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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ASHE COUNTY ASHE CO., C.S.C.

16 CVS 514

ASHE COUNTY, NORTH CAROLINA, *mb*)

Petitioner,)

v.)

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

Respondents.)

**PETITION FOR WRIT OF CERTIORARI
AND FOR
JUDICIAL REVIEW**

Petitioner Ashe County, North Carolina (the "County"), by and through counsel, petitions this Court to issue a Writ of Certiorari to the Ashe County Planning Board (the "PB"), ordering the PB to file in the Superior Court the record of the PB's proceedings in the matter of *In Re: Appalachian Materials, LLC's Appeal of the Planning Director's April 20, 2016, Denial of its Polluting Industry Development Permit Application* (the "Proceeding"). The PB held a hearing in the Proceeding on October 6, 2016 and signed its order on December 1, 2016 reversing the County Planning Director's decision denying a permit pursuant to the County's Polluting Industry Development Ordinance (the "PIDO") and affirmatively ordering the County Planning Director to issue a PIDO permit to Appalachian Materials, LLC (the "Order").¹

Upon the PB's delivery to the Court of the full and complete record of the Proceeding, the County requests the Court to conduct a Judicial Review of the record and reverse the Order for the reasons stated hereafter in the Petition. In support of its Petition and request for Judicial Review, the County, alleges and says as follows:

¹ A copy of the Order is attached as Exhibit A.

PARTIES, STANDING, JURISDICTION AND VENUE

1. The Petitioner is a body politic formed and operated by virtue of the laws of the State of North Carolina and having such powers as are granted to it by the State. The Petitioner is one of the North Carolina counties, as defined by State law.
2. The Respondent PB is an administrative board established by the County to perform the functions of a zoning board of adjustment under the limited enabling statutes of N.C.G.S. §§153A-345.1 and 160A-388(a). The respondent PB entered the Order that is the subject of the Petition. The PB is named as a Respondent as required by N.C.G.S. § 160A-393(e).
3. Upon information and belief, Respondent Appalachian Materials, LLC ("AM") is a limited liability company organized under the laws of the State of Tennessee, with its principal office located at 5605 Bamboo Road, Boone, North Carolina 28607.
4. In June 2015, the Respondent AM caused BREC.Biz, a private professional engineering and surveying firm licensed by the State of North Carolina, to deliver to the County a letter and attached materials that the engineering firm asserted constituted AM's application for a permit under the PIDO. In the professional engineering and land surveying firm's letter, the firm stated that AM's application "meets all requirements" of the PIDO. For reasons stated hereafter, this assertion was false when made. In reliance upon the letter, the Planning Director accepted a fee for a Polluting Industries Permit. A copy of the letter, materials and receipt issued by the County is attached as Exhibit B (collectively "Delivered Materials").

5. Upon information and belief, Mr. Derek S. Goddard signed the letter stating that the Filed Materials “meets all requirements” and upon information and belief, Mr. Goddard is licensed as a professional land surveyor by the State of North Carolina.
6. On or about April 6, 2016, AM filed a petition in Ashe County Superior Court requesting a Writ of Mandamus and Declaratory Judgment against the County and the Planning Director (the “Petition”) in a civil action styled “*Appalachian Materials, LLC v. Ashe County, North Carolina; and Adam Stumb, Ashe County Director of Planning, in his Official Capacity*” and identified in the Ashe County Superior Court’s records as 16 CVS 157 (the “Pending Lawsuit”). A copy of AM’s petition to Superior Court (without attachments) is attached as Exhibit C.
7. The County’s Planning Director denied AM’s request for a PIDO permit on April 20, 2016. A copy of the Planning Director’s decision denying issuing a PIDO permit to AM is attached as Exhibit D.
8. On or about May 16, 2016, AM delivered to the Clerk of the Ashe County Planning Board a letter with documents stating that AM was delivering a “Notice of Appeal.” A copy of AM’s letter addressed to the Clerk of the Ashe County Planning Board is attached as Exhibit E.
9. On or about June 7, 2016, AM filed its amended petition in Superior Court in its Pending Lawsuit. A copy of AM’s amended petition to Superior Court (without attachments) is attached as Exhibit F.
10. AM’s pleadings in the Superior Court did not inform the Superior Court that AM had filed an appeal with the PB.
11. In the Order, the PB ruled upon issues first raised by AM in the Pending Lawsuit.

12. The Pending Lawsuit was pending at all times relevant to the Proceeding and Order and remains pending.
13. The Planning Director, whose decision was reversed by the PB and who is required by the Order to issue a permit to AM under the County's PIDO, is an employee of the County and was acting in accordance with his limited duties and powers under the PIDO when he denied to issue the PIDO permit. The County actively participated in the Proceeding defending its Planning Director's decision.
14. The County believes that the Order was substantially inconsistent with the proper interpretation of the PIDO and other County laws; and the Order improperly, without basis in law or fact, exempts AM from other County laws and orders the Planning Director to issue a PIDO to AM.
15. The County believes that the PB, composed of good and well-intended County citizens, was led by AM's arguments to far exceed the board's limited appellate jurisdiction and to substantially misinterpret the PIDO and other County laws. The PB rarely hears appeals of any type. Although one member of the PB was a licensed attorney, the PB had no independent legal counsel advising it as to its limited appellate jurisdiction or how to control and manage the Proceeding within the confines of North Carolina and County law.
16. The County believes that the PB, having accepted a fanciful narrative that the County Planning Director had mistreated AM when he denied AM's request for a PIDO permit, waived or interpreted away the mandatory, non-discretionary required standards of the PIDO in order to require the County's Planning Director to issue the

PIDO. The County believes that the PB is powerless to change any County laws, including the PIDO.

17. The issues created by the Proceeding and the Order exposes all County citizens to the harms of polluting industries and appealing the Order is necessary to protect the County and its citizens.
18. Every County citizen is entitled to enjoy the protections of the PIDO and the precedent established by the Proceeding and Order harms and threatens every County citizen's interests. Because the County represents all County citizens, there is no reason for any County property owners or citizens to be joined as a petitioner in the County's request for Judicial Review of the Proceeding and Order.
19. There is no need to name any persons as Respondents other than the PB and AM. *See*, N.C.G.S. § 160A-393(e).
20. The County has set forth facts in its petition showing its standing to appeal the Order to the Ashe County Superior Court under the standing requirements of N.C.G.S. § 160A-393(c)(1) and the County has standing to file the petition. N.C.G.S. § 160A-393(d)(4).
21. This Court has jurisdiction to issue the Writ of Certiorari to the PB and to conduct a judicial review of the record of the PB's proceedings pursuant to N.C. Gen. Stat. §§153A-345.1, 160A-388(e2)(2) and 160A-393.

BACKGROUND AND RELEVANT COUNTY LAWS

22. The County is located in the mountains of North Carolina and is known for its natural scenery. Tourism, second homes and growing Christmas trees are principal economic activities in the County.

23. The prospect of asphalt plants operating in the County has stirred controversy since at least the 1990s. See. Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, (4th Cir. 2002)(affirming dismissal of asphalt plant operator’s challenge to the County denying a permit and County subsequently adopting a moratorium on asphalt plants and later adopting the PIDO).

The County’s Polluting Industries Development Ordinance (PIDO)

24. AM relied upon the PIDO and transmitted through a professional engineering firm the Delivered Materials, stating to the County that the Delivered Materials met all of the PIDO requirements.

25. The Planning Director denied AM’s request for a PIDO permit and AM appealed the Planning Director’s denial of AM’s request to the PB.

26. The Proceeding was the appeal by AM of the Planning Director’s denial of AM’s request for a PIDO permit.

27. As codified, the PIDO was four (4) pages long and was a clear and simple law. A copy of the PIDO is attached as Exhibit G.

28. The County adopted the PIDO using its general ordinance-making powers. Exhibit G, § 159.03.

29. The PIDO was not a zoning ordinance.

30. The PIDO was not a subdivision ordinance.

31. The PIDO was not adopted using the powers granted to the County under Article 18 “Planning and Regulation” of Chapter 153A of the North Carolina General Statutes.

32. The purpose of the PIDO was promoting health, safety, and general welfare of all County citizens and the peace and dignity of the County.

33. The PIDO found that 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.
34. To combat these harms and to protect County citizens the PIDO established "Permitting Standards." Exhibit G, § 159.06.
35. AM has, at no time, contested the validity of the PIDO "Permitting Standards" and has, at all times, admitted that it must comply with all of the Permitting Standards of the PIDO to be entitled to a PIDO permit.
36. The PIDO did not change from June 1, 2015 to April 20, 2016.
37. The PIDO was repealed in its entirety on October 3, 2016.

Moratorium and High Impact Land Use Ordinance (HILUO)

38. In June 2015, AM transmitted to the Planning Director the Delivered Materials and the letter transmitting the Delivered Materials falsely stated the Delivered Materials met all PIDO requirements. On the date the Delivered Materials were presented to the County by hand delivery, the County Planning Department accepted \$500.00 for "Polluting Industries Permit."
39. In fact, upon a cursory review, the Delivered Materials were obviously incomplete because it was legally insufficient to entitle AM to a PIDO permit. Nevertheless, AM presented the Delivered Materials, represented that the Delivered Materials met all PIDO requirements and paid the fee.
40. Instead of requesting a final decision and having the Planning Director deny to issue a PIDO permit, AM requested the Planning Director to hold the Delivered Materials while AM sought a state air quality permit. Until AM secured a state air quality

permit, the Delivered Materials remained wholly incomplete and legally insufficient under the PIDO to authorize the Planning Director to issue a PIDO permit.

41. As a courtesy, the Planning Director agreed to hold the Delivered Materials, even though the PIDO does not authorize holding materials for an extended time period.
42. During the extended duration while the County waited for AM to submit a complete and legally sufficient application, County citizens became aware of the Delivered Materials and the County adopted a moratorium on issuing development approvals to polluting industries in October 2015. By its terms, the moratorium took effect on October 19, 2015 “and shall expire April 19, 2016 with the possibility of a six month extension.” A copy of the Moratorium is attached as Exhibit H.
43. On October 3, 2016, the County adopted a new standalone ordinance, the High Impact Land Use Ordinance (the “HILUO”) to protect County citizens from the harms of High Impact Land Uses. A copy of the HILUO is attached as Exhibit I.
44. As of the date of the Order, the Planning Director had determined all pending applications under the PIDO and the HILUO was a separate standalone County law applicable to asphalt plants and other uses and was different from the PIDO in a number of material respects.
45. Unless AM abandons contending that it complied with PIDO, AM must comply with both the PIDO and the HILUO, in addition to other County ordinances, such as the County Noise Ordinance and Watershed Ordinance in order to operate in the County.

Chronology of Events in the Order

46. The following is the chronology of events:

- a. On June 5, 2015, AM delivered the Delivered Materials to the County and the County Planning Department wrote a receipt for a PIDO permit. Order, Findings of Fact, 1.²
- b. The Delivered Materials did not include an air permit issued by the State of North Carolina and was patently insufficient to authorize the Planning Director to issue a PIDO permit. Order, Findings of Fact 3-5.
- c. AM knew at the time it delivered the Delivered Materials to the County that the Delivered Materials were incomplete and legally insufficient to authorize the Planning Director to issue a PIDO permit. Order, Findings of Fact 5; PIDO, § 159.06(A).
- d. On October 19, 2015, the County adopted a Moratorium issuing approvals to Polluting Industries (the “Moratorium”). Order, Findings of Fact 25. A copy of the Moratorium is attached as Exhibit H.
- e. At AM’s request, the Planning Director neither required AM to withdraw the incomplete and legally insufficient Delivered Materials nor denied AM’s request for a PIDO permit until April 20, 2016. Order, Findings of Fact 12-16, 18.
- f. At the time the County adopted the Moratorium, the Delivered Materials were incomplete and legally insufficient to authorize the Planning Director to issue a PIDO permit. PIDO, § 159.06(A). Order, Findings of Fact 3.

² Findings of Fact 1 contains an obvious error. The date, according to numerous other findings and conclusions of law, the Application was submitted to the County Planning Staff was June 15, 2015, not as stated in the first Findings of Fact as June 15, 2016.

- g. The first date that the Delivered Materials could have possibly been complete and legally sufficient to authorize the Planning Director to issue a PIDO permit to AM was February 29, 2016 – nearly 8 months after the Delivered Materials were delivered to the Planning Department – the date the State of North Carolina air quality permit was delivered to the Planning Director. Order, Findings of Fact 28.
- h. With the delivery of the air quality permit, AM requested the Planning Director to issue a PIDO Permit. Order, Findings of Fact, 28.
- i. The air permit provided to the Planning Director conflicted with information in the Delivered Materials. Order, Findings of Fact 29-31, 38-44.
- j. The conflict rendered the Delivered Materials legally insufficient to authorize the Planning Director to issue a PIDO permit because a residential dwelling unit was located within PIDO's restricted radius. Order, Findings of Fact 38, 40, 43.
- k. On April 4th, 2016, the Moratorium was extended for another six months or until October 19, 2016. Order, Findings of Fact 26.
- l. When the Planning Director did not issue or deny issuing a PIDO permit to AM, AM filed a Petition for Writ of Mandamus and Request for Declaratory Judgment on April 7, 2016 and this Pending Litigation remained pending during the Proceeding. Order, Findings of Fact 32.
- m. On April 20, 2016, the Planning Director wrote a letter to AM denying issuing the PIDO permit. Order, Findings of Fact 34.

- n. On May 16, 2016, AM filed an appeal of the Planning Director's decision to deny issuing a PIDO permit to the PB and requested the PB to reverse the Planning Director's decision. Order, First Paragraph.
- o. On May 25, 2016, the State of North Carolina revised the original air permit to eliminate the conflict between the Delivered Materials and the air permit. Order, Findings of Fact 44 -45.
- p. On May 26, 2016, AM delivered the new air permit to the Planning Director. Order, Findings of Fact 46.
- q. In April and May 2016, AM commenced two separate proceedings with two separate decision makers and both proceedings were pending when the PB decided to hold an evidentiary hearing. Order, Findings of Fact 32 & First Paragraph.
- r. On October 6, 2016, the PB held a quasi-judicial hearing on AM's Notice of Appeal of the Planning Director's April 20, 2016 decision to deny issuing a PIDO permit to AM. Order, First Paragraph.
- s. On December 1, 2016, the Chairman of the PB signed the Planning Director's written decision.

47. Upon information and belief, the PB signed the Order as drafted by AM.

Chronology Presented to the PB but Omitted from the Order

48. On August 31, 2015, AM communicated to the Planning Director saying that AM was "very surprised" that the Planning Director had said that the Delivered Materials were incomplete. Attached as Exhibit J is AM's communication to the Planning Director.

49. On September 2, 2015, the Planning Director responded and stated to AM “[w]ithout the Air Quality permit the application is incomplete.” See, Exhibit J.
50. AM neither appealed this determination nor supplemented the Delivered Materials before, on October 19, 2015, the date the County adopted the Moratorium.
51. Exhibit J was presented to the PB and sworn testimony verified Exhibit J as being genuine and as being received by AM.
52. Nevertheless, zero mention of this requested determination is found within the four corners of the Order.
53. Likewise, the original air quality permit characterized in the Order as being administratively revised was, in fact, a new air quality permit issued with a new and different number, and with an issuance and effective date of May 25, 2016. A copy of this air permit is attached as Exhibit K.
54. Exhibit K has a new and different mandatory location for the truck load-out than the air permit delivered to the Planning Director on February 29, 2016.

GROUND ON WHICH THE COUNTY CONTENDS THE PB ERRED

As required by N.C.G.S. 160A-393(c)(2), the County sets forth the grounds in its Petition upon which the County contends the PB erred. Allegations 1-46(a) through (s) and 47 through 54 of the Petition are re-alleged and incorporated as allegations in support of each and every ground set forth hereafter.

- I. **Applying the *De Novo Review* standard, the PB committed the following errors as a matter of law:**

In Excess of Statutory Authority Conferred Upon the PB (NCGS § 160A-393(k)(1)(a))

1. The PB erred when it heard AM’s appeal and signed the Order.

- a. The PB was acting as a board of adjustment, had no inherent jurisdiction or powers and possessed only the jurisdiction granted by State and County law. The PB exceeded its jurisdiction because for among other reasons:
 - i. The PB was an inferior administrative tribunal to the Superior Court.
 - ii. At the time of the Appeal, AM had already selected the Ashe County Superior Court as the forum to litigate the issues it sought to raise in the Proceeding and the PB was aware of the Pending Litigation. Order, Findings of Fact 23.
 - b. The PB should not have held the Proceeding or entered the Order. The Order should be reversed.
2. Many Conclusions of Law in the Order were well beyond the PB's limited appellate jurisdiction.
- a. AM's Notice of Appeal was limited to the Planning Director's April 20, 2016 letter and AM's characterization of the April letter as a reversal of a prior letter signed by the Planning Director on June 22, 2015. Exhibit D.
 - b. The legal issues decided by the PB in the portion of the Order in Conclusions of Law 1-7 under the label "*The Application is entitled to Review under the Ordinance in Effect at the Time the Application was Submitted*" were beyond the PB's appellate jurisdiction. The HILUO

was never part of the Planning Director's decision and no appeal under HILUO was before the PB in the Proceeding.

- c. The legal issues decided by the PB in the portion of the Order Conclusions of Law 8-14) under the label "*The June 2015 is a Binding and Final Determination*" was beyond the PB's appellate jurisdiction as the Order found as a fact that the June 2015 letter was not appealed. Order, Findings of Fact, 23.
 - d. The Order, to the extent it overrules the Planning Director's September 2, 2015 determination was beyond the PB's appellate jurisdiction because the determination was not appealed.
3. Many Conclusions of Law in the Order rest upon Findings of Facts based solely upon information not presented to the Planning Director by AM on or before April 20, 2016. These Findings and Conclusions are beyond the PB's appellate jurisdiction.
- a. Even if the PB had some limited appellate jurisdiction, the simple issue before the PB in the Proceeding was whether, based upon the record transmitted to the PB by the Planning Director, the Planning Director's decision on April 20, 2016 was correct on that date under PIDO - and nothing more. See, N.C.G.S. § 160A-388(b1)(5) ("The official who made the decision shall transmit to the board all documents and exhibits constituting the record.")
 - b. Based upon the record transmitted to the Planning Board by the Planning Director, the Planning Board should have affirmed the

Planning Director's decision, allowing AM to file an application for a HILUO permit.

- c. The Order proves that the PB considered information not in the record transmitted der to reach its decision reversing the Planning Director and ordering the Planning Director to issue a PIDO permit.
4. The PB is powerless to grant exemptions from County laws, waive mandatory requirements of County laws or estop the County from enforcing its laws as written.
- a. The Order, in effect, grants AM an exemption from complying with the HILUO. This was error.
 - b. The Order, in effect, transforms the June 2015 letter where the Planning Director communicated the only thing he was authorized under PIDO to communicate - I cannot issue a PIDO permit - into a final determination granting a PIDO permit conditioned upon submittal of the air permit. PIDO forbids issuance of PIDO permits conditionally. Exhibit G, § 159.06A) ("No permit from the Planning Department shall be issued until the appropriate Federal and State permits have been issued."). This was error.
 - c. The Order, by omitting the September 2, 2015 determination, both ignores (1) that a prior determination as to the incompleteness of the Delivered Materials had been made and not appealed and (2) any ambiguity as to whether the Planning Director had, in the June 22,

2015 made a final determination was clarified that no final determination had been made.

d. The Order estops the County from enforcing County laws as written.

This is error.

5. The PB is powerless to order the Planning Director to issue a PIDO permit when (1) the Planning Director's final decision was correct based upon the record before him or (2) the appellant has not presented a prima facie case of entitlement on the date the Planning Director made his final decision. Reversing the Planning Director's final decision made on April 20, 2016 and ordering the Planning Director to issue AM a PIDO permit was both, individually and collectively, error.

a. Under State law, AM's appeal is decided based upon the record on which the Planning Director made his decision.

b. The record of the Planning Director action shows that AM had not submitted a prima facie case of entitlement to a PIDO permit on April 20, 2016 for multiple separate, independent deficiencies, any one of which required the Planning Director to deny issuing a PIDO permit.

c. The Order illegally shifts AM's burden to show a prima facie case of entitlement to a PIDO permit in the record transmitted to PB by the Planning Director.

Inconsistent with applicable procedures specified by statute or ordinance.(NCGS § 160A-393(k)(1)(c)

All five (5) grounds stated under In Excess of Statutory Authority are also Inconsistent with Applicable Procedures specified by Statute or Ordinance and incorporated as grounds

for error under being inconsistent with Applicable Procedures specified by Statute or Ordinance.

Affected by other errors of law. (NCGS § 160A-393(k)(1)(d))

1. Even if the PB had jurisdiction to interpret and apply NCGS §§ 143-755 and 153A-320.1, its interpretation and application was error.
 - a. The adoption of HILUO did not change the PIDO. NCGS §143-755 only applies to changes to an ordinance under which an application is filed.
 - b. The Planning Director had specifically determined, a determination which AM did not appeal, that the Delivered Materials were incomplete.
 - c. The Delivered Materials contain a false representation and N.C.G.S. §143-755 must be read in light of N.C.G.S. § 153A-362 which authorizes revocation of permits “for false statements or misrepresentations made in securing permits.” Here the Delivered Materials contained a letter signed by a licensed professional stating to a governmental official that the Delivered Materials “meet all requirements.”
 - d. The PIDO permit is not a development permit. NCGS § 153A-320.1 does not apply to ordinances adopted under the County’s general powers.
 - e. The PB’s interpretation is absurd and well beyond the language, purpose and spirit of either of these statutes. Under the PB’s interpretation, an application for a permit for an activity under one

ordinance vests a right of infinite duration to file other applications under other ordinances and select either the version of each of the ordinance existing when the first application was filed under a different ordinance or the version existing when the subsequent application was filed. This was not the purpose or the spirit of these statutes.

2. The PB's determination that the June 22, 2015 letter was a binding and final determination was wrong. (Conclusions of law 8-14).
 - a. The PIDO grants the Planning Director the authority to receive applications and grant unconditional permits only when every permitting standard has been satisfied. He has no authority to issue permits conditionally or render interim decisions short of issuance or denial of a PIDO permit. PIDO is not a zoning or subdivision ordinance.
 - b. In the June 22, 2015 letter, the Planning Director stated that he could not issue a PIDO permit. If the letter was a final decision, it was adverse to AM and AM did not appeal it.
 - c. Instead of limiting its decision to the language of PIDO and the Planning Director's actual decision, the PB relied upon case law decided under zoning ordinances adopted in other jurisdictions. This is error. PIDO is not a zoning ordinance, the language of the Planning Director's letter does not give him authority to bind the County, AM purported reliance was unreasonable and controlling general statutes

have changed since the case law cited by the PB was decided and they are inapposite.

- d. To the extent the PB attached legal significance to the June 22, 2015 letter, the PB overlooked that the Delivered Materials were represented to the Planning Director as meeting all requirements. In these circumstances, the Planning Director has the power and the duty to correct his error and AM cannot claim any reliance on the June 22, 2015.
3. AM and the PB were bound by the Planning Director's determination of incompleteness made on September 2, 2015 and not appealed by AM. Exhibit K.
4. Conclusion of Laws 21, 23-24 that the "mobile shed" is not a commercial building is contrary to Findings of Fact 57.
5. Conclusion of Law 21 that the barn is not a commercial building is unsupported by the Findings of Fact.
6. The PB's construction and application of the term "commercial building" in the PIDO is wrong.
 - a. The PB relied upon case law decided under zoning ordinances adopted by other jurisdictions. PIDO is not a zoning ordinance. It does not divide the County into zoning districts nor adopts a zoning map.
 - b. The Order evidences that the PB never (1) looked to other County laws or (2) considered the prohibition of "residential dwelling unit or commercial building" as a whole, being mindful of PIDO's purposes, its

spirit and its language. PIDO's purpose is to promote health, safety and general welfare of County citizens and the peace and dignity of the County. The PIDO restriction on a building located within 1000 feet of polluting activities existed to ensure that no County citizen would have to live or work in a building within 1000 feet a polluting industry, unless the citizen was an employee of the polluting industry.

c. The various facts which the PB latched onto to limit the PIDO, like public access to the barn or the fact that people work for the applicant's corporate parent have no basis in PIDO and these limitations are contrary to broad restriction on "residential dwelling unit" or "commercial building" found in the PIDO.

d. The barn and shed were commercial buildings. The PB erred by focusing upon the interests of polluting industries and not County citizens working within 1000 feet of a polluting industry which does not employ them. *See Conclusions of Law 25-26.*

7. The PB's reliance on information not in the record transmitted by the Planning Director to the PB as grounds to reverse the Planning Director was error.

a. Numerous Findings of Fact and Conclusions of Law are based wholly upon information not included in the Delivered Materials or presented to the Planning Director on or before April 20, 2016. For example, Findings of Fact 39-40, 43-47, 52-57, 59 & 61 and Conclusions of Law, 15-16, 21-26.

- b. Shearing this new information from the Order shows that on the date the Planning Director provided the final decision, a decision that AM was demanding that:
 - i. The air permit provided to the Planning Director contradicted the Delivered Materials, necessitating a denial because a residential dwelling unit was located in the area restricted by PIDO to have no residential dwelling units. Findings of Fact, 38, 40, 43-47;
 - ii. The new air permit upon which the PB found to satisfy PIDO was not issued or effective until over a month after the Planning Director had rendered his final decision.
 - iii. The barn and the mobile shed were located within the forbidden radius established by the PIDO on the Delivered Materials, Findings of Fact 49. AM provided none of the information it produced in the Proceeding in the Delivered Materials to claim that these buildings were not commercial buildings. Findings of Fact 52-59.
- 8. The PB erred when it reversed the Planning Director's decision on April 20, 2016 by failing to conclude that as a matter of County law the Planning Director was forbidden to issue a PIDO permit.
 - a. In February 2016, AM began demanding a PIDO permit. Findings of Fact 29. From February 2016 to April 6, 2016 AM's demands for a PIDO permit intensified Findings of Fact 30-31. On April 7, 2016, AM

sued the County demanding the Planning Director to make a final decision. Findings of Fact 32. In short, AM forced the Planning Director to make a final decision and did so when the Moratorium was in place. The Planning Director's decision to deny the PIDO permit was the only decision he could make on that date and not violate County law. It was error not to affirm the Planning Director's decision.

9. The PB erred when it ordered the Planning Director to issue a PIDO permit because AM never submitted a prima facie case of entitled to a PIDO permit on or before April 20, 2016.

a. Under long settled law, every applicant is required to *first* submit a prima facie case showing that its applicant satisfies all of the requirements of the relevant ordinance. The Findings of Fact and Conclusions of Law show:

i. The PB never required AM to *first* show a prima facie case of compliance to the administrative official authorized to issue PIDO permits; and

ii. As shown by the Order, the only time there might have been a prima facie case of compliance was after the Planning Director had rendered a final, binding decision on the Delivered Materials and administration of the Delivered Materials by the Planning Department had ended. The PB erred when it ordered the Planning Director to issue a PIDO permit to AM.

II. Applying the *Whole Record Review* standard established by North Carolina law, the PB's Proceeding and the Order was arbitrary or capricious.

Arbitrary or Capricious (160A-393(k)(1)(f))

The County incorporates each and every ground of set out under the De Novo Review Standard as grounds that the Proceeding and Order was arbitrary or capricious. In particular:

A. The PB should have deferred to the Pending Litigation as the Appellant, AM, had already joined the issues in the Ashe County Superior Court and many of AM's arguments exceeded the limited jurisdiction and powers of the PB to determine. The decision to enter the Order was arbitrary or capricious.

B. Assuming arguendo that the PB had some limited appellate jurisdiction, the PB should have restricted its Proceeding to only two issues: (1) Did the Planning Director err on April 20, 2016 when he denied the PIDO permit to AM and (2) Was AM entitled to issuance of the PIDO permit on April 20, 2016. Both of these issues are "snapshots" as of April 20, 2016 based upon the record transmitted to the PB by the Planning Director. To reach a conclusion favorable to AM on both issues, the PB employed information and law that was not in the record and had not been provided to the Planning Director by AM on or before April 20, 2016 to support its Order. The PB's use of information not submitted to the Planning Director on or before April 20, 2016 as its basis to reverse the Planning Director's decision was arbitrary or capricious

C. The PB should have restricted its Proceeding and Order to hearing and deciding the only two issues stated above because the PB's jurisdiction and powers, assuming it had jurisdiction to hear the appeal, is appellate. Tate v. Board of Adjustment, 83 N.C.

App. 512,513, 350 S.E. 2d 873, 874 (1986)(“The statute clearly confers on the board only appellate jurisdiction, as distinguished from original jurisdiction...”) Expanding the scope of the Proceeding and deciding matters never considered by the Planning Director and which the Planning Director had no authority to decide was arbitrary or capricious.

- D. To consider AM’s request that the PB order the Planning Director to issue the PIDO permit, the PB had to require AM to present evidence that AM had satisfied *all permitting requirements on April 20, 2016*. To enter the Order ordering the Planning Director to issue the PIDO permit, the PB had to find facts showing that AM satisfied all PIDO permitting standards including 159.06(B) (1)(permanent streets), (2) (material piles and other accumulations of by-products) and (4)(compliance with the County Noise Ordinance as of April 20, 2016.) The PB made no findings of fact as to these individual, standalone requirements. Its Order directing the Planning Director to issue the PIDO permit was arbitrary or capricious.
- E. The PB’s methodology of not considering material documents in the record transmitted to it, such as the Planning Director’s September 2, 2015 decision, was arbitrary or capricious.
- F. The PB’s methodology of adding information and documents to the record that were not part of the record and which were not available to the Planning Director to cobble together a basis to grant a PIDO permit to AM was arbitrary or capricious.
- G. The PB’s methodology of finding that an air permit issued on May 25, 2016 with an effective date of May 25, 2016 which was neither part of the record upon with the Planning Director made his decision and which could not have been part of the

record entitled the PB to reverse the Planning Director's decision was arbitrary and capricious.

H. The reasoning employed by the PB violates one of the most fundamental rules of permitting: The applicant always has the duty to present a prima facie case of compliance with all requirements of the applicable law to be entitled to the permit he seeks. Until he shows a prima facie case while his request is pending, the permitting official must deny the application. Under PIDO, the Planning staff possess original jurisdiction to issue PIDO permits and the PB has no original jurisdiction to receive applications of PIDO permits. In the Proceeding, the PB's jurisdiction was only appellate and derivative of the Planning Director's jurisdiction. When the PB assumed the role of being the permitting official for issuing PIDO permits based upon information not first presented to the Planning Director on or before April 20, 2016, it acted arbitrarily or capriciously.

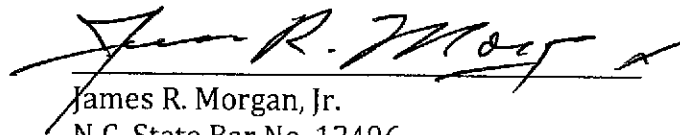
As shown by its own Order, affirming the Planning Director's decision, the outcome required by State and County law, is the polar opposite of the outcomes found in the Order. The PB acted arbitrarily or capriciously when it signed the Order prepared by AM without confining its Order to its limited appellate jurisdiction and without basing its decisions on the PIDO.

WHEREFORE, the County requests the Court:

1. Issue the attached Writ of Certiorari directed to the PB to prepare and file a complete record of the Proceeding with the Ashe County Superior Court on or before the date specified in the Writ;
2. Conduct a Judicial Review of the record of the Proceeding;

3. Reverse the PB and conclude that AM was not entitled to PIDO permit on April 20, 2016 when the Planning Director made his final decision on the Delivered Materials.
4. Reverse the PB and conclude that the portion of the Order directing the Planning Director to issue a PIDO permit was error;
5. Grant the County such other and further relief as is just and proper; and
6. Tax the costs of this proceeding against AM.

This the 30th day of December, 2016.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date mailed the foregoing **PETITION FOR WRIT OF CERTIORARI AND FOR JUDICIAL REVIEW** and **WRIT OF CERTIORARI** in the action styled *Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC* upon all respondents in this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository, certified mail, return receipt requested, under the exclusive care and custody of the United States Postal Service, addressed as follows:

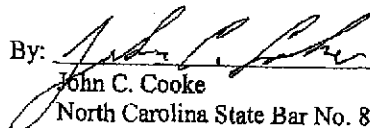
Appalachian Materials, LLC
Attn: D.J. Cecile, Manager and Registered Agent
P.O. Box 3613
Boone, N.C 28607

Ashe County Planning Board
Attn: Gene Hafer, Chairman of the Ashe County Planning Board
150 Government Circle, Suite 2400
Jefferson, North Carolina 28640

This the 30th day of December, 2016.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: _____


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