NO. 249PA19 TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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THE NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS' AMICUS CURIAE BRIEF

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INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

NO. 249PA19 TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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THE NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS' AMICUS CURIAE BRIEF

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Amicus Curiae, the North Carolina Association of County Commissioners ("NCACC" or "County Association"), pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, filed a Motion for Leave to file an Amicus Curiae Brief in support of the position

presented by Ashe County, North Carolina and submits the foregoing brief in support of its Motion.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

To avoid unnecessary repetition, the NCACC respectfully incorporates by reference the statement of the facts and statement of the case as set forth by Ashe County.

I. THE NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS.

The NCACC is a voluntary, nonprofit organization created to represent the interests and concerns of county governments in North Carolina. The mission of the NCACC is to improve the ability of counties to provide services to North Carolina citizens. The County Association was founded in 1908 and works on behalf of all 100 counties. Collectively, the NCACC serves an estimated population of 10,488,084. (See United States Census Bureau, Quick Facts North Carolina, https://www.census.gov/quickfacts/NC; population estimates July 1, 2019 (last visited January 2, 2020). Ashe County is a member of the Association.

The NCACC advocates for its member counties, researches fiscal and legal issues affecting county government, and educates county leaders on those issues. Among the 100 Counties, local governments handle a broad range of applications for permits including permits for land use development. County employees respond to requests for updates and information concerning applications that have been submitted through a variety of methods including telephone calls, in-person meetings, email, and written guidance. The staffing of planning departments varies across North Carolina counties. Some departments include multiple staff that review numerous applications and plans every week. For example, Wake County currently has nine members in the planning department who work with the development community on a daily basis to make decisions and provide plan review comments to applicants. Located in a county with large unincorporated areas that are rapidly developing, the department reviews hundreds of plans each year. The Moore County planning department includes four staff members and a planning director who review approximately 450 residential zoning permits, as well as numerous nonresidential permits and other plans each year. The Winston-Salem/Forsyth County joint city-county planning

and inspections department contains 8-10 staff members who make dozens of recommendations on land use plans every month. The wide ranges reflect the diversity of the North Carolina counties in their geography and demand for building and land use regulation.

Among the 100 counties there is also a variety of methods used to regulate land use. A number of counties do not use zoning ordinances. The Ashe County case decision constitutes a new standard and process that impedes a county's ability to effectively use its powers to regulate land development and upends previously established criteria for interpreting a local government communication related to land use development.

ARGUMENT

The NCACC's 100 member counties have a substantial interest in the Court of Appeals' decision that is the subject of this appeal because the opinion directly impacts the decision-making process and police powers of a county government. The Court of Appeals' decision raises significant concerns about the creation of an interlocutory appeal of a preliminary staff communication. The NCACC respectfully requests that the Supreme Court reverse the holding of the Court of Appeals. The

NCACC respectfully incorporates by references and refers to and supports the arguments set forth in Ashe County's brief and submits the following in support of those arguments and specifically as those issues affect the Association's members.

I. THE COURT OF APPEALS ERRED BY REQUIRING COUNTIES TO TREAT ALL COMMUNICATIONS RESPONDING TO PERMITS AS POTENTIAL FINAL DECISIONS.

Prior to the Ashe County opinion, a final decision of a local government concerning a zoning interpretation triggers an appeal period if the letter is definitive, authoritative and affects the legal rights of the party making the appeal. Meier v. City of Charlotte, 206 N.C. App. 471, 698 S.E.2d 704 (2010). In contrast, a letter merely explaining the law was not considered to have legal or binding effect. In re Appeal of the Society for the Preservation of Historic Oakwood, 153 N.C. App. 737, 571 S.E.2d 588 (2002). The Court of Appeals erroneously analyzed the June 2015 communication using factors applied in zoning cases despite the fact that the ordinance at question in Ashe County was not a zoning ordinance. In S.T. Wooten Corp. v. Bd. of Adjustment of Town of Zebulon, 210 N.C. App. 633, 711 S.E.2d 158 (2011), a company desiring to add an

asphalt plant to an existing concrete plant requested a zoning determination letter. The letter issued included a conclusion that an asphalt plant was a permitted use at this site. The Court of Appeals in Wooten determined this letter was a binding decision because:

1) the town ordinance in place authorized the zoning administrator to interpret the ordinance;

2) the letter addressed a specific question of interpretation;

3) the additional information in the letter, which stated additional requirements prior to construction, did not make the interpretation less binding; and

4) the ordinance provided that appeals must be made within thirty days. As the town in that case did not appeal, the court determined the letter was binding. Id.

In contrast, the Court of Appeals in the Ashe County opinion incorrectly applied the Wooten factors to a non-zoning ordinance. The result changed the test from clearly stated and delineated factors that had permitted a county to determine under which circumstances a communication concerning a zoning question will be considered binding and when it must be appealed, to an unworkable standard applied to an

ordinance enacted by the exercise of police powers. None of the factors present in the Wooten case were present in the Ashe County case, including the fact that the Ashe County ordinance in question was not a zoning ordinance. The Court of Appeals should have reversed the trial court and held that the June 2015 letter was not a binding decision.

The County joins in the Petitioner's arguments in support of reversal on the basis that the June 2015 letter responding to the request as to whether the development complied with the Polluting Industries Development Ordinances did not constitute a decision. Viewed in its full context, the letter at issue was not determinative because 1) the code of ordinances for Ashe County did not empower the planning director with authority to issue interpretations of the code and permitting requirements; 2) the additional requirements and description based on an incomplete application alters the opinion expressed in the letter since those necessary preceding conditions were required to have been met before the development could be approved; and 3) there was no provision for the County to appeal it. (See Pp. 4-5 of the Ashe County Petition for Discretionary Review). The Court of Appeals materialized a new standard weakening a county's police powers. The Supreme Court should

reverse and remand the decision for entry of an opinion rejecting the new standard.

II. THE COURT OF APPEALS' DECISION IMPOSES AN UNWORKABLE UN-FUNDED MANDATE THAT IMPEDES THE COUNTIES' ABILITY TO SERVE THE PUBLIC.

The Court of Appeals' decision clearly states that counties must "develop a process" for the county to become aware of intermediate staff decisions and preserve the county's right to appeal. As a result of this error, counties must review every communication related to land development, not limited to zoning ordinances as was the case in Wooten. Given the number of permits, applications, and size of planning departments, this is an unworkable and astronomical task that will adversely affect the public and the counties. The effect of this decision will require counties to expend significant resources on tracking all communications and utilizing legal counsel to review and evaluate which communications trigger a right to an appeal, and which do not. This task amounts to a logistical impossibility and impedes counties since the standard to be applied is unclear under the facts of the Ashe County case.

Despite the fact that the Court of Appeals acknowledged that the June 2015 letter was not intended to be a determination that the permit would be issued, the Court of Appeals implied a "binding effect" on the determination of buffer zones. The confusing new standard will be difficult for county planning departments to navigate, and lends itself to a county electing to engage in less communication with applicants to avoid the risk of rendering a decision, even when a communication is conditioned upon an incomplete application, which then exposes the county to litigation and attorneys' fees. See N.C. Gen. Stat. § 6-21.7 (2019).

The Supreme Court of North Carolina historically has considered the effect of an opinion on local governments. See Morris Communications Corp. v. City of Bessemer City Zoning, 365 N.C. 152, 161-62, 712 S.E.2d 868, 874 (2011) ("We acknowledge that requiring municipalities to investigate the validity of the numerous permits they have issued would be unduly burdensome."). Far greater a burden than determining the validity of permits, the Ashe County opinion requires that a local government must be able to anticipate which communications an applicant has relied upon in order to preserve the government's right

to appeal. (Slip Op at 15) The Ashe County decision affirmatively set forth that it is on "each county to develop a process whereby it can preserve its right to appeal such determinations, unless and until the law in this regard is changed." (Slip Op at 15) The broad sweeping language conflicts with existing law for the reasons stated in the Petitioner Ashe County's brief and creates an unworkable standard for counties to meet.

Under the facts of the Ashe County opinion, the elements required to establish a binding decision were not present. The result leaves counties responding to land development applications especially vulnerable to litigation. Counties will incur expenses and divert staff resources in attempting to develop a process to evaluate each communication, which amounts to a logistical impracticality in light of the application workload or number of staff, depending on the county. Counties may be forced to elect to actively decrease their communications concerning land use applications in order to avoid incurring the expense of evaluating whether a particular communication constitutes a final determination, and whether the communication is appealable. This "gag order" or chilling effect will hinder the relationships that counties foster with the development community and the public.

In order to accomplish the rules imposed by the Court of Appeals' opinion, counties must establish a tracking system of every staff communication to citizens. For counties receiving large numbers of applications yearly, managing and tracking all communications from the planning department to determine which communications constitute binding decisions or partially binding decisions amounts to a logistical impossibility. For example, Wake County engages in hundreds of interactions per year. In 2018, the annual number of residential permits issued by Wake County amounted to 14,845[1] and the annual number of commercial permits issued totaled 2,379.[2] Binding counties to a preliminary interpretation before an application is complete and

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[1] See Lori K. Neumeier and Jason Horton, Data Dashboard: Residential Building Permits, WakeGov Open Data, (last modified 3/14/2019 2:43 PM), http://www.wakegov.com/data/bythenumbers/Lists/Data%20Indicator/DispForm.aspx?ID=22&Source=http%3A%2F%2Fwww%2Ewakegov%2Ecom%2Fdata%2Fbythenumbers%2FPages%2Fdefault%2Easpx&ContentTypeId=0x010054C103E0A003C943977BA82E8204CDEE

[2] See Lori K. Neumeier and Jason Horton, Data Dashboard: Commercial Building Permits, WakeGov Open Data, (last modified 3/14/2019 2:42 PM), http://www.wakegov.com/data/bythenumbers/Lists/Data%20Indicator/DispForm.aspx?ID=31&Source=http%3A%2F%2Fwww%2Ewakegov%2Ecom%2Fdata%2Fbythenumbers%2FPages%2Fdefault%2Easpx&ContentTypeId=0x010054C103E0A003C943977BA82E8204CDEE

submitted could negatively impact communities, planning decisions, and surrounding properties for years to come.

In addition to the administrative expenses of developing "a process," counties will be forced to incur legal expenses for the evaluation of communications, and engage in appeals of the determination resulting in higher costs to the tax-payer. Essentially, the Court of Appeals is imposing an unworkable and unduly burdensome process that will result in additional costs to counties, which will ultimately impose a burden on the tax-payer, by diverting tax revenue from other public services to pay for an administrative purpose that was improperly imposed by the slip opinion. If counties cannot provide services to their citizens without the threat of increased costs, then counties will fail to meet the needs of their citizenry. The opinion's mandate is prejudicial to both counties and to the public for these reasons and should be reversed.

CONCLUSION

WHEREFORE, for the reasons set forth herein and the reasons expressed in Ashe County's brief, the County Association respectfully requests the Court to reverse the decision of the Court of Appeals and remand for an opinion reversing the trial court's order.

This the 2nd day of January, 2020.

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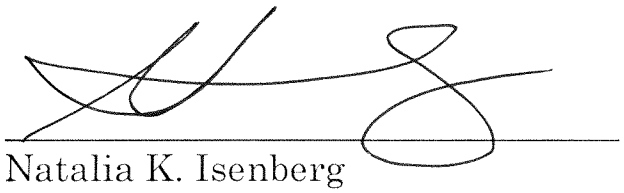
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Amicus Curiae certifies that the foregoing brief, which is prepared using proportional font, is less than 3,750 words (excluding cover, indexes, table of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing **BRIEF** on all other parties to this action by depositing a copy hereof, postage paid, in the United States Mail, addressed as follows:

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