STATE OF NORTH CAROLINA

COUNTY OF PENDER

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
14 EHR 01136, 14 EHR 01410

CASTLE BAY PROPERTY OWNERS ASSOCIATION INC. A NC NON-PROFIT CORP, Petitioner, v. NCDENR DIVISION OF ENERGY, MINERAL & LAND RESOURCES, Respondent. and WHITE HORSE FARM, RICHARD & ANN DONALDSON, Petitioners, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES, Respondent.	**FINAL DECISION**

THIS MATTER came before the undersigned Administrative Law Judge J. Randall May on September 9, 2014, upon Respondent North Carolina Department of Environment and Natural Resources ("NC DENR"), Division of Energy, Mineral and Land Resource's ("DEMLR's") Motion to Dismiss and Motion for Summary Judgment; and Petitioners', White Horse Farm, Richard and Ann Donaldson and Castle Bay Property Owners Association, Motion for Summary Judgment. Respondent's Motion to Dismiss and Motion for Summary Judgment is GRANTED. Petitioners' Motion for Summary Judgment is DENIED.

This ruling is made after a review of the proposed decisions of both parties; *Mount Ulla Historical Preservation Society, Inc., et al., Petitioners v Rowan County, Davidson County Broadcasting, Inc., Richard and Dorcas Parker, and Maurice E. and Mary Lee Parker, Respondents, COA13-447*, 754 S.E.2d 237 (filed February 18, 2014); as well as other submissions of the parties.

APPEARANCES

RESPONDENT	PETITIONERS
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STANDARD OF REVIEW AND LAW

1. The North Carolina Administrative Procedure Act ("NC APA"), provides that "[t]he Administrative Law Judge shall decide the case based upon a preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a). Actions by State officials are presumed to be made lawfully and in good faith. *Painter v. Wake County Bd. of Ed.*, 288 N.C. 165, 217 S.E.2d 650 (1975); *see also Huntley v. Potter*, 255 N.C. 619, 122 S.E.2d 681 (1961); *Albemarle Elec. Membership Corp v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

2. There is a rebuttable presumption that an administrative agency has acted properly in performing its official duties. *In re Appeal from Civil Penalty*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 635 S.E.2d 442 (2007); *see also Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583 (1971).

3. An agency's interpretation of its own regulations are accorded deference, unless such interpretation is clearly erroneous. *Elliot v. N.C. Psychology Board*, 126 N.C. App. 453, 456, 485 S.E. 2d 882, 884 (1997), *rev'd in part on other grounds*, 348 N.C. 230, 498 S.E.2d 616 (1998). Moreover, NC DENR's interpretation of its own rules and regulations are "entitled to some judicial deference because the General Assembly made [DENR] responsible for administering the statute." *Hensley v. NC DENR*, 364 N.C. 285, 294, 698 S.E.2d 42, 47 (2010).

4. The burden is on Petitioners to show that, in issuing the Mining Permit, the agency: (1) exceeded its authority; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23(a).

5. "'In order for [a] petitioner to prevail on her claim to status as a 'person aggrieved' under the [NC APA], [a] petitioner must first demonstrate that her personal, property, employment or other legal rights have been in some way impaired.'" *Diggs v. N.C. Dep't of Health and Human Servs.*, 157 N.C. App. 344, 347, 578 S.E.2d 666, 668 (2003) (quoting *In re Denial of Request for Full Admin. Hearing*, 146 N.C. App. 258, 261, 552 S.E.2d 230, 232, *disc. rev. denied*, 354 N.C. 573, 558 S.E.2d 867 (2001)). However, a petitioner must allege "sufficient

injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit." *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, Div. of Envtl. Management*, 337 N.C. 569, 589, 447 S.E.2d 768, 780 (1994); *see also Diggs*, 157 N.C. App. 344, 578 S.E.2d 666 (2003) (holding that the intervenors were not aggrieved because they presented only speculative harms regarding potential losses).

6. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. rev. denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). An issue is material only if its resolution would prevent the party against whom it is resolved from prevailing. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E.2d 518 (1981). The party moving for summary judgment has the burden of showing a lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 448, 491, 329 S.E.2d 350, 353 (1985). The moving party may meet this burden by showing an essential element of the opposing party's claim is nonexistent, or that the opposing party will be unable to produce evidence to support an essential element of the claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

HAVING REVIEWED the pleadings, briefs, and affidavits submitted by the parties in support of their cross motions on summary judgment and Respondent's motion to dismiss, the undersigned decides as follows:

DISMISSAL

Petitioners first claim that the truck traffic from the mining operation will be a direct and substantial physical hazard to public health and safety for the area, particularly focusing on the fact that school-aged children will be catching school buses along Saps Road and the adjacent Hoover Road. (Claim No. 2) On the issue of whether Petitioners have standing with regards to Claim No. 2, whether truck traffic adversely impacts public health and safety, Petitioners have not alleged harm that is within the zone of that to be protected by the Mining Act of 1971 (N.C. Gen. Stat. § 74-46 *et seq.*) and, therefore, lack standing to bring this case.

Petitioners' claims regarding *res judicata* and the doctrine of collateral estoppel are inapplicable to this case. The doctrine of collateral estoppel applies when the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990) (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806) (1973)). Here, Petitioners' argument fails because the issues to be concluded are not the same as those involved in the prior action and because the determination of the prior action was not necessary or relevant to the resulting judgment. Petitioners have not litigated these particular claims against DEMLR in any prior action. The actions of the Pender County Board of Commissioners with regard to truck traffic and public health and safety issues are not relevant to DEMLR's statutory requirements in issuing mining permits. N.C. Gen. Stat. § 74-51 (establishing the seven (7) denial criteria by which DEMLR may deny a mining permit). The determinations of zoning issues are separate and distinct from DEMLR's actions, each entity basing its decisions upon separate statutory authority. "No provision of this Article shall be construed to supersede or otherwise affect or prevent the enforcement of any zoning regulation or ordinance duly adopted by an incorporated city or county or by any agency or department of the State of North Carolina, except insofar as a provision of said regulation or ordinance is in direct conflict with this Article" N.C. Gen. Stat. § 74-65.

SUMMARY JUDGMENT

Petitioners next claim that DEMLR improperly issued a Mining Permit on Saps Road, claiming that it is not owned by the applicant, Shingleton, and that Saps Road is not sufficient to withstand repeated and regular use by heavy mining facility trucks. (Claim No. 1) On the issue of whether Petitioners can show that DEMLR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in regards to Claim No. 1 about ownership of Saps Road, genuine issues of material fact do not exist. Mr. Shingleton, the mining permit holder, retains an ownership interest in Saps Road which is sufficient for issuance of a Mining Permit. Petitioners will not be able to allege sufficient facts to support an essential element of the claim.

Petitioners claim that excessive noise and dust from truck traffic will adversely impact the health and well-being of residents, workers, clients and horses. (Claim No. 3) On the issue of whether Petitioners can show that DEMLR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in regards to Claim No. 3 about excessive dust and noise along Saps Road impacting the health and well-being of horses and residents, genuine issues of material fact do not exist. Noise associated with truck traffic is not regulated by the Mining Act. Concerns regarding dust and off-site sedimentation are satisfied by the fact that the haul road remains subject to the Sedimentation Pollution Control Act of 1973, and by the terms and conditions in the Permit requiring dust suppression by applying water to the road.

Petitioners next claim potential adverse environmental impacts associated with the Mining Permit, contending that the area is adjacent to, or in close proximity to, Trumpeter Creek, the Holly Shelter Game Land, and nearby wetlands. (Claim No. 4) On the issue of whether Petitioners can show that DEMLR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in regards to Claim No. 4 about potential adverse environmental impacts to adjacent wetlands or sensitive areas, genuine issues of material fact do not exist. Petitioners have not

alleged sufficient information to support this claim, and terms and conditions in the Mining Permit as issued already mitigate potential adverse impacts.

Petitioners' final claim is that the mining permit holder, here Mr. Shingleton, has not been in substantial compliance with the Mining Act in the past and that a mining permit should never have been issued. (Claim No. 5) On the issue of whether Petitioners can show that DEMLR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in regards to Claim No. 5 about prior enforcement history of the permit holder, genuine issues of material fact do not exist. DEMLR has met the required standards established N.C. Gen. Stat. § 74-51(d)(1)-(7) and was required to issue the Mining Permit pursuant to N.C. Gen. Stat. § 74-51(e).

THEREFORE, it is hereby ORDERED that the Petitioners' claim regarding public safety concerns associated with truck traffic on Saps Road (Claim No. 2) within the Petition for Contested Case Hearing be DISMISSED. Petitioners' Motion for Summary Judgment is hereby DENIED. It is also ORDERED that, as to the remaining claims contained within the Petition for a Contested Case Hearing (Claims Nos. 1, 3, 4, and 5), Respondent's Motion for Summary Judgment be GRANTED. There being no remaining claims, this case is hereby DISMISSED.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 14th day of November, 2014.

J. Randall May
Administrative Law Judge