

STATE OF NORTH CAROLINA
COUNTY OF RICHMOND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 EHR 01929

<p>Kim McRae McCall Petitioner,</p> <p>v.</p> <p>Department of Environmental Quality Respondent.</p>	<p>FINAL DECISION AND ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENT</p>
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Petitioner Kim McRae McCall (“Petitioner”) commenced the above-entitled matter by the filing of a Petition for a Contested Case Hearing in the Office of Administrative Hearings on April 30, 2020, challenging Respondent North Carolina Department of Environmental Quality (hereinafter “DEQ”), Division of Energy, Mineral and Land Resource’s (hereinafter “DEMLR’s”) issuance of a modification to Mining Permit No. 77-31 (“the Permit”) to Barnhill Contracting Company (“Barnhill”). Petitioner alleges Respondent substantially prejudiced her rights by acting erroneously; failing to use proper procedure; acted arbitrarily or capriciously; or by failing to act as required by law or rule as enumerated by N.C. Gen. Stat. § 150B-23. Additionally, Petitioner raised claims related to a Conditional Use Permit issued by the Richmond County Zoning Board; claims related to impacts to, and diminution of value of, her property; and allegations of bias and discrimination.

This matter came on for hearing before the undersigned Administrative Law Judge on August 26, 2020, upon Respondent’s Motion to Dismiss and Motion for Summary Judgment. The undersigned has considered the parties’ motions, the supporting memoranda, and the response; the evidence presented at the hearing and submitted to this Court; the applicable statutes and regulations; and relevant legal precedent.

APPEARANCES

pro se PETITIONER: Kim McRae McCall
182 Waymond Chapel Road
Hamlet, NC 28345

RESPONDENT: Carolyn McLain
Assistant Attorney General
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent DEMLR erred in issuing a Modification to the Mining Permit to Barnhill for its Mingo Pit Mine (Mining Permit No. 77-31), located off Waymon Chapel Road in Hamlet, North Carolina (“the Site”).

STATUTES AT ISSUE

N.C. Gen. Stat. § 74-46 through -74, North Carolina Mining Act of 1971
N.C. Gen. Stat., Chapter 150B, Administrative Procedure Act

EVIDENCE PRESENTED BY THE PARTIES

FOR PETITIONER:

- IMG_1140.MOV – Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 9:56 AM
- IMG_1566.MOV – Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 10:02 AM
- IMG_1618.MOV - Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 10:04 AM
- IMG_1895.MOV- Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 10:07 AM
- IMG_1931.MOV - Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 10:17 AM
- IMG_1780.JPG, IMG_1781.JPG, IMG_1782.JPG, IMG_1783.JPG – “Application for the Mining permit Affidavits of notifications date September 12.2019 modification his name is listed yet he use to work for Barnhill Contracting..that is not fair. He should of had no approval..conflict..Thank you. Kim McCall” – Emailed by Petitioner to Ms. Betty Owens, assistant to the undersigned, on August 17, 2020 10:31 AM
- IMG_2432.JPG, “Proof of the only meeting schedule April 19,2019 I was there and staff and Barnhill Contracting Company Partington yet no one said anything when I asked about what the county would do to protect my property. I am a citizen and everyone there from DEQ and County manger said nothing about Land working.for Barnhill Contracting Company in the pass Thank you Kim McCall Adjoining property owner” - Emailed by Petitioner to Ms. Betty Owens on August 17, 2020 10:42 AM
- Post-Hearing email of Tracy Parris, Richmond County Planning and Zoning Director, emailed to OAH Clerk’s Office on September 22, 2020. This document was not introduced in the proceeding.

FOR RESPONDENT:

Submitted with Respondent’s Motion to Dismiss and Motion for Summary Judgment

- Exhibit A. Copy of NC General Warranty Deed

- Exhibit B. GIS Overview Map
- Exhibit C. Mining Map
- Exhibit D. DEMLR Letter to Barnhill Contracting Co., Dated January 17, 2020
- Exhibit E. Barnhill Contracting Co. Letter to DEMLR, Dated November 6, 2019
- Exhibit F. Affidavit of Page Blackwelder
- Exhibit G. Letter from Gradient to DEMLR, Dated December 30, 2019
- Exhibit H. Judith A. Wehner Affidavit
- Exhibit I. McCall Complaint, Dated December 18, 2012
- Exhibit J. McCall Site Visit Notes
- Exhibit K. Dr. Kenneth Taylor Report
- Exhibit L. Email Message from T. Davis to Rep. Pierce
- Exhibit M. DEMLR Email Messages
- Exhibit N. Email Messages from K. McCall
- Exhibit O. Letter to K. McCall Dated February 28, 2020
- Exhibit P. Email Messages from K. Taylor to K. McCall, Dated January 16, 19, 2020
- Exhibit Q. Letter from DWR to K. McCall, Dated December 30, 2019, January 6, 2020
- Exhibit R. Letter from R. Kramer to K. McCall

LEGAL STANDARDS

Dismissal

1. Dismissal is proper when the court does not have subject matter jurisdiction over the petition for a contested case. N.C.G.S. § 1A-1, Rule 12(h)(3). For the Office of Administrative Hearings (“OAH”) to have subject matter jurisdiction, the petition must comply with N.C.G.S. § 150B-23(a) in its entirety. *Aldridge et. al. v. DENR et. al.*, 98 EHR 0665, at 7-8 (OAH 1998) (dismissing petition for lack of subject matter jurisdiction, stating that meeting the mandate of N.C.G.S. § 150B-23(a) is a jurisdictional prerequisite); *see also Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (affirming dismissal for lack of subject matter jurisdiction where plaintiff did not establish justiciability and standing). “The term [standing] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.” *Neuse River Found., Inc. v. Smithfield Foods*,

Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). The party invoking the subject matter jurisdiction of a tribunal has the burden of proving that such jurisdiction exists. *Templeton v. Town of Boone*, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010)

Summary Judgment Standard of Review

2. 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).

FINDINGS OF FACT

BASED UPON careful consideration of the pleadings; evidence; testimony; arguments; and legal briefs received during the contested case hearing, as well as the entire record of this proceeding including the post-hearing notice of Tracy Parris, Richmond County Planning and Zoning Director by Petitioner filed September 22, 2020; and Respondent's motion to dismiss and motion for summary judgment and the responses thereto, the Undersigned finds as follows. In making the findings of fact, the Undersigned has viewed all evidence in the light most favorable to the nonmoving party and records these findings only to articulate why certain facts are either not material or are not germane to the contested issues.

Parties

1. Petitioner Kim McRae McCall owns property located at 182 Waymon Chapel Road in Hamlet, North Carolina.

2. Respondent North Carolina Department of Environmental Quality is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 and is vested with the statutory authority to enforce the State's environmental laws, including the North Carolina Mining Act of 1971 (hereinafter "the Mining Act").

Statute at Issue

3. The North Carolina Legislature passed the Mining Act to ensure "[t]hat the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration." N.C. Gen. Stat. § 74-48(1). The Mining Act accomplishes this goal through a permitting process that ensures the restoration of mined lands through reclamation plans and financial bonds.

Evidence Presented

4. Barnhill applied to Respondent for a permit to mine the Mingo Pit located off Waymon Chapel Road in Hamlet, North Carolina, on June 20, 2012. Petitioner's property and the Mingo Pit are located adjacent to each other. (Resp.'s B).

5. Petitioner's land was then identified as adjoining Barnhill's proposed mine and, as required by the Mining Act, Petitioner was notified of the application and was provided opportunity to comment on the proposed permit prior to its issuance. Respondent ultimately issued Mining Permit No. 77-31 (hereinafter "the 2012 Permit") on September 18, 2012.

6. In addition to the Mining Permit, on August 14, 2012 Barnhill received a separate Conditional Use Permit (hereinafter "the Conditional Use Permit") from the Board of Adjustment for Richmond County, North Carolina, to open and operate a small scale sand mining operation on the Site.

7. On October 9, 2019, Respondent received an application from Barnhill to modify the 2012 Permit and expand operations at the Site by adding approximately six (6) acres to the permitted boundary. The expanded areas included three and a half (3.5) acres of area to be disturbed.

8. As required by N.C. Gen. Stat. § 74-50(b1), Barnhill, via its consultant Gradient, provided notice to adjacent landowners within 1,000 feet of the new mining acreage regarding the proposed permit modification. The initial mailing of notifications to those landowners in mid-September 2019 did not include Petitioner. (Resp.'s Exhibits B, C, and H). However, because Petitioner previously expressed concerns to Respondent regarding the impacts of the mine to her property, Respondent determined that a courtesy notice was appropriate. By letter dated November 6, 2019, Respondent required Barnhill to make such notification and correct certain other technical deficiencies. (Resp.'s Exhibit D). By letter dated January 17, 2020, Barnhill provided confirmation that Petitioner received the notification on January 13, 2020. (Resp.'s Exhibit E).

9. As early as December 10, 2012, following feeling vibrations and shaking in her home on a few days prior, which she attributed to the construction of the Mingo Pit, Petitioner expressed interest in filing a complaint concerning the Mining Permit and Conditional Use Permit that had been issued. (Resp.'s Exhibit I).

10. On January 11, 2013, Mrs. Diane Adams with DEMLR visited and inspected Petitioner's property. (Resp.'s Exhibit J). Following this visit and the taking of a soil sample, Respondent solicited the expertise of Dr. Kenneth Taylor, State Geologist and Chief of the NC Geological Survey, to investigate these concerns. Dr. Taylor produced a report and concluded that the vibrations correlated with "ground shaking which is significantly beneath the safe levels for damage." (Resp.'s Exhibit K). Additionally, the report stated that there were no site conditions that could support the argument that the previous vibrations could cause the reported level of damage. Id. As such, Respondent concluded that while the vibrations may be a nuisance to Petitioner, Barnhill would soon be done with the construction, and that neither a reported loud boom nor the cracks in Petitioner's foundation could be tied to the activities of Barnhill. Id.

11. Petitioner also reported these concerns to her local representative on March 19, 2013, and Respondent again addressed these concerns both to her and the legislator, explaining the situation. (Resp.'s Exhibit L).

12. On October 31, 2016, Petitioner emailed Respondent with concerns regarding her property sinking and the ground shaking. (Resp.'s Exhibit M). Respondent concluded that its only available action was to ensure that Barnhill was in compliance with its Permit and the Mining Act.

13. In April and June 2019, Petitioner complained to both DEMLR and the Division of Water Resources ("DWR") regarding concerns about her property. (Resp.'s Exhibit N). Based on these and other complaints filed with the Governor's Office, Judy Wehner with DEMLR; Mike Lawyer with DEMLR; and Nat Wilson with DWR completed a site visit to inspect the mine and Petitioner's property. (Resp.'s Exhibit O). In addition to the activities and testing conducted that day, Respondent engaged Dr. Taylor again, who responded directly to Petitioner on two occasions regarding her concerns. (Resp.'s Exhibit P). As a result of these investigations, Respondent found the mine to be compliant with the Operating and Reclamation Conditions of the Mining Permit.

14. In addition to inspecting the mine, DWR also investigated the concerns set forth by Petitioner regarding her water well and subsequently sent letters addressing these issues. (Resp.'s Exhibit Q). The letters and inspections indicate that there was no reason to believe that the mine was causing Petitioner's concerns, but DWR also recommended some further steps Petitioner could take to address her concerns. Id.

15. Petitioner also alleged discrimination and/or bias on behalf of both Respondent and the Richmond County Zoning Board. In response to Petitioner, on February 28, 2020, Respondent's Environmental Justice and Title VI coordinator sent Petitioner a letter explaining the findings of the July 11, 2019 inspection and visit, as well as addressing other issues, such as yard depressions and improper notice. (Resp.'s Exhibits O and R).

16. On March 6, 2020, Respondent modified the Mining Permit and sent a Notice of Issuance of Mining Permit No. 77-31 notifying adjoining and other landowners of that modification. Petitioner's notification was inadvertently delayed due to staff miscommunication and did not go out by registered mail until April 15, 2020. (Resp.'s Exhibit H)

17. Petitioner filed a Petition for a Contested Case Hearing that was accepted by the Office of Administrative Hearings on April 30, 2020.

18. During the hearing on August 26, 2020, Mr. David Miller, State Mining Engineer for Respondent DEMLR, testified that as the State Mining Engineer, he is responsible for implementing the Mining Act throughout the State of North Carolina. He stated that he has had the position for approximately 2.5 years.

19. Mr. Miller testified that Ms. McCall received notification of the pending Mining Permit Modification satisfactory to Respondent and in accordance with N.C. Gen. Stat. § 74-50(b1).

20. Mr. Miller testified that the Mining Act does not address concerns related to local zoning issues, including truck traffic or impacts to private property.

21. Mr. Miller testified that the Mining Act does address concerns regarding dust control and that the Modified Mining Permit required Barnhill to prevent dust from leaving the permitted area.

22. Mr. Miller testified that the buffer requirements for the Mining Act required 25 feet of undisturbed buffer from the property boundary, which was unrelated to the setback requirements established by the Richmond County's Conditional Use Permit.

CONCLUSIONS OF LAW

1. To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be considered without regard to the given labels.

2. Under the Administrative Procedure Act ("APA"), the right to file a petition for a contested case in the Office of Administrative Hearings ("OAH") is limited to a "person aggrieved." N.C.G.S. § 150B-23(a). A "person aggrieved" is "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C.G.S. § 150B-2(6). "Where a party is not aggrieved, his appeal [of an agency decision] will be dismissed." Hoisington v. ZT-Winston-Salem Assocs., 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999); see, e.g., Thompson v. N.C. Respiratory Care Bd., 202 N.C. App. 340, 688 S.E. 2d 516 (2010) (holding that petitioner was not an "aggrieved party" under section 150B-2(6) and lacked standing because her interest in her person, property, or employment were not affected substantially by any administrative action of the North Carolina Respiratory Care Board, which had reversed its decision requiring her to pay monetary penalties).

3. A petitioner must allege and prove "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 Env'tl. Management, 337 N.C. 569, 589, 447 S.E.2d 768, 780 (1994). See also 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) ((holding that the intervenors were not aggrieved because they presented only speculative harms regarding potential. "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.")).

4. Petitioner's claims related to the Conditional Use Permit neither result from an agency decision by Respondent, nor are they within the zone of those interests protected under the Mining Act. The Mining Act specifically states that issuance of a mining permit does not supersede or otherwise affect or prevent the enforcement of any zoning regulation. N.C. Gen. Stat. § 74-65.

The Mining Act does not address ancillary concerns regarding use and enjoyment by adjacent landowners. Instead, the Mining Act leaves zoning matters like those raised by Petitioner – truck traffic; harm to private property; local land use regulations; or diminution of value to real property – for regulation by local entities. It also explicitly **does not preclude any private legal action** to address hazards or nuisance. N.C. Gen. Stat. § 74-66. (“No provision of this Article shall be construed to restrict or impair the right of any private or public person . . . to bring any legal or equitable action for redress against nuisances or hazards.”).

5. For claims related to the Conditional Use Permit, Petitioner therefore is not a “person aggrieved” with standing to commence this contested case. See N.C.G.S. §§ 150B-2(6) and 150B-23(a). Accordingly, dismissal is appropriate pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1).

6. For claims regarding diminution of property value or impacts to health and safety, Petitioner fails to state a claim upon which relief can be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Money damages are not available under the NC APA. Nanny’s Korner Day Care Ctr., Inc. v. N.C. HHS, Div. of Child Dev., 837 S.E.2d 560, 563, 2020 N.C. App. LEXIS __, 5 (2020). With respect to claims regarding damages, Petitioner failed to allege facts establishing the necessary elements of N.C.G.S. § 150B-23; therefore, this court lacks subject matter jurisdiction over Petitioner’s Petition for Contest Case Hearing and Petitioner has failed to state a claim upon which relief can be granted. Accordingly, dismissal is appropriate pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

7. Based on Petitioner’s lack of evidence of bias or discrimination, and Respondent’s evidence that their Environmental Justice and Title III Coordinator sent letters to Petitioner addressing Petitioner’s claims and explaining their conclusions as to possible remedies, the undersigned cannot sustain a showing by Petitioner of bias or discrimination attributable to Respondent.

8. Petitioner argued that she was not properly notified by the permit applicant with respect to the Modification of the Mining Permit. Petitioner has put forward no evidence to show that she did not receive notification of the pending Mining Permit Modification or that Respondent erred in its notification requirements pursuant to N.C. Gen. Stat. § 74-50(b1). Petitioner did submit a post-hearing email from Tracy Parris, Richmond County Planning and Zoning Director, concerning notification; however, this was not introduced at trial. The purpose of such notification is, in part, to provide adjacent landowners the opportunity to address their concerns with Respondent prior to issuance of the Modification.

9. Petitioner argued that she did not receive appropriate notification regarding the Notice of Issuance of the Mining Permit Modification. While Petitioner’s notice was inadvertently delayed, she did ultimately receive it and that notice has served its intended purpose: Petitioner has availed herself of the opportunity to appeal the issuance of the Mining Permit Modification, as evidenced by the filing of the Petition. Petitioner has put forward no evidence to show that Respondent erred in issuing the Notice of Issuance of the Mining Permit Modification.

10. Petitioner argued that the letter of notification she received was dated “January 10, 2019” but envelope meter marked January 10, 2020. This is correct and, upon Respondent’s investigation, was determined to be a typographical error made by Barnhill. (Resp.’s Exhibit H).

11. Based on this information, Respondent did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by law; or otherwise err in its decision to issue a Modification to the Mining Permit to Barnhill.

12. There are no issues of material fact preventing summary judgment.

FINAL DECISION AND ORDER ON RESPONDENT’S MOTION TO DISMISS

BASED ON the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby GRANTS Respondent’s Motion to Dismiss Petitioner’s claims related to the Conditional Use Permit issued by the Richmond County Zoning Board and claims related to impacts to and diminution of value of her property.

FINAL DECISION AND ORDER ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

BASED ON the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby GRANTS Respondent’s Motion for Summary Judgement on Petitioner’s claims brought pursuant to N.C. Gen. Stat. § 150B-23.

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 to ensure the timely filing of the record.

SO ORDERED this the 19th day of October, 2020.



J Randall May
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:

Kim McRae McCall
182 Waymond Chapel Road
Hamlet NC 28345
Petitioner

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N.C. Department of Justice
cmclain@ncdoj.gov
Attorney for Respondent

This the 19th day of October, 2020.



Betty Owens
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