

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 01468

<p>LDI Shallotte 179 Holdings LLC Petitioner,</p> <p>v.</p> <p>North Carolina Department of Environmental Quality, Division of Energy Mineral and Land Resources Respondent.</p>	<p>FINAL DECISION</p>
--	------------------------------

THIS MATTER comes before the Undersigned pursuant to Petitioner's Motion for Summary Judgment, filed on August 19, 2022, and Respondent's Cross Motion for Summary Judgment, filed in the Office of Administrative Hearings on August 29, 2022. On August 19, 2022, the Undersigned issued a Request for Response to Petitioner's Motion, which ordered Respondent to file a written response to the motion on or before August 29, 2022. Respondent timely filed a response to the Motion. Petitioner did not file a written response to Respondent's Cross Motion. Thereafter, the matter came on for hearing before the Undersigned on September 14, 2022. All parties having been given the opportunity to be heard, the matter is now ripe for disposition.

For the reasons explained herein, the Undersigned hereby GRANTS Petitioner's Motion for Summary Judgment and DENIES Respondent's Cross Motion for Summary Judgment

APPEARANCES

FOR PETITIONER: Thomas R. Harvey,
James T. Moore,
Gary K. Shipman,
Shipman & Wright, LLP
575 Military Cutoff Rd,
Wilmington, NC 28405

FOR RESPONDENT: Carolyn A. McLain, Assistant Attorney General,
Victor A. Unnone III, Assistant Attorney General,
John A. Payne, Special Deputy Attorney General,
N.C. Department of Justice
9001 Mail Service Center,
Raleigh, NC 27609

ISSUES

Whether there are genuine issues of material fact and if a party is entitled to summary judgment as a matter of law?

STATUTES AND RULES AT ISSUE

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1, *et seq.*

2. The substantive statutory law applicable to this contested case is Article 7 of Chapter 143B and Article 21 of Chapter 143 of the North Carolina General Statutes.

3. The substantive administrative regulations applicable to this contested case are the North Carolina Stormwater Management Rules, 15A N.C. Admin. Code 2H .01040, *et seq.*

BACKGROUND

Petitioner, LDI Shallotte 179 Holdings, owns several parcels of real property in Brunswick County, North Carolina. Respondent, North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources, is a State agency responsible for implementing and enforcing the State's stormwater management plan. Petitioner desires to develop its real property, but needs a stormwater permit from Respondent in order to do so. In June 2021, Petitioner applied for the necessary stormwater permit, but Respondent refused to review the application because Respondent's records revealed that the property was previously permitted for a different project. The portion of the earlier project which was not purchased by Petitioner is currently in violation with the stormwater management rules. Respondent has refused to issue a new permit until the original project—that portion of the earlier project which Petitioner did not develop—is brought into compliance or a schedule for compliance is presented. Petitioner has appealed, arguing Respondent failed to comply with the applicable law and acted arbitrarily and capriciously in refusing the review Petitioner's application for a stormwater permit. Petitioner argues, *inter alia*, that it should not be forced to bring land Petitioner does not own into compliance with a permit Petitioner does not hold.

UNCONTESTED FACTS

1. In July 1998, Owen Ventures, Inc. ("Owen Ventures") executed a Master Declaration of Covenants, Conditions, and Restrictions ("Master Declaration") for a residential development known as "Owendon Plantation" in Brunswick County, North Carolina. The Master Declaration was recorded in the Brunswick County Register of Deeds Office.

2. Owendon Plantation was designed as a five phased subdivision. Owen Ventures finished Phases 1 and 2, but did not develop any lots in Phases 3, 4, or 5.

3. On February 8, 2001, Respondent issued a Stormwater Permit (the "Permit") to Mr. Don Owen for Owendon Plantation. Under the Permit, each lot within the subdivision was limited to

3,000 square feet of built-upon area, with the overall tract impervious area maintained at 30% pursuant to the then-effective stormwater rules.

4. Don Owen elected to withdraw Phases 3-5 due to a low number of sales. When Don Owen decided to withdraw Phases 3-5, he also decided to sell the real property to other local developers.

5. On October 1, 2004, Owen Ventures formally withdrew Phases 3, 4, and 5 from its Master Declaration. The withdrawal was recorded at the Brunswick County Register of Deeds Office.

6. Since 2015, the Owendon Plantation Property Owner's Association, Inc. owns and maintains all stormwater facilities within Phase 1 and 2.

7. On or about October 28, 2004, Respondent issued a Notice of Violation (NOV) to Don Owen, owner of Owen Ventures.

8. On or about February 4, 2005, Respondent issued a second Notice of Violation (NOV) to Don Owen, owner of Owen Ventures.

9. On or about April 18, 2005, Respondent issued a third Notice of Violation (NOV) to Don Own, owner of Owen Ventures.

10. Beyond the continued requirement of the maximum built upon area, the NOV's were only for violations associated with activity on Phases 1 and 2.

11. Though the real property comprising Phases 3, 4, and 5 of Owendon Plantation has been conveyed several times, the real property is not subject to the restrictive covenants of Owendon Plantation.

12. The 2001 stormwater permit has not been modified or transferred to any subsequent owner of any portions of the property.

13. Petitioner submitted a "PUD Master Development & Site Plan Zoning Submittal" for an independent residential development to Brunswick County. The development will be known as "Summers Walk" and will be comprised of the lots formally designated for Phases 3, 4, and 5 of Owendon Plantation. The Master Development and Site Plan has been approved by Brunswick County.

14. On June 10, 2021, Petitioner submitted a Request for Express Permit Review and an Express Stormwater Narrative, which included the Master Development and Site Plan, to Respondent.

15. Respondent's Express Review Program is designed to offer "quicker permit decisions and certifications as well as consultation to identify necessary environmental requirements" for eligible applicants.

16. Petitioner submitted the Express Review request seeking permission to apply for modification of the Owendon Plantation Stormwater Permit. Petitioner sought to sever the real property comprising Phases 3, 4, and 5 from the Permit.

17. Summers Walk is not part of the common plan and scheme of development of Owendon Plantation. Summers Walk will have private streets and stormwater infrastructure independent of Owendon Plantation Phases 1 and 2.

18. Petitioner asserts the proposed impervious area of Summers Walk complies with the applicable stormwater statutes and regulations. Respondent has not reviewed the Summers Walk application to confirm whether Petitioner's project would comply with all applicable stormwater statutes and regulations.

19. Petitioner's application for Phases 3–5 called for compliance with the more environmentally protective built upon area requirement of 24% rather than the 30% required under the existing permit.

20. Petitioner's application set aside enough property to ensure compliance of the Phase 1 and 2 built upon area of 30% required under the existing permit.

21. On July 14, 2021, Respondent informed Petitioner that it was not eligible for the Express Review Program as Summers Walk was not the current permittee for the real property at issue and that the application was prohibited according to footnote 1 to the Express Application Review Fee Chart.

22. On July 14, 2021, Respondent recommended Petitioner apply to have the entire Permit transferred to Petitioner which would require the "new owners to resolve any compliance issues." Thereafter, Petitioner could apply to modify the Permit to exclude Phases 1 and 2, which comprise Owendon Plantation.

23. Respondent's recommended path would require Petitioner to assume liability for Don Owen's Notices of Violation, although Petitioner was not involved in the development of Owendon Plantation, does not own the property comprising Owendon Plantation, and has never been the permit holder.¹

24. On July 14, 2021, Petitioner applied to transfer and modify the entire Permit, which included Phases 1 through 5, despite the fact that Owendon Plantation and Summers Walk are independent residential development projects. Petitioner also submitted a new permit application for Summers Walk.

25. Respondent confirmed it received a new permit application for Summers Walk on September 9, 2021. However, Respondent did not review the new permit application as it had not

¹ Respondent issued the Permit to Mr. Don Owen and sent the three Notices of Violation to Don Owen. Nevertheless, there is some confusion on Respondent's part as to whether the current permit holder might be Owen Ventures, Owendon Plantation, or Don Owen.

received an application to modify Don Owen's Permit to remove the area that will become Summers Walk (Phases 3 – 5). The new permit application was returned to Petitioner.

26. On November 18, 2021, Respondent requested that Petitioner assume responsibility for the Permit violations and bring Owendon Plantation into compliance with Don Owen's Permit prior to the Permit transfer and modification.

27. Prior to Petitioner's permit application, Respondent took no action to enforce the violations issued to Don Owen over 15 years ago.

28. On December 20, 2021, Respondent returned the transfer and modification application to Petitioner, in part, because Petitioner did not submit a schedule for compliance for Owendon Plantation.

29. On January 5, 2022, Respondent notified Petitioner that a stormwater application for Summers Walk could be processed if Don Owen² submitted a permit transfer and modification application. Don Owen would need to bring Owendon Plantation into compliance with the Permit before the application could be processed and the transfer and modification completed.

30. On January 5, 2022, at Respondent's advice Petitioner requested Respondent modify the Permit under 15A N.C. Admin. Code 2H .1040(6).

31. On February 21, 2022, Respondent considered Petitioner's request to modify the Permit under N.C. Admin. Code 2H .1040(6) but elected not to do so. Respondent "felt it was not appropriate" to modify the Permit under that provision.

32. More specifically, when asked about N.C. Admin. Code 2H .1046(6) during deposition, Kelly Johnson with Respondent said, "I can certainly read that in the rule, but I'm not -- I do not know how we would implement that as an agency, because I do not believe we've ever done it."

33. In March 2022, Respondent sent Don Owen a Transfer Notice Request. In the Notice, Respondent requested Petitioner and Don Owen jointly file a transfer application and informed the parties that the site would need to be brought into compliance with the Permit as a part of the transfer application.

34. Don Owen informed Respondent that he did not object to the modification of the Permit on June 2, 2022. Don Owen further informed Respondent he would not assume any responsibility for the violations of the Permit.

35. Respondent's position is that the Permit remains in full force and effect until modified, renewed, or transferred.

36. On April 19, 2022, Petitioner filed a Petition for a Contested Case Hearing (the "Petition") in the Office of Administrative Hearings. The Petition alleged Respondent deprived

² Respondent was under the impression that Don Owen had passed away. Petitioner was able to put Respondent in touch with him, as he was very much alive.

Petitioner of property; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; failed to act as required by law or rule; and/or otherwise substantially prejudiced its rights by failing to use its authority pursuant to 15A N.C. Admin. Code 2H .1040(6) to modify the Owendon Plantation Stormwater Permit (to the extent that Respondent believed that such a modification was required) to “split off” the property that comprises Summers Walk, and to then process Petitioner’s application for a stormwater permit for Summers Walk under the Respondent’s “Express Permitting Program.”

37. Respondent filed a Motion to Dismiss on June 28, 2022. Petitioner timely filed a Response to the Motion on July 8, 2022. The Undersigned denied the Motion to Dismiss on August 15, 2022.

38. Petitioner moved for summary judgment on August 19, 2022. Respondent timely filed a Response to the Motion on August 29, 2022. In Respondent’s Response, Respondent also moved for summary judgment. Thereafter, a motions hearing was held in Bolivia, North Carolina on September 14, 2022.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and there is no question as to misjoinder and nonjoinder.

2. Notice was given to all parties in accordance with N.C. Gen. Stat. § 150B-23.

3. To the extent the Uncontested Facts contain Conclusions of Law and the Conclusions of Law contain Findings of Fact, they should be so considered regardless of their given label. *See Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citations omitted); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (citations omitted).

4. This Tribunal is authorized to grant summary judgment. N.C. Gen. Stat. § 150B-34(e).

5. Petitioner bears the burden of proof on each element of its case. *Overcash v. N.C. Dep’t of Env’t & Nat. Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2000); N.C. Gen. Stat. § 150B-25.1(a). The burden of persuasion placed upon a petitioner is the “greater weight of the evidence.” *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C. App. 704, 712, 513 S.E.2d 823, 828 (1999).

6. To succeed in a contested case before the Office of Administrative Hearings, Petitioner must demonstrate (1) that Respondent substantially prejudiced its rights; and (2) that the agency 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. N.C. Gen. Stat. § 150B-23(a).

7. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with

respect to the facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34(a).

8. The purpose of summary judgment is to bring litigation to an expeditious and efficient conclusion on the merits where only a question of law on the indisputable facts is in controversy. Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if “there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C. Admin. Code 3 .0101(b).

9. Summary judgment “is an extreme remedy and should be awarded only where the truth is quite clear.” *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970). “[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

10. “[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor the nonmoving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted).

11. More than fifteen (15) years ago, Don Owen, a developer, received a stormwater permit from Respondent that allowed him to develop a tract of land in 5 phases. Phases 1 and 2 were subsequently developed but the remaining 3 phases were not. The developer did not comply with some of the permit terms and conditions and was cited for those violations in 2004 and 2005. Citing poor business conditions, Don Owen stopped developing the land and the undeveloped land was sold to multiple subsequent owners. The developed portion of the residential development was subsequently transferred to the Owendon Plantation Property Owner’s Association.

12. For over 15 years, nothing was done to rectify the cited violations on the developed land by Don Owen or the Owendon Plantation Property Owner’s Association. Respondent admitted it did nothing to force compliance.

13. Summers Walk and Owendon Plantation are two separate and distinct residential developments in Brunswick County. The only apparent connection between Summers Walk and Owendon Plantation is that Summers Walk will be comprised of abandoned property of Owendon Plantation. Summers Walk will not be subject to Owendon Plantation’s restrictive covenants.

14. Petitioner, as the owner of the real property comprising Summers Walk, has the right to “possess, use, enjoy, and dispose” of the property. *Kirby v. N.C. Dep’t of Transp.* 368 N.C. 847, 853, 786 S.E.2d 919, 924 (2016) (citation omitted). This includes the “right[] to improve, develop, and subdivide” the property. *Id.*

15. Pursuant to N.C. Gen. Stat. § 143B-279.13, Respondent is required to develop an express review program for stormwater permits. N.C. Gen. Stat. § 143B-279.13(a)(1).

16. The Express Review Program is a statutory program mandated by the North Carolina General Assembly to offer “quicker permit decisions and certifications as well as consultation to identify necessary environmental requirements.”

17. Petitioner originally applied under the Express Review Program. Respondent determined Petitioner’s application was not eligible for the Express Review Program under Respondent’s policy, as stated in a footnote of the Fee Chart, of disallowing applications for properties that in its opinion (a) overlapped with another permit and (b) would not resolve existing compliance issues.

18. While Respondent has the authority to “determine the project applications to review under the express program,” N.C. Gen. Stat. § 143B-279.1(a), the reason given for the denial was a footnote on page two of the Express Application Review Fee Chart. The footnote was simply a “policy” statement, not included in any statutory provision or regulation. The North Carolina Administrative Procedure Act prohibits policy statements masquerading as rules,

“An agency shall not seek to implement . . . a policy that meets the definition of a rule [N.C. Gen. Stat. 150B-2(8a)] if the policy . . . has not been adopted as a rule in accordance with [the APA].”

N.C. Gen. Stat. § 150B-18.

19. Respondent exceeded its authority and acted erroneously in excluding Petitioner’s application from the Express Review Program based on a policy that has not been subjected to the protections afforded to the public under Chapter 150B of the North Carolina General Statutes.

20. After denying review under the Express Program Respondent offered a “recommended path forward” that required Petitioner to, among other things, “resolve any compliance issues” for property Petitioner did not own, develop, or hold a permit for.

21. Respondent’s position is that a stormwater permit is issued to include a defined property; in this case the original 5 Phases. Respondent believes the Permit remains in effect for all 5 Phases, despite all or a portion of the land being subdivided and sold after the permit is issued. Respondent’s position is that Don Owen still held the Permit for the entire tract (all phases), despite the fact he no longer owns any of the property.

22. Respondent’s position leads to bureaucratic entanglement as subsequent owners attempt to develop only the land they bought and are understandably uninterested in accepting liability for compliance requirements that apply to land they do not own.

23. Respondent asserts that it lacks the authority to unilaterally modify the Permit and that the Permit must first be transferred to Petitioner under N.C. Gen. Stat. § 143-214.7(c5). Prior to the transfer, the Permit must be compliant with its conditions.

24. The plain language of N.C. Gen. Stat. § 143-214.7(c5) addresses transfers of permits, not permit modifications.

25. This change in legislation by the General Assembly has made the transfer of an entire land tract covered under a permit—along with possible compliance issues—to another owner easier. Here, however, the compliance issues do not apply to the new owner since the land has been subdivided.

26. In the series of proposed “paths forward” that included as preconditions strategies to correct past violations, Respondent erred by withholding review of Petitioner’s application.

27. For over 15 years, Respondent has not taken any enforcement action against the holder of the Stormwater Permit. Unsurprisingly, in this case, neither the current owner of the non-compliant land nor the owner of the undeveloped land wanted to accept liability for the 15-year-old violations.

28. Respondent does not have the authority to impute responsibility for the Permit violations of Phase 1 and Phase 2 to Petitioner. Petitioner was not involved in the development of Owendon Plantation, Petitioner does not own the property that comprises Owendon Plantation, and Petitioner has never held the Permit for Owendon Plantation.

29. 15A N.C. Admin. Code 2H .1040(6) provides Respondent with the authority to revoke or modify a permit upon 60 days written notice for good cause. Good cause exists where there is a “violation of any terms or conditions of the permit.” 15A N.C. Admin. Code 2H .1040(6)(a).

30. Petitioner ultimately sought relief in this Tribunal after Respondent informed Petitioner that it should file a joint application for transfer with the former owner, Don Owen, who wanted no part in any obligations to correct the 15-year-old violations.

31. Respondent refused to exercise its authority to modify the Permit under 15A N.C. Admin. Code 2H .1040 which provides for precisely situations like this one.

32. Here, then, is the common thread in all the strategies Respondent offered to Petitioner before Petitioner’s application would be reviewed: the land not under Petitioner’s control was to be brought into compliance. Petitioner refused to act as deputized enforcer for Respondent, so Respondent refused to use their authority to modify the existing permit.

33. “Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.” *Lewis v. N.C. Dep’t of Hum. Res.* 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (internal quotation marks and citations omitted).

34. Respondent arbitrarily and capriciously refused to modify the Permit or revoke the permit as to Phases 3-5 because it “felt it was not appropriate to do so,” and that it did not know how to implement its own rule.

35. Respondent has exercised this authority on at least one occasion in *Godfrey Lumber v. Howard*, 151 N.C. App. 738, 739-41, 566 S.E.2d 825, 826-27 (2002) (finding no due process violation where the N.C. Department of Environmental and Natural Resources, Division of Water Quality revoked a stormwater permit for noncompliance).

36. Modifying the Permit to sever Phases 3, 4, and 5 will not preclude Respondent from enforcing the violations on Phases 1 and 2.

37. Significantly, Petitioner suggested modifying the Permit under 15A N.C. Admin. Code 2H .1040 and pointed out that this would lead to a more environmentally protective permit by accepting more recent restrictions that were promulgated since the permit issued in 2001 to Don Owen.

Constitutional Claim

1. Petitioner has raised a constitutional claim that Respondent prevented Petitioner from use of its property. Specifically, Petitioner claims it has a right to a Stormwater Permit to develop Phases 3-5.

2. Leaving aside the validity of a constitutional right to a permit, regulatory takings have been found to violate a party's due process rights. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 394 (1922). "The general rule, at least, is that, if regulation goes too far, it will be recognized as a taking for which compensation must be paid." *Id.*; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (finding that a deprivation of economically beneficial use of real property may be viewed as deprivation of the real property itself).

3. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the landowner's] title to begin with." *Lucas*, 505 U.S. at 1027. Under North Carolina law, landowners have a constitutionally protected right to develop, improve, and subdivide their property. *Kirby*, 368 N.C. at 853, 786 S.E.2d at 924 (citation omitted).

4. While a property owner "expects the uses of his property to be restricted, from time to time," Respondent's repeated inaction in this case deprives Petitioner of its right to develop its real property. *Lucas*, 505 U.S. at 1019.

5. In *Godfrey Lumber*, the Department of Environment and Natural Resources revoked a lumber mill's permit due to non-compliance with the terms and conditions of the permit and applicable regulations. 151 N.C. App. at 739, 566 S.E.2d at 826. The mill operator asserted that the permit revocation violated its due process rights by depriving it of the right to develop and use its real property. *Id.*

6. The North Carolina Court of Appeals recognized that the North Carolina Administrative Procedure Act (APA) provided *Godfrey Lumber* with "constitutionally adequate due process of law," because it was able to appeal the revocation to the Office of Administrative Hearings.

7. In this case, Petitioner was not given access to the protections afforded under the APA. Respondent has not revoked, suspended, or modified the 2001 Permit. Further, Respondent declined to review Petitioner's application and did not advise Petitioner of its right to an administrative appeal. Indeed, at the hearing on the Cross Motions for Summary Judgment, Respondent's counsel asked, "what is the agency action in this case?" (T p 37).

8. It is a constitutional violation where state action, or state inaction, deprives a person of their protected interest in life, liberty, or property. *Id.* at 740-41, 566 S.E.2d at 826-27 (citation omitted). In other words, the agency action here was Respondent's inaction, contrary to law, to arbitrarily and capriciously seek to pressure Petitioner into resolving other individual's violations while refusing to follow its own rules that would provide relief.

9. Respondent's refusal to modify the 2001 Permit, revoke the 2001 Permit, and to review and process any of Petitioner's applications substantially prejudices Petitioner's constitutionally protected right to develop and use its real property. *See Kirby*, 368 N.C. at 853, 786 S.E.2d at 924 (citation omitted).

10. There are no genuine issues of material fact. Petitioner is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56.

11. N.C. Gen. Stat. § 150B-33(b)(11) grants administrative law judges the authority to assess reasonable attorneys' fees against the State agency named as the respondent in a contested case where the agency has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously.

12. Respondent's arbitrary and capricious refusal to process Petitioner's modification request or new project application substantially prejudices Petitioner's right to develop its real property.

DECISION

BASED UPON the foregoing Uncontested Facts and Conclusions of Law, the Undersigned finds that Petitioner met its burden that Respondent exceeded its authority, acted erroneously, and acted arbitrarily and capriciously by: (1) relying on a policy that meets the definition of a rule but was not adopted in accordance with N.C. Gen. Stat. § 150B-1, *et seq.* to exclude Petitioner from access to the Express Review Program; (2) refusing to review Petitioner's application until violations unrelated to Petitioner's actions were remedied; and (3) refusing to implement its own rules to revoke part of the existing permit and subsequently review Petitioner's application. Therefore, the Undersigned hereby GRANTS Petitioner's Motion for Summary Judgment and DENIES Respondent's Motion for Summary Judgment.

Respondent is hereby ORDERED to revoke Phases 3, 4, and 5 from the current permit holder in accordance with 15A N.C. Admin. Code 2H .1040(6)(a). Respondent is further ORDERED to review Petitioner's application for those Phases under the Express Review Program as a new permit.

Should Petitioner wish an award of costs, including reasonable attorney's fees, to be considered, Petitioner's counsel shall file, within thirty (30) days of this Final Decision, a petition for attorney's fees, appropriately supported by affidavit(s) and including the factors identified in *Hunt v. N.C. Dep't of Pub. Safety*, 266 N.C. App. 24, 32, 830 S.E.2d 865, 870 (2019).

NOTICE OF APPEAL

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 as indicated by 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 16th day of November, 2022.



Donald R. van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Thomas R. Harvey III
Shipman & Wright, LLP
tharvey@shipmanlaw.com
Attorney For Petitioner

John Abb Payne
N.C. Department of Justice
jpayne@ncdoj.gov
Attorney For Respondent

Gary K. Shipman
Shipman & Wright
gshipman@shipmanlaw.com
Attorney For Petitioner

Victor August Unnone III
North Carolina Department of Justice
vunnone@ncdoj.gov
Attorney For Respondent

James T. Moore
Shipman & Wright
jmoore@shipmanlaw.com
Attorney For Petitioner

Carolyn Ann McLain
N.C. Department of Justice
cmclain@ncdoj.gov
Attorney For Respondent

This the 16th day of November, 2022.



Christine E. Cline
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850