immediately issue the permit subjected the County to damages and attorneys' fees. *Id.* For the first time, AM claimed that the Director's 22 June 2015 Letter was binding on the County because AM had relied upon it and the County had not appealed it. *Id.*

In early April 2016, AM sued the County, claiming damages, seeking legal fees, and demanding immediate issuance of a PIDO permit. (R pp 209-25). On 20 April 2016, the Director issued the detailed final decision denying AM's request for a PIDO permit. (R pp 501-04). The Director set out detailed factual determinations based upon the documents submitted by AM, including their inaccuracies and internal inconsistencies, and the existence of the Moratorium. For example, he explained the location of the site shown in the documents provided by AM was

internally inconsistent, as subsequent documents depicted the asphalt plant in a different location contrary to PIDO permitting requirements. *Id.*

E. AM's Appeal, Judicial Review, and the Slip Opinion.

AM appealed the final decision and sought a variance of PIDO's "purported" buffer requirements from the PB while maintaining the civil litigation, but did not file a new application addressing the defects identified in the final decision. (R pp 505-06).

At AM's request, the PB delayed hearing AM's request for a variance, heard AM's appeal, and signed an "order" containing sixty-four (64) findings of fact and thirty-six (36) conclusions of law on December 1, 2016. (R pp 515-26). A careful reading of this order shows that (1) the Moratorium existed when the final decision was made, (2) the Director's determination that the air quality permit contradicted the materials provided to him in June 2015 was correct, (3) the air quality permit located a portion of the asphalt plant at a different site in violation of PIDO's buffer requirements, (4) a building used in operating a quarry related to AM was located within PIDO's protective buffer, and (5) a building depicted on the June 2015 survey as "Old Barn" was located within PIDO's protective buffer and was used in agricultural operations. *Id.* As explained by the Director, "in Ashe County agriculture's definitely a commercial enterprise." (R p 783, lines 1-2). Despite these facts, the PB reversed the final decision and ordered the Director to issue a PIDO permit. (R pp 515-26).

The County sought judicial review of the PB's "order." (R pp 8-300). AM again sought attorneys' fees. (R pp 316-17). The Superior Court (1) affirmed the PB's conclusion that "[t]he Moratorium . . . has no impact on consideration of the Application", (R p 522), (2) concluded the 22 June 2015 Letter was a final and binding decision, and (3) concluded that under state law the PB was "not limited to considering only the information before the Planning Director at the time he issued that decision" and was authorized to order the Director to issue a PIDO permit. (R pp 2031-39). The County appealed the Superior Court's Order to the Court of Appeals. The Court of Appeals affirmed the Superior Court's decision without discussion of the Superior Court's order. (Slip Op. p 5). The County filed this Petition for Discretionary Review pursuant to N.C.G.S. § 7A-31.

REASONS WHY CERTIFICATION SHOULD ISSUE

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.

The Slip Opinion announces a new rule of law: *local governments must appeal **any** portion of **every** preliminary communication or evaluation made by their own staff of an application for a permit which **might** be relied upon by an applicant.* The Slip Opinion recognizes that this rule creates the New System of "interlocutory appeals" to be heard by local government lay boards. (Slip Op. p 15). The New System legislated by the Slip Opinion is undeveloped, confused, and requires decades of work by local governments and the Judiciary. Among other matters:

- The New System fails to articulate who it is designed to benefit. At one point, the Slip Opinion describes the class of citizens benefiting from this New System as applicants (Slip Op. p 15); but, at another point, the Slip Opinion indicates any citizen "'with a clear interest in the outcome,' such as at the request of a landowner, adjacent landowner or builder" is a potential beneficiary. (Slip Op. p 11).
- The New System is one-sided. The Slip Opinion states *the County* is bound by "an interlocutory determination that is relied upon by an applicant." (Slip Op. p 15). The Slip Opinion ignores that the applicant did not appeal multiple communications from the Director stating (1) no final decision had been made, (2) there was no authority to issue a permit conditionally, or (3) "the new plans for the site [must] meet the requirements" of PIDO. (Slip Op. p 9).
- The Slip Opinion fails to set forth the standard of "reliance" necessary to trigger the need to file an interlocutory appeal. The Slip Opinion states AM "was prejudiced" by the 22 June 2015 Letter "in that it could have sought a variance had the Planning Director not made the determination." (Slip Op. p 14). The Slip Opinion's statement is without basis in fact. AM sought a variance of PIDO's protective buffers. (R pp 505-06).

Practically, all portions of any preliminary communication or evaluation are viewed as "favorable" by some citizen whether for or against issuance of a permit. Like AM, such a citizen could wait until the time to appeal has expired to claim reliance. Until rejected or clarified, the New System requires local governments to appeal all

portions of all preliminary communications or evaluations or risk waiving its power to enforce local laws.

Recognizing the impact of the New System, the Slip Opinion issues an unfunded mandate to all local governments:[4]

> [E]ach county [is to] develop a process whereby it can become aware of determinations made by its own staff so that it can preserve its right to appeal such determinations, unless and until the law in this regard is changed. (Slip Op. p 15).

The New System and the unfunded mandate transform matters which this Court instructs should be "routine" into piecemeal and constant litigation. *See County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993).

A. The New System affects the public interest.

The New System applies to all North Carolina local governments: 100 counties and 550 municipalities. Every North Carolina citizen is a citizen of at least a county, if not also a municipality—meaning every North Carolina citizen is taxed by the New System and its incalculable costs and consequences.

The New System causes interlocutory appeals to be lodged at local government lay boards unequipped to handle them. Regardless of who lodges an interlocutory appeal, all citizens with a clear interest in the outcome must participate in interlocutory appeals to preserve their interests and advocate their positions.

The outcome of the New System is that *for each request for a permit or license* multiple interlocutory appeals must be taken by local governments, applicants, and

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[4] The origins of this mandate are Court of Appeals precedents involving municipal zoning ordinances. (Slip Op. pp 10-12). The mandate applies to all municipalities.

other citizens with a clear interest in the outcome. *See Meier v. City of Charlotte*, 206 N.C. App 471, 698 S.E.2d 704 (2010) (applying zoning rules to a final decision adverse to a citizen with a clear interest in the outcome). While these interlocutory appeals move through lay boards and the Judiciary like Yo-Yos, the underlying local government permit or licensing request remains dormant. With the New System, only citizens with substantial financial "staying power" can protect their property and legal interests.

The New System stifles communications between governments and citizens. As a means to minimize interlocutory appeals, local governments could impose gag orders on internal[5] and exterior preliminary evaluations and communications. The cost of gag orders to North Carolina citizens is incalculable. Most citizens seek permits for routine development, like adding a deck to their house or building a new driveway. Currently, they rely on local government staff to provide guidance and feedback; they have no need to retain lawyers.

The New System is a windfall to private land use litigators with an incalculable tax on every North Carolina citizen. Citizens will bear the costs of: (1) paying lawyers retained to represent local governments, (2) paying lawyers retained to represent their interests, (3) paying attorneys' fees of other parties, as every interlocutory appeal presents an opportunity to invade public coffers by requesting fees asserting the local government "has acted outside the scope of its legal authority or abused its discretion," (R pp 223-24; 316-18); *see* N.C.G.S. § 6-

[5] Of course, internal preliminary evaluations and communications are subject to public record requests.

21.7, and (4) paying the increases to the Judiciary's budget caused by the New System.

The New System excludes citizens from participating unless they have financial resources to retain lawyers. For many citizens who live or own property adjacent to polluting industries, their homes are their largest asset. They are "land rich, cash poor", live on fixed incomes, and cannot afford to participate in the New System to protect their interests. The New System affects significant public interest.

B. The New System is of major significance to the jurisprudence of the State.

There are few areas of existing North Carolina jurisprudence more perplexing than interlocutory appeals from trial courts. This Court has noted the tension between the jurisprudence of interlocutory appeals and the North Carolina Constitution's mandate that "right and justice shall be administered without favor, denial, or delay." N.C. CONST. art. 1, § 18; *see Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) ("There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders."). With the New System, lay boards determine when local governments (and potentially all citizens "with a clear interest in the outcome") must or can file interlocutory appeals. Whatever the lay board's decision, it is reviewed by the Judiciary as a question of subject matter jurisdiction.

The New System is far more perplexing than the current system of interlocutory appeals from trial courts. Oftentimes it is difficult to determine what constitutes a "substantial right", but the New System's test is "reliance." The facts at bar illustrate the quagmire of this test.

Before applying for a PIDO permit, AM applied for a State air quality permit. In June and September 2015, the Director told AM no final decision had been made and AM did not appeal these communications. AM did not inform the County that AM was relying upon other portions of these communications until after the time, whatever that deadline might be,[6] for the County to appeal had expired. AM was not prejudiced. It sought a variance. (R pp 505-06); *cf.* (Slip Op. p 14).

Before the New System, the one legal standard established by North Carolina jurisprudence for administrative permit decisions was: is the application complete and does it satisfy the law? *County of Lancaster*, 334 N.C. at 508, 434 S.E.2d at 612. The New System adds a new threshold and overrides the current legal standard, resting on shifting sands of daily communications regarding transitory evaluations of evolving information and claims of reliance. The New System involves legal principles of major significance to the jurisprudence of the State.

C. The New System conflicts with the decisions of this Court.

In creating the New System, the Slip Opinion claims:

> [W]e are bound by our precedent. And where a county's planning department official has made an interlocutory determination

[6] County law establishes a right of appeal to the PB for citizens directly affected by the outcome of a final decision, but *does not* grant the County a right to appeal a staff decision to the PB. *See* C.L. § 153.04(J)(3). The Slip Opinion lacks a citation to a law granting a right of appeal to the County or a statement as to the time limit for the County to appeal.

> that is relied upon by an applicant, to its detriment, such determination must be appealed by the county to its board of adjustment within thirty (30) days, otherwise the determination becomes binding. (Slip Op. p 15).

The precedent cited in the Slip Opinion requiring the New System is *S.T. Wooten Corp. v. Bd. of Adjustment of Town of Zebulon*, 210 N.C. App. 633, 711 S.E.2d 158 (2011), a decision arising under a final administrative decision applying a municipal zoning ordinance. The New System is unsupported by *Wooten.*

In *Wooten*, Chief Justice Beasley carefully considers this Court's precedents and limited *Wooten* to (1) a final decision on a distinct question under a zoning ordinance, (2) a zoning ordinance granting the Zoning Administrator broad interpretation powers, and (3) a zoning ordinance that provided the Town of Zebulon with a right to appeal final determinations. *Id.* at 643-44, 711 S.E.2d at 164-65. After *Wooten*, the General Assembly endorsed the requirement of a *final and binding decision* in State zoning statutes. *See* N.C.G.S. § 160A-388(a1).

As of 2016, twenty (20) North Carolina counties have no zoning. This Court has instructed what is zoning and that police power is different. *See Lanvale Properties, LLC v County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012) (explaining zoning); *King v. Town of Chapel Hill*, 367 N.C. 400, 758 S.E.2d 364 (2014) (explaining the differences between zoning and general police power ordinances). The New System conflicts with these decisions.

The New System, resting on reliance, conflicts with this Court's general rule of no governmental estoppel. *Candler v. City of Asheville*, 247 N.C. 398, 412, 101 S.E.2d 470, 480 (1958) ("we hold that a municipality cannot be estopped from

enforcing its legal ordinances[.]"); *City of Raleigh v. Fisher,* 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950) ("a municipality cannot be estopped to enforce a zoning ordinance[.]"). A mistakenly issued building permit cannot estop a municipality from enforcing its zoning ordinance. *Helms v. City of Charlotte*, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961).

The New System conflicts with decisions of this Court.

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.

Contrary to restraints this Court imposes upon itself, the Slip Opinion fails to restrain itself to only declaring "the law as it relates to the facts of the particular case under consideration." *Boswell v. Boswell*, 241 N.C. 515, 518, 85 S.E.2d 899, 902 (1955). The advisory opinions of Section II(A) and (B) of the Slip Opinion answer abstract questions concerning the County applying a new ordinance. In this cause, the County never applied the new ordinance. The advisory opinions in Sections II(C) and (D) answer questions arising under municipal zoning ordinances. PIDO is not zoning. *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430 (2002) (upholding PIDO as a police power ordinance).

Although advisory, these opinions apply to every local government in North Carolina in routine matters arising daily. As explained in the next two sections, these advisory opinions mischaracterize the questions of law arising from the facts in this cause.

In a time of divided government where the public, politicians, and pundits question the motives of every public official, including the Judiciary, it affects significant public interest when courts issue advisory opinions. Ensuring that advisory opinions are not provided is a cornerstone for preserving the fair and just administration of justice and is necessary for maintaining the Judiciary's reputation for integrity. These advisory opinions affect significant public interest, involve legal principles of major significance to the jurisprudence of the State, and conflict with decisions of this Court.

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.

In Section II(B), the Slip Opinion frames its advisory opinion as whether a moratorium nullifies the "Permit Choice Rights" and concludes "the existence of a moratorium is not grounds to deny a permit. A moratorium simply delays the decision." (Slip Op. p 6). In support of this conclusion, the Slip Opinion cites *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007), an opinion uncited by either party, because *Robins* is different than the facts of this cause.

The interplay between the Permit Choice Statute and the Moratorium Statute has not been addressed by this Court. The question of law arising under the facts of this cause is: when an applicant demands a final decision knowing a moratorium exists, is a moratorium a ground for denial? AM contends the answer is "no" and the Director must issue the permit because the application was received before the Moratorium was adopted. The County contends the answer is "yes"

because the Moratorium prevented issuance of a PIDO permit when AM demanded a final decision.

The Permit Choice Statute applies to requests for permits state-wide at all local governments and at State agencies. *Id.* The interplay between the Permit Choice Statutes and moratoria affects local governments and the General Assembly. *See, e.g.*, An Act to Reform North Carolina's Approach to Integration of Renewable Electricity Generation, 2017 N.C. Sess. Law 192 (where the General Assembly placed an 18-month moratorium on the issuance of permits for new wind energy projects by NCDEQ). Under the Slip Opinion, State officials cannot deny applications for permits when the General Assembly adopts moratoria because the Slip Opinion announces there are "Permit Choice Rights." It seems unlikely the General Assembly curbed its legislative power to adopt moratoria that bar issuance of permits for pending applications.

Here, the Director, a governmental staff member charged with making final decisions on permit requests, was caught in a vise: (1) an applicant demanding an immediate final decision, asserting that the Permit Choice Statute requires the Director to not recognize the Moratorium, claiming damages, and seeking attorneys' fees from the County's taxpayers and (2) the Moratorium forbidding issuing of PIDO permits.

North Carolina law does not provide an answer to this question and this question will arise repeatedly. Until the question is answered, government staff will guess and whatever choice they make, land use litigators will claim the government

exceeded its authority or abused its discretion and will ask the Judiciary to tax damages and legal fees against taxpayers. Local governments will be compelled to retain lawyers to defend scarce public resources.

To protect public coffers of all local governments, to promote fair and efficient administration of justice, and to ensure that discretion possessed by lawmakers is not unreasonably invaded, this question of law should be answered. It affects significant public interest and involves legal principles of major significance to the jurisprudence of the State.

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.

The Slip Opinion's advisory opinions in Sections II(C) and (D) rest on Court of Appeals precedents arising under zoning ordinances and overlooks there is no zoning in the County. For example, the Slip Opinion assumes the County had a right to appeal when no right exists under County law. The only source for this assumption is State zoning statutes. *Compare* C.L. § 153.04(J)(3)(a)-(c) (listing the parties who may appeal to the PB), *with* N.C.G.S. § 160A-388(b1)(1) (providing "or a city may appeal").

The question of law in this cause is: Are the twenty (20) counties in North Carolina where no zoning exists required by the General Assembly to administer police power laws as if they were zoning laws? AM contends police power laws regulating land usage must be administered as zoning, particularly when a county

assigns a duty to a lay board to act as a local board of adjustment. The Superior Court adopted AM's contention. (R pp 2035-36). The County disagrees.

The General Assembly grants three discretionary powers to counties relevant to this cause: (1) the power to adopt zoning, N.C.G.S. § 153A-340(a), (2) the power to adopt police power laws, N.C.G.S. § 153A-121(a), and (3) the power to organize county government, N.C.G.S. §§ 153A-76, -77.

This Court held that the grant of zoning power to counties is unambiguous and zoning authority is limited to the express power granted. *Lanvale Properties, LLC*, 366 N.C. at 155, 731 S.E.2d at 810. However, the polar opposite applies to the grant of police power. In *King v. Town of Chapel Hill*, this Court stated that police power granted to municipalities is "by its very nature ambiguous" and police power must be "elastic." 367 N.C. at 406, 758 S.E.2d at 370.

The grant of police power to municipalities is identical to the grant of police power to counties. *Compare* N.C.G.S. § 160A-174(a), *with* N.C.G.S. § 153A-121(a). The statute mandating broad construction of grants of powers to municipalities is similar to the statute mandating broad construction of grants of powers to counties. *Compare* N.C.G.S. § 160A-4, *with* N.C.G.S. § 153A-4.

The County possessed discretionary authority to assign a duty to hold hearings and act as a board of adjustment to the PB, and possessed the discretion to tailor its PB's authority to fit the County. *See, e.g., Bd. of Adjustment of Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 426, 432 S.E.2d 310, 313 (1993) (a board of adjustment may be abolished).

The facts of this cause required the Slip Opinion to recognize and apply this Court's rules for interpretation of local laws. The rules of statutory construction apply. *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965). This includes the Court's duty to reconcile laws and adopt the construction of an ordinance that harmonizes it with other provisions. *Id.*; *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 474, 489 S.E.2d 681, 684 (1997) ("where one of two [ordinances] might apply to the same situation, the [ordinance] which deals more directly and specifically with the situation controls[.]"). The Slip Opinion does not recognize or apply these rules.

The answer to this question of law affects legislative and administrative discretion to organize county government granted to all Boards of Commissioners and the actual local government administration and operations at twenty percent (20%) of North Carolina counties. When this Court reviews the map showing the counties without county-wide zoning or no zoning at all, a pattern emerges. Most counties without zoning are rural and have no need for multiple layers of complex zoning restrictions and decisions. They have small county governments because they lack large tax bases. Their staff members have multiple jobs and responsibilities. They rarely have full-time county attorneys. Every dollar they spend on administration of laws is a dollar unavailable for core public services, such as schools, social services, and parks.

This question of law affects significant public interest and involves legal principles of major significance to the jurisprudence of the State. The Slip Opinion treatment of it conflicts with decisions of this Court.

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.

The Slip Opinion, Superior Court, and PB failed to recognize and apply the rules established by the decisions of the North Carolina Supreme Court governing processing permits administratively. These rules establish a simple, transparent, fair, and complete framework—neither burdensome to local governments nor favoring applicants or citizens opposing issuance of the permit. This Court's framework is threefold:

1. Administrative decisions are routine, nondiscretionary ordinance implementation matters carried out by the staff, including issuing permits. *See County of Lancaster*, 334 N.C. at 507, 434 S.E.2d at 612. In general, the staff member is a purely administrative or ministerial agent following the literal provisions of the ordinance. *Lee v. Bd. of Adjustment of City of Rocky Mount*, 226 N.C. 107, 110, 37 S.E.2d 128, 131 (1946). This involves determining objective facts that do not involve an element of discretion: "[T]he staff member review[s] an application to determine if it is complete and whether it complies with

objective standards set forth in the zoning ordinance." *County of Lancaster*, 334 N.C. at 508, 434 S.E.2d at 612.

2. A local lay board is "an administrative agency" and "[i]t must abide by and comply with the rules of conduct provided by its charter – the local ordinance[.]" *Lee,* 226 N.C. at 111, 37 S.E.2d at 132.

3. Local governments are not estopped to enforce their laws. *See Candler*, 247 N.C. at 412, 101 S.E.2d at 480; *Fisher,* 232 N.C. at 635, 61 S.E.2d at 902.

The Slip Opinion changes this Court's framework by creating the New System.

In February 2016, AM's counsel submitted an air quality permit to the Director, threatened damages and attorneys' fees, and demanded immediate issuance of a PIDO permit. When the Director did not issue a PIDO permit, AM sued the County in April 2016 seeking a writ of mandamus ordering the Director to issue a PIDO permit, damages, and attorneys' fees. (R pp 209-25). The options available to the Director at that time were (1) do nothing and be accused of stonewalling, (2) exercise discretion, favor AM, and attempt to cure the defects in the materials submitted, or (3) issue a final decision denying the permit.

In the final decision, the Director reviewed AM's application "to determine if it [was] complete and whether it compli[ed] with the objective standards set forth in [PIDO]." *See County of Lancaster*, 334 N.C. at 508, 434 S.E.2d at 612. As the Director understood the law based upon this Court's decisions, he had no discretion to violate the Moratorium, PIDO's permitting standards, and he was not to exercise

discretion or employ favoritism. He issued the final decision denying AM's request for a permit because the application provided by AM failed to satisfy PIDO's objective permitting standards and because of the Moratorium.

In the appeal of the final decision, the PB constantly traveled beyond its limited authority granted by County law and applied its new rule. For example, the Director found in the final decision:

> [I]t is clear from the air quality permit issued by the State that a portion of Appalachian Materials' proposed asphalt operation is outside the 'limits' as represented by Appalachian's purported application to Ashe County . . . [T]he location of the equipment comprising Appalachian Materials' asphalt operation, as described on the air quality permit, shows that Appalachian Materials' proposed polluting industry will be within the 1,000 feet of a residential dwelling unit, in addition to being within 1,000 feet of a commercial building. (R pp 501-02).

The PB "order" found: (1) the air quality permit given to the Director by AM "was not consistent with . . . the Application" and (2) on 25 May 2015, more than a month after the Director's final decision, the air quality permit was amended. (R p 520). But the PB issued a conclusion of law that "any variance between the measurement represented in the Application and those shown in the Air Quality Permit . . . (which has now been corrected) are not a basis for denying [AM's] PID permit." (R p 525, Conclusion 28).

The Director found in the final decision:

> Another commercial building . . . is within a 1,000 feet of the proposed polluting industry[.] (R p 502)

The PB "order" found two buildings are "in close proximity to the proposed asphalt operations" and concluded (1) "the June 2015 Letter was not appealed and is

binding," (2) the Director's final decision "is rendered null and void", and (3) neither building is a "commercial building." (R pp 521-24).

The Director found in the final decision:

> On October 15, 2015 Ashe County adopted a moratorium regarding new polluting industries. (R p 502).

The PB "order" found "a six month moratorium on the issuance of [PIDO] permits" was adopted on 19 October 2015 and "[t]he Moratorium was subsequently extended for another six months on April 4, 2016." (R p 518). The PB concluded the Moratorium "has no impact on the consideration of the Application and should not be a reason for denial of [AM's PIDO] Permit." (R p 522).

County law authorizes the PB to hear and decide appeals, but does not authorize the PB to receive amended applications, issue permits, or order the Director to issue a permit. *See* C.L. § 153.04(J)(3); *Lee*, 226 N.C. at 111, 37 S.E.2d at 132 (board of adjustments are "not left free to make any determination whatever that appeals to its sense of justice."). The PB exceeded its limited authority and favored AM.

The Superior Court affirmed every aspect of the PB "order" and extended the PB's authority beyond the authority granted by the County. Without recognizing or applying any of this Court's rules, the Slip Opinion announces "[the Court] need not resolve" whether the application complied with the objective standards of PIDO because of the New System. (Slip Op. pp 14-15).

A. Changing this Court's framework governing final administrative permit decisions affects significant public interest.

This Court's rules establish the framework for administering permits at all 100 counties and 550 municipalities in North Carolina. These rules serve the people of North Carolina well and possess salutatory fruits: (1) government staff members rely upon these rules every day to make objective decisions without favoritism; (2) the rules require transparent decisions which are easy for citizens to understand and accept, and (3) the rules do not overburden scarce public funds.

This Court's framework is very fair to applicants. The final decision in April 2016 provided a "roadmap" for AM to re-apply for a PIDO permit. Before PIDO was repealed in October 2016, AM had a right to file a new application addressing the deficiencies identified in the final decision, asking the Director to apply PIDO to a new request, and acknowledging that the Director would have to delay the final decision until after the Moratorium expired.

The New System's radical change of this Court's complete framework affects significant public interest.

B. Changing this Court's framework governing final administrative permit decisions involves legal principles of major significance to the jurisprudence of the State.

Under this Court's rules, like a basketball referee deciding whether a player was standing behind the three-point line, the Director determined whether the application satisfied the objective standards of PIDO and whether he had authority to issue a permit. His final decision was reviewable by the PB under County law as an *appeal*, where the only question was whether the "instant replay" showed the

player standing behind the three-point line. The burden to be standing behind the three-point line rests solely on the player. Likewise, the burden to submit an application with documents satisfying PIDO permitting standards and waiting for the Moratorium to expire rested solely on AM.

This is not the law of the Slip Opinion. Under the Slip Opinion, applicants are relieved of their burdens to comply with objective standards of law so long as they assert a delayed claim of reliance based upon a portion of a preliminary communication or evaluation and the local government has not appealed.

Shifting an applicant's burdens to local governments, the Slip Opinion mandates local governments to change their operations. To implement the Slip Opinion's mandate, more legal services must be purchased by local governments and local government lawyers must scrutinize every communication by staff. Lawyers' determinations of whether a particular communication might trigger an interlocutory appeal will be guesses. In this cause, the New System applied because of a particular word in a phrase on a chart that was an incomplete sentence, even when other complete statements in the same string of communications contradicted the Slip Opinion's interpretation of the word. (Slip Op. pp 10, 14).

The Slip Opinion is a failure to recognize and apply this Court's rules. The fruits of the New System are: (1) applicants can avoid complying with law, (2) local governments exhaust limited public resources implementing the New System, and (3) other citizens without substantial financial resources are excluded and discouraged from protecting their interests.

If this Court's simple, fair, transparent and complete framework is changed, it should be changed by this Court only. This cause involves legal principles of major significance to the jurisprudence of the State.

C. The Slip Opinion's rules governing administrative permit decisions conflict with this Court's decisions.

For the reasons stated, the Slip Opinion conflicts with the Court's rules governing: (1) local government staff members charged with authority to issue permits administratively, *County of Lancaster*, 334 N.C. at 507, 434 S.E.2d at 612; *Lee*, 226 N.C. at 110, 37 S.E.2d at 131, (2) local government administrative boards, *Lee,* 226 N.C. at 111, 37 S.E.2d at 128, and (3) governmental estoppel, *Candler*, 247 N.C. at 412, 101 S.E.2d at 480; *Fisher,* 232 N.C. at 635, 61 S.E.2d at 902.

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, the County intends to present the following issues in its brief for review:

I. Did the Court of Appeals err by holding that the Director's 22 June 2015 Letter was partially binding on the County and creating the New System of interlocutory appeals?

II. Did the Court of Appeals err by providing advisory opinions?

III. Was the Moratorium a ground for the Director to deny AM's demand for a PIDO permit?

IV. Did the Court of Appeals and the Superior Court err by holding that the PB did not exceed its authority?

V. Did the Court of Appeals err by not upholding the Director's decision and reversing the Superior Court?

CONCLUSION

The Slip Opinion:

- Creates the New System of interlocutory appeals unauthorized by this Court or the General Assembly;
- Issues advisory opinions;
- Fails to answer two important questions of law; and
- Changes this Court's complete framework governing administrative permit decisions.

This appeal has significant public interest, this cause involves legal principles of major significance to the jurisprudence of the State, and the Slip Opinion is in conflict with various decisions of this Court.

Respectfully submitted, this the 25th day of June, 2019.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Discretionary Review Under N.C. Gen. Stat. § 7A-31 has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

Ashe County Planning Board
Attn: Priscilla C. Cox, Chair
150 Government Circle
Suite 2400
Jefferson, North Carolina 28640

Chad W. Essick
Keith H. Johnson
Colin R. McGrath
POYNER SPRUILL LLP
Post Office Box 1801
Raleigh, North Carolina 27602

This the 25th day of June, 2019.

John C. Cooke

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-253

Filed: 21 May 2019

Ashe County, No. 16 CVS 514

ASHE COUNTY, NORTH CAROLINA, Petitioner,

v.

ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC, Respondents.

Appeal by Ashe County, North Carolina, from an order entered 30 November 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Womble Bond Dickinson (US) LLP, by John C. Cooke, for Ashe County, North Carolina, Petitioner-Appellant.

Poyner Spruill LLP, by Chad W. Essick, Keith H. Johnson, and Colin R. McGrath, for Appalachian Materials, LLC, Respondent-Appellee.

DILLON, Judge.

Appalachian Materials, LLC ("Appalachian Materials"), filed an application for a permit to operate an asphalt plant in Ashe County (the "County"). Its permit was initially denied by the County's Planning Director. However, the County's Planning Board reversed the Planning Director's decision, directing that the permit be issued. The County appealed the decision of its Planning Board to the superior court. The

superior court affirmed the decision of the Planning Board. The County appeals to this Court. We affirm.

I. Background

In June 2015, Appalachian Materials submitted an application to the County, seeking a PIDO permit[1] to operate an asphalt plant on a certain tract of land. However, Appalachian Materials noted in its application that it had applied for but not yet obtained an air quality permit *from the State*, a permit which must be obtained before the County can issue a permit for an asphalt plant in its jurisdiction.[2]

Later in June 2015, the County's Planning Director sent Appalachian Materials a letter (the "June 2015 Letter") positively commenting on the application, but stating that Appalachian Materials needed to provide the State-issued air quality permit before any PIDO permit could be issued.

Four months later, in October 2015, Ashe County's elected Board of Commissioners (the "Governing Board") adopted a temporary moratorium on the issuance of PIDO permits (the "Moratorium").

During the Moratorium, in February 2016, Appalachian Materials finally supplemented its PIDO permit application with the State air quality permit. But two

---

[1] A permit issued under Ashe County's then-existing Polluting Industries Development Ordinances.

[2] *See S.T. Wooten v. Zebulon Bd. of Adjustment*, 210 N.C. App. 633, 635, 711 S.E.2d 158, 159 (2011) (Judge, now Chief Justice, Beasley, writing for our Court, commenting on an asphalt plant operator applicant obtaining a State-issued air quality permit as a precursor to obtaining a permit from the town).

months later, in April 2016, the Planning Director issued a letter to Appalachian Materials denying the PIDO permit request. In the denial letter, the Planning Director cited the Moratorium, among other reasons, for the denial. Appalachian Materials appealed the Planning Director's denial to the Planning Board.

In the Fall of 2016, prior to the decision of the Planning Board, the County's Governing Board lifted the Moratorium, but repealed the PIDO ordinance (the "Old Ordinance") and replaced it with a new ordinance (the "New Ordinance") which created additional barriers for the approval of a permit to operate an asphalt plant.

In December 2016, the Planning Board reversed the decision of the Planning Director, determining that Appalachian Materials was entitled to the PIDO permit. The County appealed the Planning Board's decision to the superior court.

Almost a year later, in November 2017, Superior Court Judge Bray affirmed the Planning Board's order. The County has now appealed Judge Bray's order to our Court.

II. Analysis

The County's unelected Planning Board, which operates as the County's board of adjustments, voted in favor of permitting Appalachian Materials' proposed asphalt plant. *See* Ashe County Code § 153.04(J) (2015) (stating that the County's Planning Board acts as the County's board of adjustments). The County's elected Governing Board, however, is against the decision of its Planning Board, and is seeking a

reinstatement of the decision made by its Planning Director, a County employee, denying the permit application. To better understand the issues on appeal, we pause briefly to describe the bases why the Planning Director denied the permit application and why the Planning Board reversed, voting to allow the permit application.

In June 2015, Appalachian Materials applied for the permit. In October 2015, the County's Governing Board adopted its temporary Moratorium on permit approvals. By October 2016, the Moratorium had been lifted, the Old Ordinance was repealed, and the New Ordinance had gone into effect.

However, in April 2016, while the Moratorium was still in effect, the County's Planning Director denied Appalachian Materials' application for a PIDO permit, concluding that: (1) his June 2015 Letter to Appalachian Materials, in which he positively commented on the permit application shortly after the application was submitted, did not constitute a binding decision on the County that the permit would be approved once the State permit was procured; (2) the proposed site of the asphalt plant was within one thousand (1,000) feet of certain commercial buildings, in violation of the Old Ordinance's set-back requirements; (3) Appalachian Materials' permit application was not completed when the Moratorium went into effect, as the required State permit was still pending; and (4) Appalachian Materials made misrepresentations in its application.

Appalachian Materials appealed the Planning Director's denial to the County's Planning Board. The Planning Board reversed the Planning Director's conclusions and ultimate denial, itself concluding that (1) the June 2015 Letter from the Planning Director did constitute a binding determination that the permit would be approved once the State permit was procured; (2) the proposed site was *not* in violation of the Old Ordinance's one thousand (1,000) foot buffer; (3) Appalachian Materials' application was sufficiently completed when submitted, prior to the adoption of the Moratorium, to merit a decision under the Old Ordinance; and (4) the application did not contain misrepresentations which warranted denial.

For the following reasons, we conclude that Judge Bray was correct in affirming the decision of the Planning Board.

A. Appalachian Materials' Application Was Sufficiently Complete

One disagreement between the parties is whether Appalachian Materials had completed its application sufficiently *prior to* the October 2015 Moratorium to trigger the statute which allows an applicant to choose which version of an ordinance to have its application considered under where the ordinance is changed before a submitted application is acted on by a county. Specifically, Section 153A-320.1 of our General Statutes, the "Permit Choice" statute, provides that "[i]f a [county's] rule or ordinance changes between the time a permit application is submitted and a permit decision is made, then G.S. 143-755 shall apply." N.C. Gen. Stat. § 153A-320.1 (2015). And

Section 143-755 provides that, in such situations, "the permit applicant may choose which version of the rule or ordinance will apply to the permit." N.C. Gen. Stat. § 143-755 (2015).

We conclude that Appalachian Materials' application had been "submitted" to the County, notwithstanding that a required State permit was still under review. The required State permit is one of many possible prerequisites which might have to be met after a sufficient application is submitted but before a permit can be finally approved. Here, the application was submitted, and the County accepted and deposited the application fee. The application was still before the County when the State permit was approved. Therefore, we conclude that the application was sufficiently "submitted," pursuant to the Permit Choice statute, in June 2015.

B. The Moratorium Does Not Nullify Permit Choice Rights

A county has the right to adopt a temporary moratorium on certain permit approvals. N.C. Gen. Stat. § 153A-340(h) (2015). We conclude that the existence of a moratorium is not grounds to deny a permit. A moratorium simply delays the decision.

The County, though, argues that when a county adopts a temporary moratorium and then modifies an ordinance, the Permit Choice statute has no application. Instead, the County contends, a pending application must be reviewed

under the new ordinance once the moratorium is lifted. We understand the County's policy arguments, but we are compelled to disagree.

In reaching our conclusion, we are guided in part by our Supreme Court's decision in *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007). In that case, Mr. Robins applied for a permit to construct an asphalt plant. *Id.* at 194, 639 S.E.2d at 422. While his application was pending, the town adopted a moratorium and then amended an ordinance which prohibited asphalt plants from operating in the town. *Id.* at 195-96, 639 S.E.2d at 423. Our Supreme Court ruled that Mr. Robins had the right to have his application considered under the version of the town ordinance in effect when his application was filed, an ordinance which *did* allow asphalt plants to operate within the town, under certain conditions:

> We hold that when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application. Accordingly, [Mr. Robins] was entitled to receive a final determination from [the town] regarding his application and to have it assessed under the ordinance in affect when the application was filed. We express no opinion [on the application's merits], but merely that [Mr. Robins] is entitled to a decision by [the town] pursuant to the ordinance as it existed before passage of the moratorium and the amendment.

Id. at 199-200, 639 S.E.2d at 425.

Seven years later, in 2014, the General Assembly essentially codified much of the Supreme Court's reasoning in *Robins* when it enacted the Permit Choice statute.

Like the rule applied in *Robins*, there is no language in Section 153A-340(h), the moratorium statute, which prevents the Permit Choice statute from applying once the moratorium is lifted.

C. The June 2015 Letter Was Only Partially Binding on the County

The Planning Board concluded that the June 2015 Letter, in which the Planning Director positively commented on the application, was a determination that the application would be approved once the State permit was obtained. The Planning Board further concluded that this determination by the Planning Director in his June 2015 Letter became binding on the County when the County failed to appeal the June 2015 Letter within thirty (30) days.

The County now argues that the June 2015 Letter has no binding effect.

The record shows the following: In early June 2015, Appalachian Materials submitted its application for a PIDO permit. About a week later, an Appalachian Materials representative followed up, requesting a letter from the Planning Director regarding the application:

> . . . . A letter detailing that standards of our ordinance have been met for [our] site, with the one exception [the absence of the required State air quality permit] would be great. If you could just email that to me, it would help a great deal.

That same day, the Planning Director responded by email that he would send a letter but that it would be merely his "favorable recommendation" of the application, that

he still needed to see Appalachian Materials' final plans, and that he did not have the authority to provide conditional approval for the PIDO permit:

> . . . . I will write up a permit for the site *assuming the new plans meet the requirements [of the PIDO]*.
>
> Concerning the conditional approval based on getting the [required State permit], *I cannot do that without approval from the Planning Board.* The language in the ordinance is pretty clear, "no permit from the planning department shall be issued until [all required State and Federal] permits have been issued."
>
> That said, I could write *a favorable recommendation,* or letter stating that standards of our ordinance have been met for this site, with one exception.

(Emphasis in italics added.)

A week later, the Planning Director sent the June 2015 Letter, which stated as follows:

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> The proposed site does meets (*sic*) the requirements of the Ashe County Polluting Industries Ordinance, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being issued. We have on file the general NCDENR Stormwater Permit and also the Mining Permit for this site. Once we have received the NCDENR Air Quality Permit[,] our local permit can be issued for this site.

> If you have any questions regarding this review please let me know.
>
> [/s/ Planning Director]

The June 2015 Letter enclosed the following checklist, which aligns with the "Permitting Standards" required to receive a PIDO permit under the Old Ordinance:

159.06A	Fee	**$500.00 Paid 6/5/2015**
	State & Federal Permits	Air Quality Permit – **applied for by applicant, local permit on hold until received**
159.06B	Buffer Requirements	1,000 feet of a residential dwelling or commercial building 1,320 feet of any school, daycare, hospital, or nursing home facility. **Verified, survey attached to permit.**
159.06B1	Permanent Roads	Permanent roads, used in excess of six months, within the property site shall be surfaced with a dust free material (soil cement, portland cement, bituminous concrete. **To be inspected prior to final inspection.**
159.06B3	Security Fence	**No extraction operation planned. Fence not required unless conditions change.**
159.06B4	Noise	**Operations shall not violate noise ordinance. Ongoing inspection required.**

Our Court has held that where a planning department official makes a decision, it may be binding on the city or county if not appealed to the board of adjustments within thirty (30) days. *See S.T. Wooten Corp. v. Bd. of Adjustment of*

Zebulon, 210 N.C. App. 633, 639, 711 S.E.2d 158, 162 (2011). In determining whether a statement by a town official represents a decision binding on the County (if not appealed timely), our Court has relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a planning director; (3) whether the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of [a] zoning ordinance to a landowner seeking such interpretation as it related specifically to its property;" and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *S.T. Wooten Corp.*, 210 N.C. App. at 641-42, 711 S.E.2d at 163.

However, we have also held that "[w]here the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T.*

Wooten Corp., 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

Here, based on the circumstances in which the June 2015 Letter was issued and the language of the prior email and the June 2015 Letter itself, we conclude that the Planning Director did not intend for his June 2015 Letter to be a determination that the permit would be issued once the State permit was obtained. But we also conclude that the June 2015 Letter did have *some* binding effect, as noted in the following section.

D. The June 2015 Letter Binds the County With Respect to the Buffer

The Old Ordinance prohibited any asphalt plant from being developed on a site within one thousand (1,000) feet of a "commercial building." Ashe County Code § 159.06(B) (2015) (repealed). The Planning Director denied the permit, in part, because the proposed site was within one thousand (1,000) feet of a portable shed, not attached to the land, used by Appalachian Materials' parent company on the same site and also within one thousand (1,000) feet of a barn on an adjacent property. The Planning Department determined that these structures were not "commercial buildings."

Our review of language in an ordinance is *de novo*; that is, we interpret language in an ordinance just like we interpret language in a statute. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155-56, 712 S.E.2d 868, 871 (2011) ("Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance."). And "[z]oning ordinances should be given a fair and reasonable construction in light of . . . the general structure of the Ordinance as a whole[,]" but, since zoning regulations are in "derogation of common law rights," they "should be resolved in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Here, there is uncontradicted evidence that the barn was owned by a neighbor who ran a business in which he harvested and sold hay and that he used the barn to store his hay inventory and to store farm equipment used to harvest hay.

It may be argued that it is ambiguous whether the barn's agricultural use is a "commercial use." But it could be strongly argued that the language of the Ashe County Ordinance as a whole supports the view that the barn in question, used for an agricultural purpose which is commercial in nature (to sell farm products in the marketplace), is a "commercial" property as used in the Old Ordinance. For instance, one provision in the ordinance defines "business" as a "commercial trade . . . including but not limited to . . . agricultural . . . and other similar trades or operations." Ashe

County Code § 163.05 (2015). And a planned unit development is defined as any development that includes residential and commercial uses, without any separate delineation for agricultural uses. Ashe County Code § 156.48 (2015). The ordinances dealing with permit fees to construct buildings categorize buildings as either "one and two family dwellings," "mobile homes," and "commercial," without any separate delineation for "agricultural." Ashe County Code § 150.29 (2015).

But we need not resolve whether the County's interpretation or its Planning Board's interpretation of "commercial building" as applied to the barn or the shed is correct. Rather, we conclude that the Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and that his determination was binding on the County. Indeed, the record shows that these buildings were shown in the application and that the Planning Director stated in his June 2015 Letter that he had "verified" that these buildings were not a problem. Further, Appalachian Materials was prejudiced by this determination in that it could have sought a variance had the Planning Director not made the determination. Ashe County Code § 159.07(B) (2015) (repealed) (allowing applicant to seek a variance for any buffer issues).

We conclude that the June 2015 Letter was not a binding determination that the permit would be issued once the State permit was obtained. But we also conclude that the table in the June 2015 Letter is indicative that the Planning Director was

making a determination concerning the status of the buildings shown in the application to be in proximity of the proposed site.

It could be argued that the rule we apply creates the likelihood of "interlocutory" appeals to a board of adjustments from decisions made by planning department officials. However, we are bound by our precedent. And where a county's planning department official has made an interlocutory determination that is relied upon by an applicant, to its detriment, such determination must be appealed by the county to its board of adjustments within thirty (30) days; otherwise, the determination becomes binding. Our precedent favors a policy that citizens should not suffer when they reasonably rely upon determinations made be a county official. It is, therefore, on each county to develop a process whereby it can become aware of determinations made by its own staff so that it can preserve its right to appeal such determinations, unless and until the law in this regard is changed.

E. Misrepresentations in the Application

The Planning Director denied the application based on other factors such as his view that Appalachian Materials made misrepresentations on its application. The Planning Board reviewed these alleged misrepresentations and determined that they were not sufficient to warrant the denial of the application. We note that, under the Ashe County Code, the Planning Board has the authority to "uphold, modif[y], or overrule[] in part or in its entirety" any determination made by the Planning Director.

Ashe County Code § 153.04(f) (2015). Here, the Planning Board has made its determination; and we cannot say that the Planning Board has exceeded its authority to overrule the determination made by the Planning Director.

IV. Conclusion

The Moratorium is no longer in effect. Appalachian Materials' application must be reviewed under the Old Ordinance, as requested by Appalachian Materials. The Planning Director bound the County on the issue of whether certain buildings were each a "commercial building" as defined in the buffer provision in the Old Ordinance. The Planning Board had the authority to determine whether the application otherwise complied with the Old Ordinance. We, therefore, affirm the trial court's order affirming the decision made by the Planning Board.

AFFIRMED.

Judge STROUD concurs.

Judge BERGER concurs by separate opinion.

No. COA18-253 – *Ashe Cnty. v. Ashe Cnty. Planning Bd.*

BERGER, Judge, concurring in separate opinion.

I concur with the majority that the Polluting Industries Development Ordinance permit ("PIDO" or "PIDO permit") should be released to Appalachian Materials, LLC. However, because the County did not timely appeal to the Planning Board, neither the Planning Board nor the trial court had the requisite subject matter jurisdiction to review the appeal. Therefore, the trial court's order should be vacated, this matter dismissed, and the permit released to Appalachian Materials.

In June 2015, Appalachian Materials submitted an application to Adam Stumb ("Stumb"), Ashe County's Planning Director, for a permit to be issued, as required under the local PIDO. This permit would authorize Appalachian Materials to operate portable asphalt equipment on a portion of its leased property in Ashe County, North Carolina. Appalachian Materials' application included the required $500.00 application fee and a copy of its air quality permit application, which Appalachian Materials contemporaneously submitted to the North Carolina Department of Environmental Quality ("NCDEQ"). As this air quality permit was required for a PIDO permit to be issued, Appalachian Materials further promised that it would forward a copy of the air quality permit to Stumb upon receipt from NCDEQ.

Shortly after Appalachian Materials submitted its PIDO permit application, Stumb agreed to provide written confirmation as to whether Appalachian Materials' permit complied with PIDO, notwithstanding the pending air quality permit determination. Stumb's decision "was important for Appalachian [Materials] to know

in order to continue to spend time, money and resources in connection with securing" another necessary permit. In response to Appalachian Materials' request, Stumb visited Appalachian Materials' property, "created and reviewed certain GIS maps and photographs that identified all buildings in close proximity to the [p]roperty and created certain GIS shape files identifying any buildings that required buffering or setbacks from the proposed polluting industry under [PIDO]."

On June 22, 2015, Stumb sent Appalachian Materials the following letter (the "June 2015 Letter"):

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> *The proposed site does meets (sic) the requirements of the Ashe County Polluting Industries Ordinance*, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being *issued*. We have on file the general [NCDEQ] Stormwater Permit and also the Mining Permit for this site. Once we have received the [NCDEQ] Air Quality Permit[,] our local permit can be *issued* for this site.
>
> If you have any questions regarding this review please let me know.
>
> [Stumb's Signature]
> Adam Stumb
> Director of Planning

(emphasis added). Appalachian Materials "continued to invest time, money[,] and resources into the proposed asphalt facility" after receiving the June 2015 Letter.

On February 26, 2016, NCDEQ issued the outstanding air quality permit to Appalachian Materials. On February 29, 2016, Appalachian Materials forwarded a copy of its air quality permit to Stumb and requested that he issue its PIDO permit as promised. That same day, Stumb responded via email that he may need additional information from Appalachian Materials or NCDEQ before considering the request to issue the PIDO permit. After a series of communications between Stumb and Appalachian Materials, Stumb wrote a letter to Appalachian Materials on April 20, 2016 (the "April 2016 Letter"), which denied its request to issue a PIDO permit. In the April 2016 Letter, Stumb contended that "the proposed polluting industry was located with 1,000 feet of a residential dwelling unit or commercial building, in violation of [PIDO], that the [a]pplication was incomplete because Appalachian [Materials] had not obtained all necessary state and federal permits, and that Appalachian [Materials] made several false statements in the [a]pplication."

On May 16, 2016, Appalachian Materials appealed Stumb's April 2016 Letter to the Planning Board. The Planning Board held a quasi-judicial hearing on October 6, 2016, in which Appalachian Materials argued that Stumb's June 2015 Letter was a binding determination that the County did not timely appeal. Therefore, Appalachian Materials argued that Stumb had no authority to subsequently reverse

this binding decision by denying Appalachian Materials' application for a PIDO permit in the April 2016 Letter. On December 1, 2016, the Planning Board entered an order (the "Planning Board's Order"), in which the Planning Board unanimously reversed the April 2016 Letter; concluded that Appalachian Materials had satisfied all the requirements of PIDO; classified the June 2015 Letter as a binding and final determination; and found "no basis for any other allegation made by Stumb in his April 2016 Letter that any material misrepresentation was made in the [a]pplication," and ordered Stumb to release the PIDO permit to Appalachian Materials.

The County appealed from the Planning Board's Order by filing a petition for writ of certiorari with in Ashe County Superior Court on December 30, 2016. On November 30, 2017, the superior court entered an order (the "Superior Court's Order"), affirming the Planning Board's Order in all respects and ordering the County to issue a PIDO permit to Appalachian Material within ten business days.

On December 7, 2017, the County filed a motion with the superior court to stay its order. However, the County did not calendar the motion, therefore no stay has been entered. Moreover, the County failed to comply with the Superior Court's Order because it transferred custody of Appalachian Materials' PIDO permit to the superior court rather than issuing the PIDO permit directly to Appalachian Materials.

The County timely appealed the Superior Court's Order to this Court, arguing, *inter alia*, that the superior court erred by concluding that the June 2015 Letter was a final, binding determination. Because the June 2015 Letter was a final determination that the County did not timely appeal to the Planning Board, the Planning Board and superior court lacked the requisite subject matter jurisdiction to review this matter. Accordingly, the trial court's order should be vacated and the PIDO permit should be released to Appalachian Materials.

It is well settled in North Carolina that

> *boards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed.* The extent to which a board of adjustment has jurisdiction to hear an appeal is a question of law. In the event that a board of adjustment decision is alleged to rest on an error of law such as an absence of jurisdiction, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined.

Meier v. City of Charlotte, 206 N.C. App. 471, 476, 698 S.E.2d 704, 708 (2010) (citations omitted) (emphasis added). "Upon further appeal to this Court from a superior court's review of a municipal board of adjustment's decision, the scope of our review is the same as that of the trial court." *S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 210 N.C. App. 633, 637-38, 711 S.E.2d 158, 161 (2011) (*purgandum*).

Section 153.04(J) of the Ashe County Code of Ordinances states:

> The Planning Board shall act as the Board of Adjustment for all land usage ordinances in the Ashe County Code of Ordinances (Title XV: Land Usage). The Board shall act

> and hold hearings in accordance with G.S. § 153A-345.1 entitled Planning Boards. Each hearing shall follow rules applied to quasi-judicial proceedings. Each decision shall be based upon competent, material, and substantial evidence noted in the record of the proceeding.

Ashe County Code § 153.04(J) (2019).

Section 153A-345.1(a) of the North Carolina General Statutes dictates that "[t]he provisions of G.S. 160A-388 are applicable to the counties." N.C. Gen. Stat. § 153A-345.1(a) (2017). In relevant part, Section 160A-388 states:

> (a1) *Provisions of Ordinance.* – The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term "decision" includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development.

N.C. Gen. Stat. § 160A-388(a1) (2017).

Aligning with Section 160A-388(b1), Section 153.04(J)(3) of the Ashe County Code states, in relevant part:

> The Planning Board shall hear and decide appeals from decisions of Planning Department officials charged with enforcement of the development ordinances and may hear appeals arising out of any other ordinance that regulates land use, subject to all of the following:

> (a) Any person who is directly affected may appeal a decision to the Planning Board. An appeal is taken by filing a notice of appeal with the clerk to the Board. The notice of appeal shall state the grounds for appeal.
>
> (b) A county administrative official who has made a decision from which someone wishes to appeal shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first class mail.
>
> (c) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

Ashe County Code § 153.04(J)(3).

Simply stated, to appeal a decision made by an Ashe County Planning Department official, a petitioner must (1) have standing and (2) file the appeal within 30 days after receiving actual or constructive notice of the official's binding decision. "Our case law has made clear that for this thirty-day [notice of appeal] clock to be triggered, the order, decision, or determination of the administrative official must have some binding force or effect for there to be a right to appeal . . . ." *S.T. Wooten Corp.* 210 N.C. App. at 639, 711 S.E.2d at 162 (citation and quotation marks omitted). "Where the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is

conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T. Wooten Corp.*, 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

When assessing whether a letter from an administrative official represents the official's binding and appealable decision, this Court has previously relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a Planning Director; (3) whether the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property"; and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *Id.* at 641-42, 711 S.E.2d at 163.

Here, the parties do not dispute standing, and it is uncontested that the County did not timely appeal Stumb's June 2015 letter. Rather, the crux of this appeal is

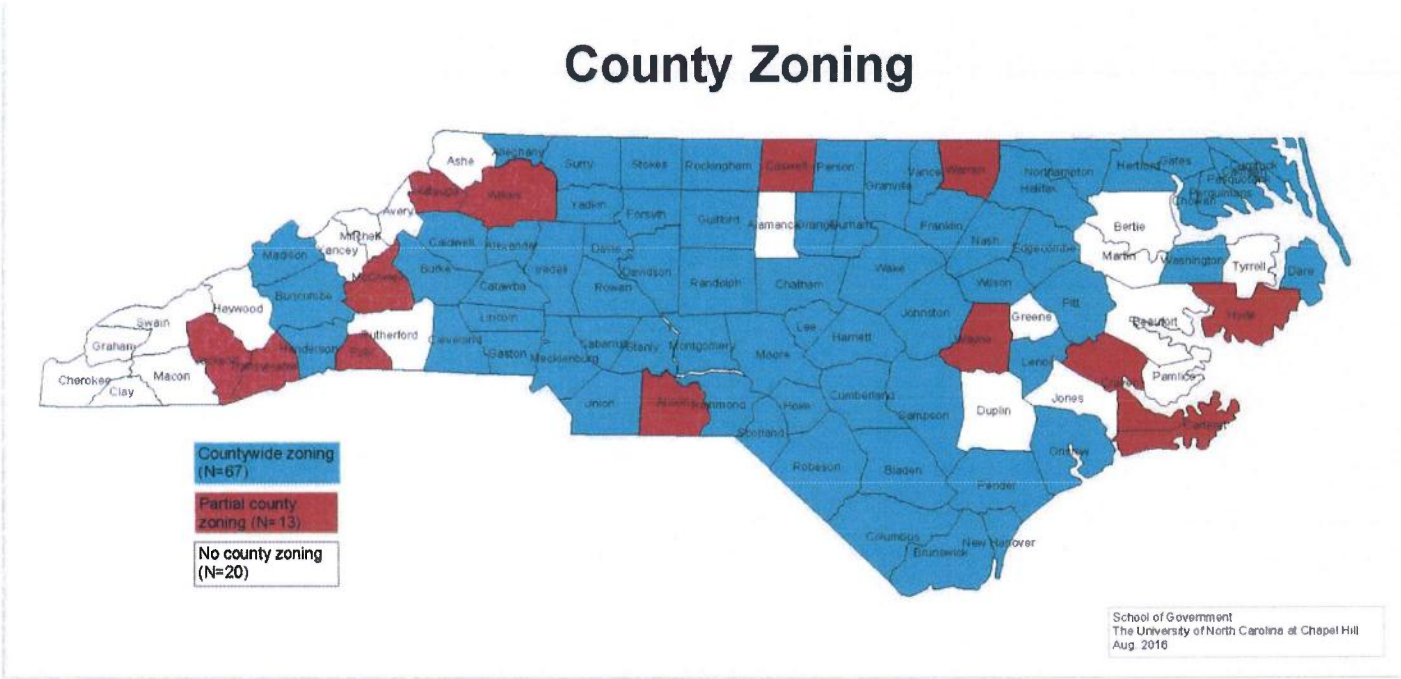
whether Stumb's June 2015 Letter served as a final determination binding the County to issue Appalachian Materials a PIDO permit.

Applying the above-mentioned factors, it is clear that (1) Stumb issued the June 2015 Letter to Appalachian Materials who, as the lessee of the disputed property and owner of the proposed asphalt plant, had a "clear interest" in whether Stumb concluded that its permit application complied with PIDO; (2) Stumb, as Ashe County's Planning Director, had the authority to issue PIDO permits and determine whether Appalachian Materials' permit application complied with PIDO; (3) the June 2015 Letter reflected Stumb's formal and definitive interpretation that Appalachian Materials' permit application complied with PIDO; and (4) Appalachian Materials relied on Stumb's June 2015 Letter as a binding decision that its application had been approved and that the PIDO permit would be issued once the air quality permit was obtained. Accordingly, the June 2015 Letter represented a binding determination that was subject to appeal to the Planning Board per N.C. Gen. Stat. § 160A-388(a1) and Ashe County Code § 153.04(J)(3).

Therefore, the County was required to voice any objection to the June 2015 Letter by noticing appeal within the requisite 30-day period per N.C. Gen. Stat. § 160A-388(b1)(3) and Ashe County Code § 153.04(J)(3)(c). Because the County did not timely appeal from the June 2015 Letter, both the Planning Board and the superior court lacked subject matter jurisdiction to reconsider whether Appalachian

Materials' application complied with PIDO. *See Meier*, 206 N.C. App. at 476, 698 S.E.2d at 708 ("[B]oards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed."). Absent a timely appeal, the June 2015 Letter bound the County to release the PIDO permit to Appalachian Materials once a copy of the outstanding air quality permit was forwarded to Stumb on February 29, 2016.

Because neither the Planning Board nor the trial court had subject matter jurisdiction, the order should be vacated, this matter dismissed, and the PIDO permit released to Appalachian Materials.



David Owens, *County Zoning*, UNC School of Government (Aug. 2016), https://www.sog.unc.edu/resources/legal-summaries/county-zoning

STATE OF NORTH CAROLINA

ASHE COUNTY

CLERK'S CERTIFICATE

I, Ann J. Clark, Clerk to the Ashe County Board of Commissioners, pursuant to N.C.G.S. §§153A-50 and 106A-79, do hereby certify as follows:

1. The Planning Ordinance was adopted on October 20, 1993 by the Ashe County Board of Commissioners and set out in the minutes of the Board of Commissioners in Book 6, Pages 473 through 477 and later codified in the Code of Ashe County as Title XV, Chapter 153 of the Code of Ashe County.
2. The attached being a true and accurate copy of the Planning Ordinance as codified on April 20, 2016.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of Ashe County, North Carolina, this the 15th day of May, 2017.

Official Seal:

Ann J. Clark, MMC, NCCCC
Clerk to the Board of Commissioners

CHAPTER 153: PLANNING

Section

§ 153.01 SCOPE OF PLANNING.

Every action and program of every component of the county involves planning, in a broad sense of the term. For the purposes of this chapter, the term is restricted to activities and programs involving physical, economic, and social development of the county.

(Ord. passed 10-20-93)

§ 153.02 PLANNING AGENCIES.

The following are designated as planning agencies assigned responsibilities under this chapter: the Board of County Commissioners, the Planning Board, the Planning Department, the Inspection Department, the Airport Authority and the Economic Development Commission.

(Ord. passed 10-20-93)

§ 153.03 BOARD OF COUNTY COMMISSIONERS.

In its legislative capacity the Board adopts policies, chapters, and amendments; appropriates funds; approves acquisition, construction, and disposition of public facilities; and oversees administration of the county. In its quasi-judicial or administrative capacity it serves as the appellate board for Planning Board decisions.

(Ord. passed 10-20-93)

§ 153.04 COUNTY PLANNING BOARD.

The Planning Board of the county is hereby created, in accordance with the following provisions.

(A) *Membership and vacancies.* The Planning Board shall consist of five members. All members shall be citizens and residents of the county and shall be appointed by the County Commissioners. Two of the initial members shall be appointed for a term of one year; two for two years; and one for three years. Their successors shall be appointed for terms of three years. Vacancies occurring for reasons other than expiration of terms shall be filled as they occur for the period of the unexpired term. Members may be removed for cause by the County Commissioners. If any member shall miss three consecutive meetings without good excuse, this shall be deemed cause for dismissal.

(B) *Organization, rules, meetings, and records.* Within 30 days after appointment, the Planning Board shall meet and elect a chairman and create and fill such offices as it may determine. The term of the chairman and other officers shall be one year, with eligibility for reelection. The Board shall adopt rules for transaction of its business and shall keep a record of its members' attendance and of its resolutions, discussions, findings and recommendations, which shall be public record. The Board shall hold at least one meeting monthly, and all of its meetings shall be open to the public. For the purpose of taking any official action three members will constitute a quorum.

(C) *General powers and duties.* It shall be the duty of the Planning Board, in general:

(1) To acquire and maintain in current form such basic information and materials as are necessary to an understanding of past trends, present conditions, and forces at work to cause changes in these conditions;

(2) To identify needs and problems growing out of those needs;

(3) To determine objectives to be sought in development of the county;

(4) To establish principles and policies for guiding action in development of the county;

(5) To prepare and from time to time amend and revise a comprehensive and coordinated plan for the physical, social, and economic development of the county;

(6) To prepare and recommend to the County Commissioners ordinances promoting orderly development along lines indicated in the comprehensive plan and advise them concerning proposed amendments of such ordinances;

(7) To determine whether specific proposed developments conform to the principles and requirements of the comprehensive plan for the growth and improvement of the area and ordinances adopted in furtherance of such plan;

(8) To keep the County Commissioners and the general public informed and advised as to these matters;

(9) To perform such quasi-judicial functions as: administering the county mobile home park ordinance, the county floodplain ordinance, and the county junk car ordinance; and

(10) To perform any other duties that may lawfully be assigned to it.

(D) *Basic studies.*

(1) As background for its comprehensive plan and any ordinances it may prepare, the Planning Board may gather maps and aerial photographs of physical features of the county; statistics on past trends and present conditions with respect to population, property values, the economic base of the county, and land use; and such other information as is important or likely to be important in determining the amount, direction, and kind of development to be expected in the area and its various parts.

(2) In addition, the Planning Board may make, cause to be made, or obtain special studies on the location, the condition, and the adequacy of specific facilities, which may include, but are not limited to, studies of housing; commercial and industrial facilities; parks, playgrounds, and other recreational facilities; public and private utilities; and traffic, transportation, and parking facilities.

(3) All county officials shall, upon request, furnish to the Planning Board such available records or information as it may require in its work. The Board or its agents may, in the performance of its official duties, enter upon lands and make examinations or surveys and maintain necessary monuments thereon.

(E) *Comprehensive plan.*

(1) The comprehensive plan, with the accompanying maps, plats, charts, and descriptive matter, shall be and show the Planning Board's recommendations to the County Commissioners for the development of said territory, including, among other things; the general location, character, and extent of streets, bridges, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds, and open spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; the removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of any of the foregoing ways, buildings, grounds, open spaces, property, utilities, or terminals; and the most desirable pattern of land use within the area, including areas for farming and forestry, for manufacturing and industrial uses, for commercial uses, for recreational uses, for open spaces, and for mixed uses.

(2) The plan and any chapters or other measures to effectuate it shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the county that will, in accordance with present and future needs, best promote health, safety, morals, and the general welfare, as well as efficiency and economy in the process of development; including, among other things adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for

light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities, services, and other public requirements.

(F) *Public facilities.* The Planning Board shall review with the County Manager and other officials and report its recommendations to the County Commissioners concerning the location and design of all proposed public structures and facilities; the acquisition and disposition of public properties; and the establishment of building lines, mapped street lines, and proposals to change existing streets. It shall also make recommendations concerning other matters referred to it by the County Commissioners.

(G) *Miscellaneous powers and duties.*

(1) The Planning Board may conduct such public hearings as may be required to gather information for the drafting, establishment, and maintenance of the comprehensive plan. Before adopting any such plan, it shall hold at least one public hearing thereon.

(2) The Planning Board shall have power to promote public interest in and an understanding of its recommendations, and to that end it may publish and distribute copies of its recommendations and may employ such other means of publicity and education as it may elect.

(3) Members or employees of the Planning Board, when duly authorized by the Board, may attend planning conferences, meetings of planning associations, or hearings on pending planning legislation, and the Planning Board may by formal and affirmative vote authorize payment within the Board's budget of the reasonable traveling expenses incident to such attendance.

(H) *Annual report and budget request.* The Planning Board shall, in May of each year, submit in writing to the County Commissioners a report of its activities, an analysis of its expenditures to date for the current fiscal year, and its requested budget of funds needed for the ensuing fiscal year.

(I) *Special committees.* The Planning Board may from time to time establish special committees to assist it in studying questions and problems. The Board, however, may not delegate to such a committee any of its official powers and duties.

(J) Act as the Board of Adjustment for all land usage ordinances. The Planning Board shall act as the Board of Adjustment for all land usage ordinances in the Ashe County Code of Ordinances (Title XV: Land Usage). The Board shall act and hold hearings in accordance with G.S. § 153A-345.1 entitled Planning Boards. Each hearing shall follow rules applied to quasi-judicial proceedings. Each decision shall be based upon competent, material, and substantial evidence noted in the record of the proceeding. Each decision shall be reduced to writing and reflect the Board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the chair or other duly authorized member of the Board.

(1) *Notice of hearings.* When the Planning Board is assigned to conduct a hearing, a notice shall be mailed to the person or entity whose request is the subject of the hearing, to the owner of the property that is the subject of the hearing if the owner did not initiate the request, and to the owners of all parcels of land abutting the parcel of land that is the subject of the hearing. Notice must be mailed at least 10 days, but no more than 25 days, prior to the date of the hearing. Within that same time period, the county shall also prominently post a notice of the hearing on the site that is the subject of the hearing or on an adjacent street or highway right-of-way.

(2) *Variance authority.* When unnecessary hardship would result from carrying out the strict letter of an ordinance, the Planning Board, by a vote of four-fifths of its membership, may apply a different standard to any of the provisions of the ordinance upon a showing of all of the following:

(a) Unnecessary hardship would result from the strict application of the ordinance. However, it shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

(b) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. However, a hardship resulting from personal circumstances, as well as hardship resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

(c) The hardship did not result from actions taken by the applicant or the property owner. However, the act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as self-created hardship.

(d) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved. Appropriate conditions may be imposed on any allowed variance, provided that the conditions are reasonably related to the variance.

(3) *Appeals authority.* The Planning Board shall hear and decide appeals from decisions of Planning Department officials

charged with enforcement of the development ordinances and may hear appeals arising out of any other ordinance that regulates land use, subject to all of the following:

(a) Any person who is directly affected may appeal a decision to the Planning Board. An appeal is taken by filing a notice of appeal with the clerk to the Board. The notice of appeal shall state the grounds for appeal.

(b) A county administrative official who has made a decision from which someone wishes to appeal shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first class mail.

(c) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

(d) The official who made the decision shall transmit to the Board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.

(e) An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the Planning Board after notice of appeal has been filed that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that case, enforcement proceedings shall not be stayed except by a restraining order granted by a court. If enforcement proceedings are not stayed, the appellant may file with the official a request for an expedited hearing of the appeal, and the Planning Board shall meet to hear the appeal within 15 days after such a request is filed.

(f) By the vote of a majority of the board membership, the act of the official may be upheld, modified, or overruled in part or in its entirety.

(g) A member of the Planning Board shall not participate in or vote on any quasi-judicial matter in a manner that would violate an affected person's constitutional rights to an impartial decision maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected person, or an interest in the outcome of the matter. If an objection is raised to a member's participation and that member does not recuse himself or herself, the remaining members shall by majority vote rule on the objection. If the majority vote favors allowing the challenged member to participate, reasons for that vote shall be stated as part of the written record of the proceeding.

(Ord. passed 10-20-93; Am. Ord. passed 9-8-03; Am. Ord. passed 1-9-06; Am. Ord. passed 5-18-09; Am. Ord. passed 5-19-14)

§ 153.05 PLANNING DEPARTMENT.

Under the direction of the County Manager, the Planning Department shall assist the County Commissioners, the Planning Board, the Inspection Department, the Airport Authority, and the Economic Development Commission with studies, advice, and preparation of plans.

(Ord. passed 10-20-93)

§ 153.06 INSPECTION DEPARTMENT.

The Inspection Department carries out the responsibilities set forth in G.S. Chapter 153, Article 18, Part 4 with regard to enforcement of the State Building Code and other laws relating to construction. In addition, it enforces the other ordinances listed in § 153.04(C) of this chapter, as well as other ordinances as assigned by the County Commissioners and the Manager. Normally it is responsible for issuing permits, making inspections of both new construction and existing structures, issuing certificates of compliance, issuing orders to correct violations, initiating legal actions against violators, and keeping records.

(Ord. passed 10-20-93)

§ 153.07 ECONOMIC DEVELOPMENT COMMISSION.

The Economic Development Commission formulates economic development projects and promotes economic development of the area, pursuant to G.S. Chapter 158, Article 2.

(Ord. passed 10-20-93)

§ 153.08 SEPARABILITY.

Should any section or provision of this chapter be declared invalid or unconstitutional by any court of competent jurisdiction, such declaration shall not affect the validity of this chapter as a whole or any part thereof which is not specifically declared to be unconstitutional or invalid.

(Ord. passed 9-2-08)

STATE OF NORTH CAROLINA

ASHE COUNTY

CLERK'S CERTIFICATE

I, Ann J. Clark, Clerk to the Ashe County Board of Commissioners, pursuant to N.C.G.S. §§153A-50 and 160A-79, do hereby certify as follows:

1. The Polluting Industries Development Ordinance (PIDO) was adopted on November 15, 1999 by the Ashe County Board of Commissioners and set out in the minutes of the Board of Commissioners in Book 6-2, Pages 152 through 156 and later codified in the Code of Ashe County as Title XV, Chapter 159 of the Code of Ashe County. The attached being a true and accurate copy of the PIDO as codified on April 20, 2016.
2. On October 3, 2016, PIDO was repealed in its entirety by the Ashe County Board of Commissioners and this action is set out in the October 3, 2016 Meeting Minutes of the Board of Commissioners of Ashe County on Page 4, and a true and accurate copy of these minutes is attached hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of Ashe County, North Carolina, this the 15th day of May, 2017.

ASHE COUNTY CORPORATE SEAL NORTH CAROLINA

Official Seal:

Ann J. Clark, MMC, NCCCC
Clerk to the Board of Commissioners

CHAPTER 159: POLLUTING INDUSTRIES DEVELOPMENT

Section

§ 159.01 TITLE.

This chapter shall be known as the Polluting Industries Development Chapter of Ashe County, North Carolina.

(Ord. passed 11-15-99)

§ 159.02 PURPOSE.

For the purpose of promoting health, safety, and general welfare of its citizens and the peace and dignity of the county, the County Commissioners hereby establish certain criteria relating to polluting industries to accommodate activities as defined herein. Polluting industries, by their very nature produce objectionable levels of noise, odors, vibrations, fumes, light, or smoke that may or may not have hazardous effects. These standards shall allow for the placement and growth of polluting industrial activities, while maintaining the health, safety and general welfare standards of established residential and commercial areas in Ashe County.

(Ord. passed 11-15-99)

§ 159.03 AUTHORITY.

This chapter is adopted under the authority and provision of G.S. § 153A-121.

(Ord. passed 11-15-99)

§ 159.04 JURISDICTION.

This chapter shall apply to all areas of unincorporated Ashe County, which are not included in the extraterritorial jurisdictions of any municipalities. All municipalities and their respective corporate limits shall be exempted from the ordinance, unless they choose to adopt this chapter or some form thereof.

(Ord. passed 11-15-99)

§ 159.05 DEFINITIONS.

The definitions shall be unique to this chapter and may not be interpreted for usage in ordinary, everyday language.

AIR POLLUTION. The emission of air contaminants as defined in G.S. § 143-215.108.

ACTUAL MEASURED DISTANCE. For the purposes of this chapter, the distance requirements shall be measured from the proposed building to the existing dwelling or other structure.

NOISE. Any unreasonably loud, excessive or unnecessary sound that takes in consideration for volume, duration, frequency, time, and other characteristics of sound.

ODOR. The minimum concentration in air of a gas, vapor, or particulate matter that can be detected by the olfactory systems of a group of healthy observers.

PERSON. A person shall be defined to include individual, corporation, partnership, an entity or any association thereof or any other business entity.

POLLUTING INDUSTRY. A polluting industry shall mean an industry, which produces objectionable levels of noise, odors, vibrations, fumes, light, smoke, air pollution or other physical manifestations that may have an adverse effect on the health, safety or general welfare of the citizens of Ashe County.

SMOKE. The visible vapor and gases given off by a burning or smoldering substance.

VIBRATION. Any ground-transmitted movement that is perceptible to the human sense of touch.

(Ord. passed 11-15-99)

§ 159.06 PERMITTING STANDARDS.

(A) A permit is required from the Planning Department for any polluting industry. A uniform permit fee of $500.00 shall be paid at the time of the application for the permit. No permit from the planning department shall be issued until the appropriate Federal and State permits have been issued.

(B) The location of a polluting industry, both portable and permanent shall not be within 1,000 feet, in any direction, of a residential dwelling unit or commercial building. The location of a polluting industry shall not be within 1,320 feet of any school, daycare, hospital or nursing home facility.

(1) Permanent roads, used in excess of six months, within the property site shall be surfaced with a dust free material (i.e. soil cement, portland cement, bituminous concrete).

(2) Material piles and other accumulations of by-products shall not exceed 35 feet above the original contour and shall be graded so the slope shall not exceed a 45 degree angle.

(3) A security fence, constructed of either wood, brick, or aluminum, shall be installed where the proposed extraction takes place. The fence shall be a minimum of 10 feet in height at the time of installation.

(4) The operation of this type industry shall not violate the Ashe County Noise Ordinance.

(Ord. passed 11-15-99)

§ 159.07 VARIANCE PROCESS.

(A) Where strict adherence to the provisions of this chapter would cause an unnecessary hardship, the Planning Board may authorize a variance. Any authorizing of a variance shall not destroy the intent of this chapter. Any authorized variance shall be recorded in the minutes of the Planning Board meeting.

(B) A hardship, as used in the context of this section, shall be considered to be some unique or unusual character to the proposed site, including but not limited to unique, size, shape, contour, or distance requirement. An economic hardship to the applicant is not to be considered for a variance.

(C) All requests for a variance shall be submitted to the Planning Department at least seven days before the next scheduled planning board meeting.

(Ord. passed 11-15-99)

§ 159.08 NON-CONFORMING USE.

Any existing person operating in non-compliance of this chapter may continue to operate as a non-conforming use, but may not expand without a variance permit in accordance with provisions thereof.

(Ord. passed 11-15-99)

§ 159.09 SEPARABILITY.

Should any section or provision of this chapter be declared invalid or unconstitutional by any court of competent jurisdiction, such declaration shall not affect the validity of this chapter as a whole or any part thereof which is not specifically declared to be unconstitutional or invalid.

(Ord. passed 9-2-08)

§ 159.99 PENALTIES FOR VIOLATIONS.

(A) *Misdemeanor.* Any person who violates a provision of this chapter shall be guilty of a misdemeanor and shall be subject to punishment as provided for by G.S. § 14-4. Each day of a violation of this chapter shall be a separate offense.

(B) *Financial penalties.* In addition to criminal penalties for a violation of this chapter, the Board of County Commissioners may impose civil penalties for each day's continuation of the offense. The amount shall be limited to $500 per day. A penalty unpaid 30 days after the offender has been cited for violation of this chapter may be recovered in a civil action in the General Court of Justice.

(C) *Other remedies.* All appropriate remedies for relief authorized by G.S. § 153A-123, including orders for mandatory and prohibitory injunctions and for abatements, may be used to enforce this chapter.

(Ord. passed 11-15-99; Am. Ord. passed 3-5-12)