No. 249P19 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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BRIEF OF *AMICUS CURIAE* BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, AND ITS CHAPTER, PROTECT OUR FRESH AIR, IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, AND ITS CHAPTER, PROTECT OUR FRESH AIR, IN SUPPORT OF PETITIONER

****

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, Blue Ridge Environmental Defense League ("BREDL"), and its chapter, Protect Our Fresh Air ("POFA"), submits this brief as *amicus curiae* in support of Petitioner Ashe County, North Carolina.

STATEMENT OF THE CASE, STATEMENT OF THE FACTS

This case involves a Polluting Industries Development Ordinance ("PIDO") permit that was properly denied, both substantively and procedurally, by the Ashe County Planning Director on April 20, 2016. Thereafter, errors of law and fact were made by the Ashe County Planning Board, who incorrectly heard an "appeal" of the Planning Director's PIDO permit denial, and then wrongly reversed the denial. Ashe County brought the dispute to Superior Court, where the reversal of the Planning Director was upheld. Now,

the Court of Appeals decision embarks upon making new law, creating a complex, costly, difficult to follow and ultimately unfair local government permitting system, which decision is before this Honorable Court upon Petition for Discretionary Review filed by Petitioner Ashe County.

Due to the procedural errors and the errors on the face of the record after the Planning Director made his decision denying the PIDO permit, and the creation by the Court of Appeals thereafter of a new, highly unworkable and unwieldly review and permitting system for local governments, applicants and other interested parties, *amicus curiae* herein has filed a Motion to allow this brief in support of Petitioners before this Honorable Court.

Further, due to the resulting environmental harm the proposed asphalt plant will cause to the New River—a federally and State protected river in the heart of Ashe County –the Blue Ridge Environmental Defense League ("BREDL") and its local chapter, Protect Our Fresh Air ("POFA"), seeks to assist the Court in its understanding of some of the issues with this "friend of the court" brief. In fact, BREDL has been a known advocate for citizens affected by asphalt plant pollution in Ashe County since before PIDO was enacted. In 1998, the North Carolina Department of Environment and Natural Resources ("DENR") turned to BREDL's chapter, Ashe Citizens Against Pollution ("ACAP") to report blasting operations in preparation for the construction of an asphalt plant. Memorandum and Order at 3-4, Tri-County Paving, Inc. v. Ashe County, No. 5:99CV105-V (W.D.N.C. June 22, 2001).

Amicus curiae adopts, for efficiency and judicial economy, Petitioner-Appellant Ashe County's "Statement of Facts" and "Procedural History" as part of its Statement of the

Facts and Statement of the Case, herein. In the instant case, the Planning Director, reviewing the facts on the record, denied the PIDO permit to the permittee, Appalachian Materials, who was requesting to site a toxic asphalt plant on a direct tributary of the New River, which is an environmental and ecological jewel of Ashe County, whose residents and visitors enjoy the scenic and other values of the river designated as an Outstanding Resource Water ("ORW") of the State. Members of POFA, and BREDL, are residents of the County, some of whom are adjacent landowners to the proposed asphalt plant and property owners directly downstream from said proposed asphalt plant.

Also, immediately downstream from the proposed asphalt plant is Camp New Hope, a long-time summer camp for compromised children who play in and use the beautiful New River every summer as a restorative solace from their illnesses and afflictions. Camp New Hope's director is Randy Brown, also a member of POFA and BREDL.

BREDL's early formation was in the Glendale Springs, NC area not far from this site at issue in Ashe County in 1984. Janet Marsh Zeller, formed a church women's committee concerned about nuclear waste being transported to and disposed of in their mountain community in Madison County, as outlined in the 1982 Nuclear Policy Waste Act. After giving a talk in a neighbor's porch in Bush Creek, NC, about the Deptartment of Energy's ("DOE") nuclear waste disposal plans, which she had obtained by asking for the pertinent DOE files from Washington, DC, over 300 people showed up at the next local meeting. By 1985, the women's church committee had become a non-profit, secular organization known as BREDL. The model she started, of a larger umbrella group reaching out and helping form local "chapters" (like POFA) to educate and address environmental concerns across

the state, is the reason for this brief, and the care and concern *amicus curiae* have in regards to these issues at bar.[1]

Amicus curiae again adopts, for efficiency and judicial economy, Petitioner-Appellant Ashe County's "Statement of Facts" and "Procedural History" as part of its Statement of the Facts and Statement of the Case, herein.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Amicus curiae agrees with and adopts Petitioner-Appellant Ashe County's "Statement of the Grounds for Appellate Review," which describes this appeal before this Honorable Court pursuant to the November 1, 2019 Order allowing Ashe County's Petition for Discretionary Review under Rule 15(a) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-31(a).

ARGUMENT

Amicus Curiae, Blue Ridge Environmental Defense League ("BREDL"), and its chapter, Protect Our Fresh Air ("POFA") are North Carolina community-based, non-profit organizations that advocate for local environmental issues through citizen campaigns and advocacy. BREDL was originally founded in 1984 to "foster stewardship" and to encourage "governmental and citizen responsibility in conserving and protecting our natural resources." The BREDL Creed, BLUE RIDGE ENVTL. DEF. LEAGUE, http://www.bredl.org/about.htm (last visited Dec. 29, 2019).

[1] Janet passed away on January 14, 2019, but her work and the work of citizens who care about their local governments, processes and attendant environmental issues are at the heart of this brief.

BREDL's chapter, POFA, was founded by Ashe County citizens on August 11, 2015, who are concerned about the proposed asphalt plant on Glendale School Road, which is the subject of the Polluting Industries Development Ordinance (herein referred to as "PIDO") Permit at issue. About Protect Our Fresh Air, FACEBOOK, https://www.facebook.com/pg/protectourfreshair/about/?ref=page_internal (last visited Dec. 29, 2019).

BREDL and POFA members are property owners adjacent to, downstream of, or in immediate proximity to the site of the proposed asphalt plant and are at risk of suffering impaired water quality flowing on and across their properties if this Honorable Court affirms the Ashe County Planning Board's "order" directing issuance of a PIDO Permit for this asphalt plant. The proposed placement, construction, and operation of the asphalt plant threaten their health, their use and enjoyment of their property, the value of their property, would constitute actionable nuisance and trespass, and is in fact not allowed under the PIDO Permit given the facts and issues *sub judice*. *See BSK Enters. v. Beroth Oil Co.*, 783 S.E.2d 236, 244 (N.C. Ct. App. 2016) (holding that the common law rights of landowners to bring claims of nuisance and trespass claims is not extinguished by statutory law); ASHE COUNTY, N.C., CODE OF ORDINANCES § 159.02 (2012)[2], *repealed by* High Impact Land Use Ordinance, ASHE COUNTY, N.C., CODE OF ORDINANCES §§ 166.01-166.99 (2016). For these and other reasons stated herein, and because the New River is an Outstanding

[2] The original Ashe County Polluting Industries Development Ordinance was passed on November 15, 1999. Reference in this brief is made to the version which was amended on March 5, 2012.

Resource Water ("ORW") of the State, this Court should reverse the decision of the Court of Appeals.

I. THE *SUA SPONTE* CREATION OF A SYSTEM OF INTERLOCUTORY APPEALS FROM DECISIONS OF LOCAL LAY BOARDS PLACES AN ILLOGICAL AND UNWORKABLE BURDEN UPON LOCAL LANDOWNERS SEEKING TO PROTECT THEIR PROPERTY RIGHTS AND THEIR HEALTH FROM POLLUTING INDUSTRIES.

In *Ashe County. v. Ashe County. Planning Bd.*, 829 S.E.2d 224 (N.C. Ct. App. 2019), the court appears to establish a *sua sponte* system of interlocutory appeals that, when read alongside N.C. Gen. Stat. § 160A-388 and Ashe County Code § 153.04(J)(3), requires a landowner seeking to enforce their property rights to appeal, within 30 days, from a "decision" of a local lay board, of which they have any sort of written notice. 829 S.E.2d at 231. In *Ashe*, the court found that a "decision" can be an emailed checklist of remaining items to complete prior to receiving a permit. *Id.* at 230. Under *Ashe,* written notice of a "decision" could take the form of a conversational email with a local government employee. Notice for "other person[s]," which could trigger a 30-day appeal window under Ashe County Code § 153.04(J)(3) can also take the form of "actual or constructive notice" of a "decision." *Reductio ad absurdum*, reading these requirements in light of the court's holding in *Ashe*, a concerned landowner who might learn in the local newspaper of a polluting industry email conversation with a county planner might then unknowingly waive their right to appeal any such interlocutory "decision" made in that conversation prior to the granting of a final permit.

A. The Court of Appeals' System Enables Contradictory Permitting Determinations in Contravention of Established Precedent.

The Court of Appeals' holding at issue undercuts and muddies the clear and pre-existing precedent which explains the difference between an "advisory" communication by a local lay board, county planner, or zoning board, and one which is a final agency "decision" sufficient to bind the County. *See S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 711 S.E.2d 158 (N.C. Ct. App. 2011); *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 571 S.E.2d 588 (N.C. Ct. App. 2002); *Meier v. City of Charlotte*, 698 S.E.2d 704, 708 (N.C. Ct. App. 2010); *MLC Auto., LLC v. Town of S. Pines*, 702 S.E.2d 68 (NC. Ct. App. 2010). The *S.T. Wooten* holding discusses the potential "procedural awkwardness" of a county appealing its own planning director's final decision regarding permitting, and states that while unlikely and awkward, the procedure is clear if the county sees such an appeal as necessary. *S.T. Wooten*, 711 S.E.2d at 165.

The *Ashe* court's holding takes this awkwardness into the realm of an unworkable new precedent, when it states that while part of the Planning Director's e-mail can be read as a "final decision", that part of the same email is not, concluding that "[the email] was not a binding determination that the permit would be issued once the State permit was obtained" (as was the case in *S.T. Wooten*), while also maintaining—without the citation to any prior precedent—that "the table in the [email] is indicative that the Planning Director was making a determination concerning the status of the buildings shown in the application to be in proximity of the proposed site." *Ashe*, 829 S.E.2d at 230. It is entirely unclear which factors the *Ashe* court applied in making the determination that the nature of an emailed table is sufficient to bind a county as a "final determination," while the text

in the body of the same email is merely "advisory," and is *not* in fact a final agency decision and thus does not bind the county.

The *S.T. Wooten* holding applies a four factor test to determine whether a "final decision" is sufficient to bind a local government, or whether it is merely "advisory" in nature, and does not anticipate having subsequent courts of appeal take a scalpel to each decision of whether to grant a permit, deeming the communications regarding some to be "advisory" and regarding others to be binding "final decisions." In its reasoning, *S.T. Wooten* discusses and clearly applies the precedents of *In re Historic Oakwood* and *Meier* as seeing the status of a given communication as "advisory" or as "final decision" as a binary system, which, like oil and water, do not coexist as to a single decision in that the oil and water can be separated by applying the four factors.

S.T. Wooten never created a rule which anticipated having a future court note parts of a communication as binding "final decisions" and parts as "advisory," or that an interlocutory, pre-permit communication with a county planner could be deemed to be only "partly binding" or all at once binding and non-binding as the examining court applies the *S.T. Wooten* factors to each sentence of a given email in the manner it deems fit. *S.T. Wooten* applied pre-existing precedent in a decisive manner, stating that the distinguishable facts of that particular case bound the Town of Zebulon to issue a special use permit for an asphalt plant, and that the reviewed communication with the county, when taken as a whole, constituted a binding "final decision" to issue a special use permit. *S.T. Wooten*, 711 S.E.2d at 165. *S.T. Wooten* never broke down a single governmental communication (here, an email) into constituent parts to rule that part of a permitting

decision was binding while determining the county was not bound to issue a final permit, and that the intent of a county planner, in a single communication, could be divined by an appellate court as both binding and nonbinding, in the same communication.

The effect of the *Ashe* holding is to estop the county from enforcing the set-off provisions of PIDO, because of the "final decision" in that regard, while also allowing the county the ability to later deny the permit on another ground. This undercuts any policy argument that an applicant should be able to rely upon an interlocutory determination in anticipation of a final permit being granted. North Carolina precedent is clear that a county cannot be estopped from enforcing its ordinances in general, but even further, it "cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a zoning official in encouraging or permitting the violation." *Winston-Salem v. Hoots Concrete Co.*, 267 S.E.2d 569, 577 (N.C. Ct. App. 1980). Where the County Planning Director made a mistake, which would encourage Respondent Appalachian Materials to violate the set-off provisions of PIDO by stating that a barn or shed is "verified" when the barn or shed is actually in violation of the Ordinance, this mistake should not bind the county from enforcing an objective requirement of its ordinance, which is aimed at protecting its public. *See generally City of Raleigh v. Fisher*, 61 S.E.2d 897 (N.C. 1950). On the grounds that the Court of Appeals' opinion creates conflicting and unworkable permitting results, without reference to any controlling precedent, this Honorable Court should reverse.

B. The Ashe County Board of Commissioners is the Proper County Authority Charged with Enacting and Administering Ordinances Affecting the Environment and the Public.

"*A county* may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the *health, safety, or welfare*, of its citizens and the *peace and dignity* of the county . . . ." N.C. GEN. STAT. § 153A-121 (2019) (emphasis added). This delegation to North Carolina counties is located within Article 6 of Chapter 153A of the General Statutes, entitled "Delegation and Exercise of the General Police Power." This Honorable Court has ruled that where an ordinance permits the restriction of a landowner's right to the profitable use of his land at the expense of other properties and persons, such an ordinance is based upon police power. *Blades v. Raleigh,* 187 S.E.2d 35, 43 (N.C. 1972). PIDO is such an ordinance that is based upon police power. It uses the language of N.C. Gen. Stat. § 153A-121 verbatim and regulates the restriction of an entity's profitable use of land at the expense of other properties and persons. ASHE COUNTY, N.C., CODE OF ORDINANCES § 159.02 (2012), *repealed by* High Impact Land Use Ordinance, ASHE COUNTY, N.C., CODE OF ORDINANCES §§ 166.01-166.99 (2016).

Amicus curiae support Petitioner's position in its reading and common sense application of the statute; where the General Assembly charges a County Board of Commissioners, and not a Planning Board, to exercise the power of such an ordinance, the County Board of Commissioners is the proper entity to have the authority to order the administration of the ordinance through issuance of a permit. *See Jackson v. Guilford County Bd. of Adjustment,* 166 S.E.2d 78, 84-85 (N.C. 1969) (citing *Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 74 S.E.2d 310 (N.C. 1953)) (stating that as to powers a county

may confer upon its board of adjustment, the general principle applies that while the Legislature may delegate fact finding power, it cannot vest the power to apply or withhold application of the law to subordinate agencies of government).

Amicus curiae are a group of concerned property owners in Ashe County, who do not regularly employ a team of attorneys to monitor such emails or other public communications or other means, or to advise them of their rights with regard to interlocutory decisions being made by the Ashe County Planning Board, or the Ashe County Planning Director. In essence, under the *Ashe* holding, if such email correspondence between a local government agency employee advising an applicant for an environmental or other type permit is not challenged within thirty days, the email "action" becomes "final" and parties such as BREDL, and its chapter, POFA herein lose their rights to be heard as to the legality of such email "action". There are no North Carolina cases cited that support this new position set out by the holding in the *Ashe* opinion.

The system of interlocutory appeals established *sua sponte* in *Ashe* will be undoubtedly burdensome on the local governments of the State as well as local citizens, as the court notes, "it is...on each county to develop a process whereby it can become aware of determinations made by its own staff so that it can preserve its right to appeal such determinations, unless and until the law in this regard is changed." *Ashe*, 829 S.E.2d at 231.

The stated rationale the *Ashe* court asserts for its system is that it benefits members of a certain group of "applicant[s]" or "citizens"—in this case, a subsidiary company of a now-bankrupt parent company that participates in various polluting industries with a long

history of noncompliance, and violations of State and federal environmental regulations—who "suffer when they reasonably rely upon determinations made by a county official." *Id.*

However, the *Ashe* court fails to recognize the real suffering its holding will inflict upon landowners and citizens who would be adversely impacted by an interlocutory decision of a county planner or lay board. Neighboring citizens will likely receive neither actual nor constructive notice that an email discussion with a local government employee has triggered a "decision" in the parlance of N.C. Gen. Stat. § 160A-388. Under the Court of Appeals' reasoning such a "decision" immediately starts a 30-day stopwatch for their appeal. *Id.* at 230-31. Losing their right to appeal an interlocutory determination of a crucial issue in the permitting process could amount to their property values diminishing and their health being negatively impacted, all without allowing them any right to be heard or argument made of a decisive, interlocutory issue just before the *actual* final permitting decision is made, including if a final decision is made outside the 30-day appeal window of an appealable interlocutory decision.

Although the instant appeal is procedurally ambiguous as it affects local government decisions, it appears to violate longstanding principles of ripeness, as well as the requirement that those dealing with the government must exhaust their administrative remedies prior to an appeal. "It is well established that when the legislature has created an effective administrative remedy, it is exclusive and the matter does not become ripe for review until the statutory remedy has been exhausted." *Town of Kenansville v. Summerlin*, 320 S.E.2d 428, 430 (N.C. Ct. App. 1984) (citing *Presnell v. Pell*, 260 S.E.2d 611 (N.C. 1979)). Here, the legislature has created a method of appeal to boards of adjustment "from

decisions of administrative officials charged with enforcement of . . . any other ordinance that regulates land use or development." N.C. GEN. STAT. § 160A-388(b1). Under N.C. Gen. Stat. § 160A-388(a1), "the term 'decision' includes any final and binding order, requirement, or determination."

The Planning Director did not have the authority to grant a conditional approval of the application. The record shows that he did not grant such an approval of the PIDO permit. His communications cannot be relied upon in order to accomplish the same end via estoppel. The *Ashe* court determined that "the Planning Director did not intend for his June 2015 Letter to be a determination that the permit would be issued once the State permit was obtained." *Ashe*,829 S.E.2d at 229-30.

Indeed, the Planning Director's June 2015 letter was premised by an email stating that the forthcoming letter was merely a "favorable recommendation" in advance of his viewing Appalachian Materials' final plans and the conditions and rules as they existed at that time of his final review. Most importantly, he stated directly to Appalachian that he did not have authority to provide conditional approval. *Ashe*, 829 S.E.2d at 228. "Where the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 571 S.E.2d 588, 591 (N.C. Ct. App. 2002) (citing *Midgette v. Pate*, 380 S.E.2d 572 (N.C. Ct. App. 1989)). While those dealing with local governments are presumed to know the limits of the official's authority[3],

[3] *See generally Moody v. Transylvania County*, 156 S.E.2d 716, 720 (N.C. 1967).

and presumed to know the law[4], such presumptions are not necessarily required in Appalachian's case. "Concerning the conditional approval based on getting the [required State permit]," the Planning Director stated: "*I cannot do that without approval from the Planning Board.*" *Ashe,* 829 S.E.2d at 228 (emphasis and brackets in original). The Planning Director states: "[t]he language in the ordinance is pretty clear, 'no permit from the planning department shall be issued until [all [sic] required State and Federal permits have been issued.'" *Id.* However, the instant appeal arises out of Appalachian's insistence that their reliance on a conditional approval was reasonable, despite the Planning Director's lack of authority, and despite his clear communications to them informing them of his lack of authority and that such was not being granted. Logically it appears absurd for a staff director to say on the one hand that he is not issuing a final nor conditional permit, but the applicant Appalachian argues that they should be able to accomplish, through estoppel, what is not possible through the ordinary permitting process; such would cause the "final agency action" test as the bright line timing for making proper appeal that has been a certain mainstay of this area of environmental administrative law to be thrown into upheaval *See, In re Historic Oakwood, Midgette, supra.*

The June 2015 letter itself provided a checklist of the current status of permitting items, and stated that the application was incomplete, and that the ordinance "does require that all state and federal permits be in hand prior to a local permit being issued." *Ashe,* 829 S.E.2d at 228-29. Such a preliminary communication which occurred before the Planning

[4] *See generally State v. Boyett,* 32 N.C. 336, 343 (1849).

Director even viewed the final plans for the site, should not constitute a final binding decision for the county. The PIDO requirements must be met at the time an application is reviewed in order for an applicant to receive a permit—thus, if a site once complied with PIDO as to a particular requirement, but then is out of compliance at the time the permit is finally processed to be determined, a permit would not issue, and the applicant would then have the ability to correct the deficiencies and re-apply, or, at that juncture would have a "final agency decision" and be able to appeal within 30 days if he felt the permit should have been granted. If a decision is to reflect an "official's formal and definitive interpretation of a specific ordinance's application to a 'specific set of facts,'" it logically follows that the "specific set of facts" that is being assessed by the Planning Director would be the final plans for the given site, examined at the time the Planning Director assesses the application's sufficiency, and that a permitting decision that an application is incomplete could not be a "final decision". *Ashe*,829 S.E.2d at 229 (quoting *S.T. Wooten*, 711 S.E.2d at 162).

The Planning Director denied Appalachian's permit application, but only after reviewing Appalachian's final plans, which included changes that took the site out of compliance—notably building locations were inconsistent between state, federal, and PIDO permit applications. Instead of then seeking to comply with the ordinary permitting process by submitting or amending their application with all required permits, and by further developing their site and working with the County to comply with PIDO requirements, Appalachian filed suit and sought to bootstrap its clear permit denial via interlocutory appeals from communications with the Planning Director. They appealed to

the Planning Board and argued that the Planning Director's communications with Appalachian prior to the completion of their application barred him from assessing all parts of the application at the time he was making a final permitting decision. Rather than comply with PIDO, Appalachian appealed an unripe claim born out of letters and emails, rather than final agency decisions, in an attempt to estop the County from enforcing its own police power ordinances when it assessed their application under PIDO. This is not how PIDO works. Appalachian cannot avail itself of a different permitting process due to initial communications which do not constitute a "final decision" and therefore, the appeal was never ripe for review. Such would illogically subvert the line of cases, particularly vital to the environmental permitting process, whereby the permit issuance stands as the final agency action to be relied upon by any parties of interest or who have standing. Accordingly, this Court should reverse.

C. The Permit Authorizes the Placement, Construction, and Operation of a Dangerous, Polluting Asphalt Plant in Contravention of PIDO.

PIDO was enacted for the purpose of "promoting health, safety, and general welfare of [Ashe County] citizens" and for "the peace and dignity of the county." ASHE COUNTY, N.C., CODE OF ORDINANCES § 159.02 (2012), *repealed by* High Impact Land Use Ordinance, ASHE COUNTY, N.C., CODE OF ORDINANCES §§ 166.01-166.99 (2016). PIDO's statement of purpose expressly recognizes that "[p]olluting industries, by their very nature produce objectionable levels of noise, odors, vibrations, fumes, light, or smoke that may or may not have hazardous effects." *Id.* Respondents do not contest that under PIDO, the asphalt plant makes up a part of a "polluting industry." In fact, PIDO has been challenged before under

similar circumstances, and includes the same amicus party, BREDL. *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) (in which a paving company was seeking a building permit for an asphalt plant and the Ashe County Board of Commissioners subsequently passed a moratorium on the construction of asphalt plants and then ultimately passed PIDO). In *Tri-County Paving*, citing advocacy by BREDL at a discussion of a proposed asphalt plant before the Ashe County Board of Commissioners, the Fourth Circuit Court of Appeals ruled that "PIDO sought to limit polluting industries' proximity to citizens, especially school children and those in need of medical care," and went further on to state that "[i]t is rational for a community to decide that it does not want polluting industries, such as asphalt plants, in close proximity to residences, schools, daycare centers, hospitals or nursing homes." *Id.* at 434, 439.

In this PIDO Permit scenario, the record reflects that the survey, if a legitimate one was produced, did not properly describe the land or property, which would cause most any other environmental permit to be void on its face; other required permits, like the air quality permit and what in fact was an amended mining permit, were not part of the required PIDO submittal or were woefully incomplete. To now hold that such a permit is in fact granted is illogical at best. All local government administrative permitting, and by extension attendant environmental permitting, will be thrown into upheaval if this decision in *Ashe* is not rescinded. In a recent publication by the North Carolina Department of Environmental Quality ("DEQ", formally the North Carolina Department of Environment and Natural Resources ("DENR")), DEQ estimated that North Carolina had roughly one-hundred-fifty (150) existing asphalt plants, noting that any asphalt plant that

collects rainwater from its site and discharges runoff into a stream requires a stormwater discharge permit, while any asphalt plant that disturbs more than one acre of land also requires a sedimentation control permit. N.C. DEP'T ENV'T & NAT. RES., ASPHALT PLANTS FREQUENTLY ASKED QUESTIONS, *reprinted in* CTR. HEALTH, ENV'T & JUSTICE FACTPACK – PUB 131, 5-6 (2015).

Stormwater requirements are necessary because many of the activities at asphalt plants beyond the actual manufacturing of asphalt are sources of pollution. U.S. ENVTL. PROT. AGENCY, EPA-833-F-06-019, INDUSTRIAL STORMWATER FACT SHEET SERIES: SECTOR D: ASPHALT PAVING AND ROOFING MATERIALS MANUFACTURERS AND LUBRICANT MANUFACTURERS 2 (2006). Most asphalt plants, including this proposed plant in the New River basin, which is the subject of this PIDO Permit, involve the outdoor storage of aggregate materials, the storage of petroleum compounds, and the transport of such materials. *Id.* During rain events, stormwater transports pollutants including total suspended solids, total dissolved solids, biochemical oxygen demand, chemical oxygen demand, oil and grease, benzene, methylene blue active substances, metals, and pH to the water resources of the State such as the New River, and its direct tributaries. *Id.* Pollutants arising from asphalt plants are so prominent that the DEQ specifically regulates them as part of its National Pollutant Discharge Elimination System (herein referred to as "NPDES") permit program administered through the Federal Clean Water Act. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388 (2019); N.C. DEP'T ENVTL. QUALITY, GENERAL PERMIT NO. NCG160000, ASPHALT PAVING MIXTURES AND BLOCKS (2019).

Under General Permit No. NCG160000, an owner or operator of an Asphalt Paving Mixture or Block may only discharge stormwater to the surface waters of North Carolina in accordance with the terms and conditions of the permit. The permit specifies stringent requirements to enact a Stormwater Pollution Prevention Plan and to monitor discharges for analytical and qualitative data. N.C. DEP'T ENVTL. QUALITY, *supra*, at 5-14.

Because Petitioner Ashe County is aware of the state-level regulatory framework designed to control industrial pollution, and also the hazards of polluting industries like asphalt manufacturing, they enacted PIDO to safeguard the environment of Ashe County, the water quality of its rivers and tributaries, and its citizens—including those members of *amicus curiae* who are especially vulnerable as further described herein. *See Tri-County Paving, supra.* The Ordinance's prohibition in locating polluting industries inside of a one thousand (1,000) foot radius from residences and commercial tenants is not arbitrary. It has since been doubled because of concerns associated with high impact activities in close proximity. ASHE COUNTY, N.C., CODE OF ORDINANCES § 166.08 (2016). Because of the dangers of the proposed asphalt plant, which were erroneously overlooked by the Planning Board, this Court should reverse the decision of the Court of Appeals. *See City of Raleigh v. Fisher*, 61 S.E.2d 897, 902 (N.C. 1950) ("The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode. (internal citations omitted)).

D. The Planning Board's Overruling of the Planning Director's Denial of the PIDO Permit Is Incongruent with Federal and State Protections Afforded to the New River.

Despite its name, the New River is the oldest river in North America and is recognized, among other things, for its scenery, charm, and recreational opportunities. *New River (South Fork), North Carolina*, NAT'L WILD & SCENIC RIVERS SYS., https://www.rivers.gov/rivers/new.php (last visited Dec. 29, 2019). Parts of the New River are protected from development due to its unique natural characteristics. What one puts in the New River upstream has consequences on its environmental health, diversity, ecosystems, and scenic value downstream. The site of the proposed asphalt plant, which is the subject of this PIDO Permit, lies immediately upstream of protected areas as provided by State and federal law and as further described herein.

The PIDO Permit prescribes the flow of polluted stormwater (as described above) into components of the National Wild and Scenic Rivers System ("WSRS") and State Natural Scenic River Systems ("NSRS"). In addition, the New River is one of just fourteen (14) rivers in the United States designated as an American Heritage River by Presidential Proclamation. Proclamation No. 7112, 63 Fed. Reg. 41,949 (July 30, 1998).

The WSRS was created by Act of Congress in 1968. Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1968). A segment of the New River, specifically "that segment . . . . in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line" was designated to be administered as a wild, scenic, or recreational river permanently. 16 U.S.C. § 1273 (2019). The Act's purpose has not been repealed, and remains to recognize the congressional policy that

> certain selected rivers of the Nation, which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. 16 U.S.C. § 1271 (2019).

In 1976, the WSRS came to include our segment of the New River specifically as a "scenic river area," meaning it is free of impoundments and has shorelines and/or watersheds that are primitive and undeveloped, while remaining accessible in some places by roads. New River: Approval for Inclusion in the National Wild and Scenic Rivers System as State Administered Scenic River Area, 41 Fed. Reg. 16,491 (Apr. 13, 1976); 16 U.S.C. § 1273 (2019). Given its status as a scenic river area, the Act provides that the federal government is prohibited from supporting actions that would harm the New River's free-flowing condition, water quality, or outstanding resource value. 16 U.S.C. § 1278 (2019). *See North Carolina v. Fed. Power Comm'n*, 393 F. Supp. 1116, (N.C.M.D. 1975) (stating that but for deletion of a provision that would have authorized a study of the New River for inclusion in the WSRS, the Federal Power Commission would have been prevented from licensing a project).[5]

However, even before the federal government made this classification, in an Act that compliments the WSRS, the State of North Carolina, mirroring language in its federal counterpart, designated the New River a "scenic river area" as part of its own Natural and Scenic Rivers System ("NSRS") in 1973. N.C. GEN. STAT. § 143B-135.152 (1973). This action, taken by the North Carolina General Assembly, has important implications for the water

[5] At the time this opinion was published, the New River had not been approved for inclusion in the WSRS.

quality standards of the New River, which were strengthened in 1995. The PIDO Permit issued by the Planning Board that would allow contaminated run-off into the New River is incongruent, inconsistent, and illegal vis-à-vis the current federal and State statutory protections and the PIDO framework as enacted by Ashe County. By allowing the PIDO permit to be granted in the way allowed to Appalachian, such flies in the face of the rationale for PIDO permitting as enunciated in *Tri-County Paving, supra.*

State regulations deem the New River "of exceptional State or national recreational or ecological significance" and thus it is entitled to protection as an Outstanding Resource Water ("ORW"). *See generally* Water Quality Standards for Outstanding Resource Waters, 15A N.C. ADMIN. CODE 2B.0225 (2019) (declaring any water body to be of "exceptional State or national recreational or ecological significance" if the waters have received a designation "such as a North Carolina or National Wild and Scenic River . . . ."). This is in part because waters of the New River make up components of the federal WSRS and State NSRS, thus exhibiting ORW uses per said regulations. *Id.*

The protections to the ORW of the South Fork of the New River extend to NPDES permitted sites upstream. *Id.* Such protections, among others, include heightened standards for oxygen consuming wastes and total suspended solids—the very wastes the United States Environmental Protection Agency ("EPA") warns of as being known to occur in connection with the operation of asphalt plants. *Compare id.* (setting heightened standards for oxygen consuming wastes and total suspended solids), *with* U.S. ENVTL. PROT. AGENCY, EPA-833-F-06-019, INDUSTRIAL STORMWATER FACT SHEET SERIES: SECTOR D: ASPHALT PAVING AND ROOFING MATERIALS MANUFACTURERS AND LUBRICANT MANUFACTURERS 2 (2006)

(noting oxygen consuming wastes and total suspended solids are pollutants often transported from asphalt paving manufacturing plants to surface waters by stormwater). The Planning Board decision and Court of Appeals opinion neglects to consider applicable and controlling environmental protections granted by this State and the federal government, and as such, this Court should reverse. *See Solid Waste Agency v. United States Army Corps Eng'rs*, 531 U.S. 159, 174 (2001) (recognizing that the primary responsibilities and rights to plan the development and use of land and water resources rests with the States).

E. The Court of Appeals' Holding in *Ashe* Will Cause Inefficiency in the Permitting Process and Wrongly Benefits the Polluting Industries, to the Detriment of the State's Most Vulnerable Citizens.

The *Ashe* court's system forces the local government to be the arbiter of which individual citizens would have standing to challenge its interlocutory decision, and to provide them with notice under N.C. Gen. Stat. § 160A-388(a1). The system that the *Ashe* court reasons will benefit "applicants," will in practice create uncertainty and inefficient delay in the permitting process, as local governments seek to identify landowners with standing, and notify affected landowners or other groups of every interlocutory "decision" of its board, which in this case is only part of an advisory, conversational e-mail.

As difficult as administration of the *Ashe* court's system will be on local governments, which regularly employ counsel to represent them and which have access to all of their communications with permit applicants, it is even more burdensome upon individual citizens impacted by an interlocutory decision by a county planner or lay board, who do not have such counsel or access to communications regarding permit applications.

While the *Ashe* court notes it is seeking to balance and consider the reliance concerns of applicants for PIDO permits (likely corporations with in-house or regulatory counsel, and compliance budgets to sustain multiple interlocutory claims on the permitting process that will overwhelm local county planners), it is equally blind and silent on the impacts its decision will have on local landowners. Under this scenario envisioned by the *Ashe* Opinion, polluting industries could use their substantial resources to assert a shotgun approach, communicating in high volumes with all levels of local governments to overwhelm planning departments and lay boards, creating a confusing haze over the local land use agenda. Prospective polluting industries will receive responses which they can then seek to rely upon in order to place their interlocutory bookmark in the permitting process, barring any future enforcement of ordinances with regards to past interlocutory determinations.

Thus, individual landowners, who under the current standards are able to more simply, comprehensively, and affordably contest one final "decision" regarding issuance or denial of a particular permit, will be overwhelmed by the sheer volume and complexity of interlocutory decisions made in the permitting process, and will be estopped from challenging individual issues at the final stage of permitting that have already been determined in an interlocutory manner and which were never appealed in the 30-day window of N.C. Gen. Stat. § 160A-388 and the current *Ashe* holding.

Such a system harms local landowners and groups who seek to challenge permit decisions by obscuring the regulatory process and forcing them to compete in several smaller litigation contests concerning compartmentalized interlocutory issues if they wish

to preserve their right to appeal any one issue. By forcing many battles on innumerable, individualized, interlocutory fronts, the *Ashe* court, if upheld, would: (1) deny affected local landowners and citizens the ability to properly contest a final permitting decision at the time that decision is made; (2) overburden local governments by forcing them to monitor interlocutory "decisions," identify and notify landowners with standing, and assert their own rights to appeal; (3) employ limited county resources to fighting many small battles over interlocutory issues rather than providing efficient county planning services to constituents; (4) give the benefit to polluting industries—not only of the substantial costs of requiring many battles on multiple individualized fronts—by allowing pollution industries to rely upon any interaction with the county planning department and limit the ability for the county and interested parties to later challenge interlocutory permitting decisions at the final permitting stage, as is the case under current "final agency action" ripeness rules; and (5) substantially burden, and harm, affected landowners who likely do not have the means to engage in multiple prolonged lawsuits over interlocutory issues affecting their rights, stripping them of the ability to challenge a final permitting decision, because of issues now undercut by the effect of collateral estoppel of prior litigation of interlocutory issues in a final permitting hearing. Under the *Ashe* holding, the real battle would happen on multiple interlocutory fronts before the actual final permit decision, rendering the final permit all but a formality, causing affected landowners to exhaust their resources and patience in endless litigation.

The system not only harms local governments and landowners, but also harms those who use and enjoy our State's recognized and protected natural resources. The New River

is directly fed by the creek flowing through the property where the asphalt plant, which is the subject of this PIDO Permit, has been proposed. In 2006, a spot located a few hundred yards downstream of where the unnamed creek meets the New River was chosen as an ideal place to locate a camp for children. Over a decade later, that camp still exists and is known as Camp New Hope.

Directed by Randy Brown, a BREDL and POFA member, Camp New Hope is a non-profit, no-charge property open to families with children who suffer from life-threatening medical conditions and other serious diseases for which there is no known effective treatment or cure. *Our Camp*, CAMP NEW HOPE, http://campnewhopenc.com/our-camp/ (last visited Dec. 29, 2019). Afflicted by cerebral palsy, Rett syndrome, hydrocephaly, microcephaly, spinocerebellar ataxia, and other cancers, reactive airway diseases, immune system disorders, and seizure disorders, these children come to Camp New Hope to experience the peace, quiet, and natural beauty of the area and recreate on the New River as so many have done before them. *Director's Report: Hope is the Thing With Feathers*, THE LEAGUE LINE (Blue Ridge Envtl. Def. League, Glendale Springs, N.C.), Fall Edition 2015, at 5. The purpose and ideal for Camp New Hope is:

> That every child who enters the gate of Camp New Hope will experience a life changing moment. That he or she will find a new appreciation for nature and the peace and solitude that is found within it. That they will have a renewed hope for the future, knowing miracles happen everyday. That when they leave they will be revived spiritually, mentally, and physically. Most importantly, that they will realize just how special they are, because we will never be the same having been touched by their lives.

Camp New Hope is a sanctuary nestled in the mountains—untouched by smokestacks, smog, asphalt plants, and water quality concerns; it is precisely a place where

our children, who suffer the most, can escape the very day-to-day conditions causing their grave illnesses. *Our Mission*, CAMP NEW HOPE, http://campnewhopenc.com/our-mission/ (last visited Dec. 29, 2019). These children are able to enjoy fishing, canoeing, kayaking, and floating down the New River in tubes. These activities reward them as well as the camp's staff and directors and the community at large. *Our Camp*, CAMP NEW HOPE, http://campnewhopenc.com/our-camp/ (last visited Dec. 29, 2019). Should this PIDO Permit issue, that action would irreparably harm and suppress the values of Camp New Hope, which complement the governmental values of promoting health, safety, and general welfare, by condoning the placement, construction, and operation of a polluting asphalt plant within walking distance of this special place.

II. THE BURDEN PLACED UPON A LOCAL GOVERNMENT TO CONTINUALLY FACE APPEAL OF INTERLOCUTORY DECISIONS OF ITS EMPLOYEES DENIES THE CONSTITUENTS OF THAT GOVERNMENT THE USE OF ITS TAX DOLLARS AND PROTECTION OF ITS ENVIRONMENTAL REGULATIONS.

Local governments, which provide an important function administering zoning, regulatory and environmental laws, operate with limited resources. Local governments administering environmental laws have a duty to protect the public from the toxic nuisances of polluting industries, while also seeing that industries operate in a properly regulated manner. Local governments only have so many employees, so much tax revenue, and so much time in a day to go about ensuring these goals.

The *Ashe* court solely focuses on the interest of the polluting industries and will burden local governments and the citizens it seeks to protect in the process.

A. The Ashe County Board of Commissioners, through its Planning Director, Properly Determined the Permit Endangers County Residents and Commerce, and is in Violation of PIDO.

The PIDO set-off requirements are objective—a potential polluting industry site is either within one thousand feet of a "commercial" building, or it is not. ASHE COUNTY, N.C., CODE OF ORDINANCES § 159.06 (2012), *repealed by* High Impact Land Use Ordinance, ASHE COUNTY, N.C., CODE OF ORDINANCES §§ 166.01-166.99 (2016). What is deemed a "commercial" building is determined by the County Planning Director, applying the ordinary meaning of the term at the time he makes such determination regarding the building. The Court of Appeals, in *Ashe,* seizes upon one word in an e-mail sent prior to the grant of a permit in order to find a final, appealable "decision" under N.C. Gen. Stat. § 160A-388—the word "verified." *Ashe,* 829 S.E.2d at 230. The court assumes that the Planning Director determined that the building in the survey was not a "commercial" building. *Id.* The court then astonishingly notes how ambiguous such a determination is, and how strongly it can be argued that the hay barn in question was actually a "commercial building." *Id.* The court goes further to note how the director should have barred the issuance of a permit if such a building were within one thousand feet of the proposed site. *Id.* Merely due to the single word "verified," found in the Planning Director's email, the *Ashe* court binds itself to a reading of the term "commercial building" which it admits is bizarre, in a needlessly restrictive manner. In fact, the Planning Director found that there was a commercial building within 1.000 feet of the proposed asphalt plant, and under those facts, among others, he did not approve the PIDO permit. He stated the same clearly in

his *earlier* email to the applicant, stating that he was not approving the permit and that no final agency action had occurred. *Ashe,* 829 S.E.2d at 228.

Morris Communs. Corp. v. City of Bessemer, 712 S.E.2d 868, 872 (N.C. Ct. App. 2011) states that "[u]ndefined and ambiguous terms in an ordinance are given their ordinary meaning and significance;" that is, the court examining an admittedly ambiguous term "commercial building," is not required to define such a term "in favor of the property owner and the free use of land." Here, to interpret the term "commercial building" in a manner that wholly denies the "commercial" nature of a hay barn engaged regularly in the commercial activity of a hay growing business (a commercial undertaking common in Ashe County), is to deny the ordinary English language meaning of "commercial building" to something beyond recognition in order to serve the interests of a polluting industry applicant.

Furthermore, the court did not concern itself with whether the Planning Director had notified all interested landowners to challenge the unintuitive, exotic meaning of "commercial building" as applied to the hay barn in question. Neither did the court concern itself with whether interested individuals were denied an opportunity to raise the court's own argument of the commonly understood meaning of "commercial" against the interlocutory, one-word determination in an e-mail by the Planning Director, that the buildings in question had been "verified." Had interested parties been notified and been given an opportunity to argue the *Ashe* court's interpretation of the term "commercial," there likely would have been an objective violation of PIDO, and a permit would not have issued. The Planning Director himself had a change of heart, realizing too late that the

commonly understood meaning of "commercial" should have applied to the hay barn, and then was barred by his prior mistake in "verifying" the set-off requirement in his earlier e-mail. *See City of Bessemer, supra.* In essence, the county is estopped from enforcing its own ordinance, and forced to verify the set-off requirement of PIDO in a manner inconsistent with the ordinary meaning of its terms.

CONCLUSION

The PIDO Permit was properly denied, on the record, by the Planning Director. The established caselaw regarding appeal of such governmental decisions, including particularly in the environmental and regulatory context, is that the governmental authority cannot be properly challenged until a final agency action or decision has been made. *See Town of Kenansville, supra.* This bright line test regarding final agency actions has guided federal, state and local governments, businesses, property owners, affected environmental groups and others as to when a governing body or agency has made a final decision that can be enforced, and thus relied upon. The *Ashe* decision before this Honorable Court, for the first time, creates a somewhat bizarre and convoluted maze of early-in-the-process, interlocutory administrative decisions that must be acted upon within 30 days, or lost, thus further endangering the line of decisions relied upon as *stare decisis* that a final agency action is the triggering event of an appeal or other legal action. *Id.*

Adding insult to injury, the record before the improper "appeal" before the Ashe County Planning Board of the Planning Director's PIDO Permit denial, and the courts that followed, is that the applicant was told, prior to the moratorium being placed on PIDO

permits that followed before the PIDO Permit was ever issued, is that the Planning Director **told the applicant that the PIDO Permit was not being granted**. That fact alone—which was not reconciled in the majority Court of Appeals opinion and not even addressed in the concurring opinion, is a basis to overturn the *Ashe* opinion – in that nowhere in our environmental, regulatory or administrative practice is there a case, nor any case stated in the Court of Appeals' Opinion, whereby the administering governmental entity tells the applicant they are not receiving a final permit, sends a "comfort" email at the request of the applicant, and then has the permit denial illogically converted into an approval, due to an email no less. To not overturn the Court of Appeals' decision will invite uncertainty and unfairness into a process that strives to allow proper comment, review and decision making in an orderly manner. The opinion is strained, incorrect in its reasoning, and does not apply the facts of the record to the state of our regulatory law and framework, and should be overruled, otherwise decades of precedent regarding rules and reliance on final agency actions to bind applicants, agencies and those seeking to appeal those decisions on a proper record is in jeopardy.

Further, the applicant Respondent had the right, and failed to act to appeal the decision, within 30 days, of not receiving the PIDO Permit and after having received the "comfort" email. Thus, if, in fact, Respondent Appalachian Materials seriously believed they had been somehow granted the PIDO Permit by email but then were denied such explicitly by the Planning Director, such would start the clock for their appeal, which they never exercised.

On the record, the evidence establishes that the Planning Board's voluminous findings of fact and conclusions of law reversing the Planning Director's denial of the PIDO Permit was arbitrary, capricious, and an error of fact and law, in that: there were commercial buildings within 1,000 feet of the proposed toxic asphalt plant; the required state air quality permit showed plant equipment within 1.000 feet of a home; the plain meaning of "commercial building" was ignored and protective buffers disregarded; the survey of the site was incomplete and incorrect; all in violation of PIDO. This Honorable Court can find, on the record, that this many deficiencies and inaccuracies are clear and convincing evidence that the PIDO Permit conditions were not being followed and even if such Permit were procedurally properly granted, on the record such was in error and the decision should be overturned.

Lastly, *amicus curiae* agree with and support Petitioner's brief and arguments, including the issue regarding the moratorium of PIDO permits and believe this Honorable Court would be well served to vacate the Court of Appeals' Opinion and order the Planning Board to deny the PIDO Permit at issue, or, in the alternative, vacate the Planning Board decision and re-establish the Planning Director's denial of the PIDO Permit allowing the applicant to apply anew, if it so desires under the current ordinances, rules, and PIDO permit structure.

Respectfully submitted this the 2nd day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the foregoing document was filed with the North Carolina Supreme Court by proper use of electronic-filing via https://www.ncappellatecourts.org and copies were served upon all parties to this matter by depositing such copies in postpaid wrappers in a post office or official depository under the exclusive care and custody of the United States Postal Service properly addressed as follows:

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