

STATE OF NORTH CAROLINA

File No.

09-CVS-576

JACKSON County

In The General Court Of Justice

District Superior Court Division

Name of Plaintiff
DUKE ENERGY CAROLINAS, LLC

Address

City, State, Zip

VERSUS

CIVIL SUMMONS

ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3, 4

Name of Defendant(s)
JACKSON COUNTY, a political subdivision of the State of North Carolina, LINDA CABLE, in her official capacity as Planning Director of Jackson County; and JOHN WITTEKIND, in his official capacity as Building Inspections Director of Jackson County

Date Original Summons Issued

Date(s) Subsequent Summon(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address of Defendant 1
Jackson County
c/o Brian McMahan, Chairman of Jackson County Board of Commissioners
401 Grindstaff Cove Road
Sylva, NC 28779
VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Name And Address of Defendant 2
Linda Cable
Planning Director of Jackson County
401 Grindstaff Cove Road, Suite A-258
Sylva, NC 28779
VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

- 1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address of Plaintiff's Attorney (If None, Address of Plaintiff)
Kiran H. Mehta / Molly L. McIntosh
K&L Gates LLP
214 North Tryon Street, 47th Floor
Charlotte, NC 28202

Date Issued 08-11-09 Time 2:55 AM PM

Signature [Handwritten Signature]
 Deputy CSC Assistant CSC Clerk of Superior Court

ENDORSEMENT
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement Time AM PM

Signature
 Deputy CSC Assistant CSC Clerk of Superior Court

NOTE TO PARTIES: Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.

3. Defendant Jackson County is a municipal corporation and a body politic created under and by virtue of G.S. § 153A-1, *et. seq.*, located in the State of North Carolina.

4. Defendant Linda Cable (“Ms. Cable” or “Planning Director”) is a citizen and resident of Bryson City, Swain County, North Carolina and the Planning Director of Jackson County. Ms. Cable is a party to this action solely in her official capacity as Planning Director of Jackson County.

5. Defendant John Wittekind (“Mr. Wittekind” or “Building Inspections Director”) is a citizen and resident of Cullowhee, Jackson County, North Carolina and the Building Inspections Director of Jackson County. Mr. Wittekind is a party to this action solely in his official capacity as Building Inspections Director of Jackson County.

JURISDICTION AND VENUE

6. Jurisdiction over this cause is conferred upon this Court under and by virtue of, *inter alia*, G.S. § 7A-245(2) and (4).

7. Venue is properly laid in this Court under and by virtue of, *inter alia*, G.S. § 1-77(2).

8. By virtue of the plaintiff’s interest in the removal of Dillsboro Dam and Powerhouse, and the delay of issuance of the Land Development Compliance Permit and the Miscellaneous Permit which threatens to postpone removal of the Dillsboro Dam and Powerhouse, the plaintiff is an aggrieved party and has standing to bring this action.

9. The plaintiff has suffered and will continue to suffer irreparable harm primarily due to the arbitrary, capricious and unreasonable actions of Jackson County, acting through the Planning Director and Building Inspections Director, as hereinafter described.

BACKGROUND FACTS

10. The Dillsboro Hydroelectric Project (“Dillsboro Project”) is located on the Tuckasegee River in Jackson County, North Carolina, and includes, among other things, a 12-foot-high, 310-foot-long concrete masonry dam (“Dillsboro Dam” or “Dam”) and an associated electric power generating facility (the “Powerhouse”).

11. In 1980, Nantahala Power and Light Company (“NP&L”) received a 25-year license to operate the Dillsboro Project. Duke Energy Carolinas succeeded to the license when it acquired NP&L in 1988. In 2003, Duke Energy Carolinas filed an application with the Federal Energy Regulatory Commission (“FERC”) for a subsequent license, and in the transmittal letter sent to FERC in connection with this application stated that it might file a surrender application for the Dillsboro Project at a later date.

12. On May 28, 2004, Duke Energy Carolinas filed an application with the FERC to surrender the Dillsboro Project license. Pending completion of the surrender process, the Dillsboro Project received from the FERC a license authorizing continued operation of the Project by Duke Energy Carolinas.

13. Jackson County intervened in the Dillsboro Project surrender proceedings, opposing surrender and removal of the Dillsboro Project, and arguing that the Dillsboro Project should be relicensed and/or transferred to Jackson County or its designee.

14. Over Jackson County's opposition, the FERC issued on July 19, 2007 an order approving surrender of the Dillsboro Project ("Surrender Order"). The Surrender Order requires Duke Energy Carolinas to remove the Dam and much of the accumulated sediment and to complete removal of the Dam and Powerhouse within three years of the Surrender Order's issuance date, or on or before July 19, 2010.

15. Thereafter, Jackson County sought from the FERC a stay of the Surrender Order, a request that the FERC rejected in its Order Denying Motion to Stay issued September 18, 2008 ("Stay Denial Order"). As set forth in the Stay Denial Order, the FERC denied the stay request "because the public interest would best be served by allowing Duke Energy Carolinas to move forward with surrender and dam removal activities without delay."

16. Jackson County has filed a petition for judicial review of the Surrender Order and the Rehearing Order, which is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit (Docket No. 08-1224). Jackson County has not, however, sought from the Court of Appeals a stay of the Surrender Order.

17. Before demolition of the Dam can begin, Duke Energy Carolinas is required to fulfill several conditions to effectuate the surrender, including removing approximately 70,000 cubic yards of sediment from the reservoir. The requirement to remove sediment prior to removing the Dam was imposed in part at the request of Jackson County.

18. Because federal law (and specifically the Federal Power Act ("FPA"), 16 U.S.C. §791, *et seq.*, preempts the field, local permits are not required in connection with a FERC licensee's compliance with FERC orders. Nevertheless, the FERC has indicated that its licensees should attempt to obtain local permits where otherwise required to the extent practicable:

It is well-established that the FPA preempts all state and local law concerning hydroelectric licensing apart from those adjudicating proprietary water rights. ... We prefer for our licensees to be good citizens of the communities in which projects are located, and thus to comply with state and local requirements, where possible. However, to the extent that state or local regulations make compliance with our orders impossible or unduly difficult, we will conclude that such regulations are pre-empted.

PacifiCorp, 115 FERC ¶ 61,194, at P 8-9 (2006).

19. In connection with the sediment removal operation described above, Duke Energy Carolinas attempted to be a "good citizen" of the community and applied in 2008 for permits deemed necessary by Jackson County for this project.

20. Jackson County refused to act on Duke Energy Carolinas' permit requests, citing the on-going litigation concerning removal of the Dillsboro Dam, and on January 5, 2009, Duke

Energy Carolinas filed a complaint against Jackson County and Ms. Cable, in her official capacity as Planning Director of Jackson County, for a writ of mandamus compelling the County to issue the permits, and asserting various state and federal constitutional claims. That suit has been assigned Docket Number 09-CvS-000009.

21. Duke Energy Carolinas moved for summary judgment on its mandamus and declaratory judgment claims. Jackson County and Ms. Cable moved to dismiss all claims. These motions were heard by the Honorable Laura J. Bridges on March 16, 2009, who on March 23, 2009 signed an Order (subsequently entered on April 1, 2009) in favor of Duke Energy Carolinas and against Jackson County and Ms. Cable as follows:

- (a) Plaintiff's request for a Writ of Mandamus is GRANTED, and Defendants are hereby ordered to immediately process and issue the Land Development Compliance Permit that Plaintiff applied for on or about August 1, 2008, and the Floodplain Development Permit that Plaintiff applied for on or about November 25, 2008, for sediment removal operations at Dillsboro Reservoir that Plaintiff is required to complete as a result of the FERC's Orders referenced in Plaintiff's Motion for Partial Summary Judgment; and
- (b) Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Court hereby declares that, due to the preemptive nature of the Federal Power Act ("FPA"), Defendants are without authority to deny Plaintiff the Land Development Compliance Permit or Floodplain Development Permit referenced above, or to require Plaintiff to seek and obtain other local permits affecting the Dillsboro Reservoir sediment removal operations, inasmuch as the FERC's Orders with respect to sediment removal were issued pursuant to the FPA.

A true and accurate copy of Judge Bridges' Order is attached hereto as Exhibit A and incorporated herein by reference. Duke Energy Carolinas' remaining claims in this lawsuit are currently pending before the Jackson County Superior Court.

22. On May 5, 2009, Ms. Cable issued the requested permits, which, as indicated above, were applied for in connection with the sediment removal project which is a precursor to removal of the Dam. The sediment removal project has now commenced.

23. Thereafter, Duke Energy Carolinas, through its employee Hugh Barwick, engaged in numerous communications with Ms. Cable and Mr. Wittekind concerning Jackson County permits which might be needed for the demolition of the Dam and Powerhouse. Mr. Wittekind initially advised Mr. Barwick that a Building Permit would be necessary for this purpose, but that this permit would not be issued in light of the on-going litigation concerning the removal of the Dillsboro Dam. Mr. Wittekind ultimately advised that a Miscellaneous Permit from the Jackson County Building Inspections Department would be needed rather than the previously-described Building Permit.

24. Although Duke Energy Carolinas did not believe that any Jackson County permit was necessary for the demolition and removal of the Dam and Powerhouse, on or about July 23, 2009 Mr. Barwick sent to Mr. Wittekind an application for a Miscellaneous Permit, along with the

required fee. A true and accurate copy of Mr. Barwick's cover letter and the permit application is attached hereto as Exhibit B and incorporated herein by reference.

25. In addition, on or about July 23, 2009 Mr. Barwick sent Ms. Cable an application for a Land Development Compliance Permit. A true and accurate copy of Mr. Barwick's cover letter and the permit application is attached hereto as Exhibit C and incorporated herein by reference.

26. Ms. Cable has previously indicated the Land Development Compliance Permit is a clearinghouse process designed to help applicants determine whether other Jackson County permits are needed. Duke Energy Carolinas applied for this permit in order to invoke this clearinghouse process and to ensure that no permits other than the previously described Miscellaneous Permit would be needed for Dam and Powerhouse removal.

27. In a letter dated August 5, 2009, Ms. Cable informed Duke Energy Carolinas that the requested Land Development Compliance Permit for removal of the Powerhouse conflicts with Jackson County's Dillsboro Heritage Park Plan. She wrote that based on this alleged conflict, she will not process plaintiff's Land Development Application for removal of the Powerhouse, and that the application is therefore denied. Ms. Cable then said that without the Land Development Compliance Permit, Duke Energy Carolinas' application for a Building Permit¹ will not be processed. Ms. Cable's letter does not mention the demolition and removal of the Dam itself, and it is unclear whether Jackson County's denial of the Land Development Application and refusal to process the Miscellaneous Permit also apply to that aspect of the work Duke Energy Carolinas is required to undertake so as to comply with the FERC's Surrender Order. A true and accurate copy of this letter is attached hereto as Exhibit D.

28. In her deposition in *Duke Energy Carolinas, LLC v. Jackson County, et al.* (09-CvS-000009), Ms. Cable testified as follows:

Q: ... [I]n this land development compliance process, there's not really an opportunity to reject an applicant; is there? Either they are exempt or there's...no other permits they need, which their process can go forward or you steer them towards the permits they need?

A: That's correct.

Q: You don't reject an applicant...in the land development compliance process; is that right?

A. No we guide them – ... to what they need; other permits.

Accordingly, Jackson County's purported rejection of Duke Energy Carolinas' application for Land Development Compliance Permit does not even comply with the County's own process and procedures.

¹ While Ms. Cable refers to a "building permit" in her letter, Duke Energy Carolinas actually applied for a Miscellaneous Permit for demolition and removal of the Dillsboro Dam and Powerhouse as instructed by Mr. Wittekind.

29. Because Jackson County's Land Development Compliance Permit process and procedures do not allow for a Land Development Application to be denied, it is erroneous to rely upon denial of a Land Development Application as grounds for refusing to process Duke Energy Carolinas' application for a Miscellaneous Permit.

30. Jackson County's invocation of the Dillsboro Heritage Park Plan as an excuse to reject and/or refuse to act upon Duke Energy Carolinas' permit applications is completely without merit. On May 18, 2009, Dena Shelley of Equinox Environmental Consultation and Design, Inc. presented the Jackson County Commissioners with a plan for Dillsboro Heritage Park to be located on certain property owned by Duke Energy Carolinas and to include the Dillsboro Dam and Powerhouse. Commissioner Tom Massie raised questions regarding the inclusion of the Dam. Chairman Brian McMahan and Ms. Shelley confirmed that the Dillsboro Heritage Park could go forward with or without including the Dillsboro Dam. The Dillsboro Heritage Park Plan provides that the Powerhouse may need to be replaced as it was affected by past flood events.

31. Duke Energy Carolinas meets all the requirements for the issuance by the Planning Director of a Land Development Compliance Permit, and is entitled to said Permit.

32. Duke Energy Carolinas meets all the requirements for the issuance by the Building Inspections Department of a Miscellaneous Permit for, *inter alia*, the demolition of the Dillsboro Dam and Powerhouse, and is entitled to said Permit.

33. By refusing to issue the Land Development Compliance Permit and Miscellaneous Permit applied for by Duke Energy, defendants are attempting to obstruct and hinder Duke Energy Carolinas' removal of the Dillsboro Dam and Powerhouse, which is required by the Surrender Order. Jackson County's actions are utterly without legal foundation and taken for an improper purpose in violation of plaintiff's constitutional rights, and have and will continue to cause plaintiff damage.

FIRST CLAIM FOR RELIEF
(Mandamus)

34. The allegations of paragraphs 1-33 are realleged and incorporated herein by reference.

35. The defendants' refusal to issue the Land Development Compliance Permit and Miscellaneous Permit to which Duke Energy Carolinas is entitled is an illegal attempt by the defendants to stall Duke Energy Carolinas' removal of the Dillsboro Dam and Powerhouse, which is permitted and required by the FERC Surrender Order, and this conduct on the part of the defendants violates Duke Energy Carolinas' right and obligation to remove the Dam and Powerhouse in accordance with the Surrender Order, as well as its constitutional rights to substantive due process and equal protection under the laws.

36. The defendants' failure to issue the Land Development Compliance Permit and Miscellaneous Permit when Duke Energy Carolinas has satisfied all of the requirements for issuance of a Land Development Compliance Permit and Miscellaneous Permit is arbitrary and

capricious in that the defendants have failed to comply with the requirements of Jackson County ordinances and the law of this State.

37. Duke Energy Carolinas is entitled to an Order directing Jackson County, through the Planning Director and Building Inspections Director, to issue a Land Development Compliance Permit and Miscellaneous Permit.

SECOND CLAIM FOR RELIEF
(Declaratory Relief)

38. The allegations of paragraphs 1-37 are realleged and incorporated herein by reference.

39. Duke Energy Carolinas is entitled to a judgment declaring that due to the preemptive nature of the FPA, defendants are without authority (a) to deny plaintiff the Land Development Compliance Permit or Miscellaneous Permit referenced above, (b) to require plaintiff to seek and obtain other local permits affecting the Dillsboro Dam and Powerhouse removal operations, or (c) to interfere in any other way with Dam and Powerhouse removal or any other rights and obligations of Duke Energy Carolinas with respect to the Surrender Order or other FERC orders.

THIRD CLAIM FOR RELIEF
(United States Constitution – Equal Protection Clause)

40. The allegations of paragraphs 1-39 are realleged and incorporated herein by reference.

41. The defendants' failure to issue Duke Energy Carolinas the Land Development Compliance Permit and Miscellaneous Permit when Duke Energy Carolinas has satisfied all of the requirements for a Land Development Compliance Permit and Miscellaneous Permit violates the Equal Protection Clause of the United States Constitution, enforceable herein through 42 U.S.C. §1983, in that defendants' failure to issue said permits illegally treats Duke Energy Carolinas differently than other applicants for these permits similarly situated.

42. Duke Energy Carolinas is entitled to a judgment declaring that the defendants' failure to issue the Land Development Compliance Permit and Miscellaneous Permit as described herein is unconstitutional, unlawful and unenforceable under the United States Constitution.

43. As a result of defendants' violation of the Equal Protection Clause of the United States Constitution, enforceable herein through 42 U.S.C. §1983, Duke Energy Carolinas is entitled to a judgment against defendants in an amount greater than \$10,000 to be proven at trial, in addition to all interest, costs, attorneys' fees, and other amounts allowed by law.

FOURTH CLAIM FOR RELIEF
(United States Constitution – Substantive Due Process)

44. The allegations of paragraphs 1-43 are realleged and incorporated herein by reference.

45. The defendants' failure to issue Duke Energy Carolinas the Land Development Compliance Permit and Miscellaneous Permit when Duke Energy Carolinas has satisfied all of the requirements for a Land Development Compliance Permit and Miscellaneous Permit violates the Due Process Clause of the United States Constitution, made applicable to the various States by the Fourteenth Amendment to the United States Constitution, and enforceable herein through 42 U.S.C. §1983, in that defendants' failure to issue said permits is arbitrary, capricious and irrational.

46. Duke Energy Carolinas is entitled to a judgment declaring that the defendants' failure to issue the Land Development Compliance Permit and Miscellaneous Permit as described herein is unconstitutional, unlawful and unenforceable under the United States Constitution.

47. As a result of defendants' violation of the Due Process Clause of the United States Constitution, made applicable to the various States by the Fourteenth Amendment to the United States Constitution, and enforceable herein through 42 U.S.C. §1983, Duke Energy Carolinas is entitled to a judgment against defendants in an amount greater than \$10,000 to be proven at trial, in addition to all interest, costs, attorneys' fees, and other amounts allowed by law.

FIFTH CLAIM FOR RELIEF
(North Carolina Constitution – Equal Protection Clause)

48. The allegations of paragraphs 1-47 are realleged and incorporated herein by reference.

49. The defendants' failure to issue Duke Energy Carolinas the Land Development Compliance Permit and Miscellaneous Permit when Duke Energy Carolinas has satisfied all of the requirements for issuance of a Land Development Compliance Permit and Miscellaneous Permit violates the Equal Protection Clause of the North Carolina Constitution (Article I, section 19), in that defendants' failure to issue said permits illegally treats Duke Energy Carolinas differently than other applicants for these permits similarly situated.

50. Duke Energy Carolinas is entitled to a judgment declaring that the defendants' failure to issue the Land Development Compliance Permit and Miscellaneous Permit as described herein is unconstitutional, unlawful and unenforceable under the North Carolina Constitution.

51. As a result of defendants' violation of the Equal Protection Clause of the North Carolina Constitution, Duke Energy Carolinas is entitled to a judgment against defendants in an amount greater than \$10,000 to be proven at trial, in addition to all interest, costs, attorneys' fees, and other amounts allowed by law.

SIXTH CLAIM FOR RELIEF
(North Carolina Constitution – Law of the Land Clause)

52. The allegations of paragraphs 1-51 are realleged and incorporated herein by reference.

53. Failure to issue Duke Energy Carolinas the Land Development Compliance Permit and Miscellaneous Permit when Duke Energy Carolinas has satisfied all of the requirements for

issuance of a Land Development Compliance Permit and Miscellaneous Permit violates the Law of the Land Clause of the North Carolina Constitution (Article I, section 19), in that the failure to issue said permits is arbitrary, capricious and irrational.

54. Duke Energy Carolinas is entitled to a judgment declaring that the failure to issue the Land Development Compliance Permit and Miscellaneous Permit as described herein is unconstitutional, unlawful and unenforceable under the North Carolina Constitution.

55. As a result of defendants' violation of the Law of the Land Clause of the North Carolina Constitution, Duke Energy Carolinas is entitled to a judgment against defendants in an amount greater than \$10,000 to be proven at trial, in addition to all interest, costs, attorneys' fees, and other amounts allowed by law.

WHEREFORE, the plaintiff respectfully prays the Court as follows:

1. That this Court issue a Writ of Mandamus compelling the County, through its Planning Director and Building Inspections Director, to issue the Land Development Compliance Permit and Miscellaneous Permit referenced above;

2. That the Court declare that, due to the preemptive nature of the FPA, defendants are without authority to deny plaintiff the Land Development Compliance Permit or Miscellaneous Permit referenced above, to require plaintiff to seek and obtain other local permits affecting the Dillsboro Dam and Powerhouse removal operations, or to interfere in any other way with Dam and Powerhouse removal or any other rights and obligations of Duke Energy Carolinas with respect to the Surrender Order or other FERC orders;

3. That the Court declare the failure to issue the Land Development Compliance Permit and Miscellaneous Permit as described herein unconstitutional, unlawful and otherwise unenforceable;

4. That Duke Energy Carolinas have and recover of defendants damages in an amount greater than \$10,000 to be proven at trial;

5. That Duke Energy Carolinas have and recover prejudgment, post-judgment interest, and attorneys' fees as may be allowed by law;

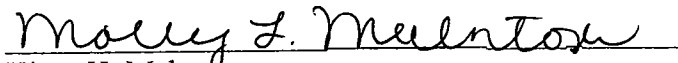
6. That this Court tax all costs of this action against defendant Jackson County;

7. That this Court expedite a hearing in disposition of this matter;

8. That a jury trial be had on all issues which may be tried by jury; and

9. That this Court order such other and further relief as it deems just and proper.

This the 10th day of August, 2009.



Kiran H. Mehta

N.C. State Bar No. 11011

Roy H. Michaux, Jr.

N.C. State Bar No. 2990

Molly L. McIntosh

N.C. State Bar No. 36931

K&L Gates, LLP

Hearst Tower, 47th Floor

214 North Tryon Street

Charlotte, NC 28202

Telephone: (704) 331-7437

or (704) 331-7462 or (704) 331-7547

Facsimile: (704) 353-3137

or (704) 353-3162 or (704) 353-3247

Attorneys for Plaintiff Duke Energy Carolinas, LLC

OF COUNSEL:

K&L Gates, LLP

Hearst Tower, 47th Floor

214 North Tryon Street

Charlotte, North Carolina 28202

Telephone: (704) 331-7400

Facsimile: (704) 331-7598

FROM K&L GATES

(MON) 3.23'09 11:30 T. 11:32/NO. 4864123295 P 3

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF JACKSON

09-CVS-09

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

v.

JACKSON COUNTY, a political
subdivision of the State of North Carolina,
and LINDA CABLE, in her official
capacity as Planning Director of Jackson
County.

Defendants.

ORDER

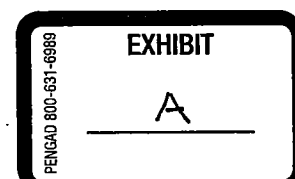
FILED

FILED

THIS MATTER came on for hearing at the March 16, 2009 session of Jackson County Superior Court before The Honorable Laura J. Bridges, Superior Court Judge Presiding, on Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion to Dismiss, both filed March 6, 2009. Plaintiff and Defendants each appeared through counsel. Having reviewed and considered the pleadings, the affidavits and other documents which have been filed with or presented to the Court; the briefs and legal authorities submitted by counsel for all parties; and the oral arguments of counsel for all parties, the Court finds that it has subject matter jurisdiction of the claims asserted in Plaintiffs' Complaint, there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law to the relief requested in its Motion for Partial Summary Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

- i. That Defendants' Motion to Dismiss against Plaintiff is DENIED;



FROM K&L GATES

(MON) 3. 23' 09 11:30 AM T. 11:32/NO. 4864123295 P 4

2. That Plaintiff's Motion for Partial Summary Judgment is GRANTED; and
3. That Judgment is hereby entered in favor of Plaintiff and against Defendants as follows:

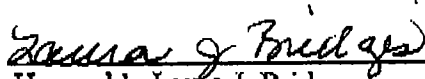
- a. Plaintiff's request for a Writ of Mandamus is GRANTED, and Defendants are hereby ordered to immediately process and issue the Land Development Compliance Permit that Plaintiff applied for on or about August 1, 2008 (attached as Exhibit 4 to the Deposition of Linda Cable, which is in the record of this case), and the Floodplain Development Permit that Plaintiff applied for on or about November 25, 2008 (attached as Exhibit 6 to the Deposition of Linda Cable), for sediment removal operations at Dillsboro Reservoir that Plaintiff is required to complete as a result of the Federal Energy Regulatory Commission ("FERC") Orders referenced in Plaintiff's Motion for Partial Summary Judgment; and

- b. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Court hereby declares that, due to the preemptive nature of the Federal Power Act ("FPA"), Defendants are without authority to deny Plaintiff the Land Development Compliance Permit or Floodplain Development Permit referenced above, or to require Plaintiff to seek and obtain other local permits affecting the Dillsboro Reservoir sediment removal operations, inasmuch as the FERC's Orders with respect to sediment removal were issued pursuant to the FPA.

FROM K&L GATES

(MON) 3. 23' 09 11:32 AM T. 11:32/NO. 4864123295 P 5

This the 23 day of March, 2009.



Honorable Laura J. Bridges
Superior Court Judge Presiding



HYDRO STRATEGY & LICENSING

Duke Energy Carolinas, LLC
EC12Y / 526 South Church Street
Charlotte, NC 28202-1802

Mailing Address:
EC12Y / P.O. Box 1006
Charlotte, NC 28201-1006

FILED
2009 AUG 11 PM 2:51
JACKSON CO. N.C.
BY _____

July 22, 2009

Via Email/Original via Certified Mail, Return Receipt Requested

John Wittekind
Director, Jackson County Building Inspections
401 Grindstaff Cove Road, Suite 146
Sylva, North Carolina 28779
Fax: (828) 586-7563

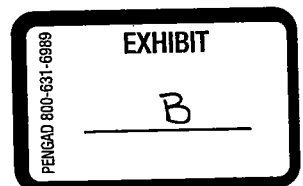
Re: Permit requirements in connection with demolition of Dillsboro Dam and Powerhouse

Dear Mr. Wittekind:

This will confirm our conversation this past Monday. After reviewing this letter, please let me know immediately and in writing if I have misstated your part of our conversation in any way.

First, you indicated that Duke Energy Carolinas will need to obtain a Jackson County permit in connection with the demolition of the Dillsboro Dam and Powerhouse. As to this issue, Duke Energy Carolinas disagrees, since the state building code exempts utility structures. The Dam itself is clearly not a building and is a utility structure. Duke Energy Carolinas has twice inquired of State building officials to determine whether the Powerhouse is a "building" under the code, and both times we have received the response that it is not, as it is not designed for human occupancy on a daily or routine basis. Nevertheless, while we disagree with your conclusion that a Jackson County permit is required, Duke Energy Carolinas is submitting an application for a permit out of deference to the County and out of an abundance of caution. I have made this application on Jackson County's "miscellaneous" permit form as you directed, as the Building Permit form does not appear to have any applicability to our particular situation.

Second, and more serious as far as Duke Energy Carolinas is concerned, you also indicated that the County would not process any applications for this work so long as the litigation surrounding the removal of the Dillsboro Project is ongoing. This is a road we have been down before. You have a legal duty to issue permits for which proper application is made, and simply cannot lawfully hide behind the lawsuits instituted by the County as a basis for refusing to act on our application. Further, because Duke Energy Carolinas is under order from the Federal Energy Regulatory Commission, local requirements that are inconsistent with this federal order are preempted. The Commission prefers that licensees cooperate with local permitting authorities to



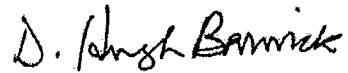
John Wittekind

Page 2

the extent practicable, but it is neither practicable nor possible to cooperate when the permitting authority states at the outset that it will not process applications submitted to it.

I have also enclosed a check for what I believe to be the appropriate filing fee for this permit application. If you are not able to process the application please return the check to me.

Sincerely,

A handwritten signature in black ink that reads "D. Hugh Barwick". The signature is written in a cursive style with a large initial "D".

D. Hugh Barwick
Demolition Project Manager

cc: Linda Cable
Ken Westmoreland



Jackson County Building Code Enforcement
401 Grindstaff Cove Road Suite 145
Sylva, North Carolina 28779
Phone (828) 586-7560 Fax (828) 586-7563

Application for Miscellaneous Permit

Permits will not be issued without pin number.
It is the responsibility of the Contractor to provide all the information listed below.

DATE: July 20, 2009

CUSTOMER NAME: Duke Energy Carolinas, LLC

ADDRESS: 526 S. Church Street, P.O. Box 1006, Charlotte, NC 28201-1006

TELEPHONE: 704/382-0805

PIN: 7631-35-5169

TYPE OF SERVICE TO BE PERFORMED: Demolition of Dillsboro Dam and Powerhouse

POWER PROVIDER: Duke Energy Carolinas WORK ORDER # NA

CONTRACTOR: (Not selected at this time) LIC # NA PH# NA

ELECTRICAL CONTRACTOR: NA LIC # NA PH# NA

APPLICANT'S SIGNATURE: D. Hugh Barwick

DIRECTIONS TO SITE: From 441/23 South in Dillsboro, turn on North River Road and proceed about 0.25 miles. Dillsboro Dam and Powerhouse are on the right side of the road.



FILED

2009 JUL 21 PM 2:51

JACKSON CO. N.C.

HYDRO STRATEGY & LICENSING

Duke Energy Carolinas, LLC
EC12Y / 526 South Church Street
Charlotte, NC 28202-1802

Mailing Address:
EC12Y / P.O. Box 1006
Charlotte, NC 28201-1006

July 22, 2009

Via Email/Original via Certified Mail, Return Receipt Requested

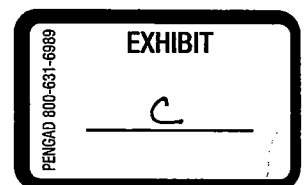
Linda Cable
Planning Director
Jackson County
401 Grindstaff Cove Road, Suite A-258
Sylva, NC 28779

Re: Permit requirements in connection with demolition of Dillsboro Dam and Powerhouse

Dear Ms. Cable:

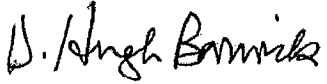
I am enclosing a copy of my letter to John Wittekind concerning a permit for demolition of the Dillsboro Dam and Powerhouse. I am also writing you, and enclosing a Land Development Application so as to invoke the clearinghouse process you have previously mentioned and ensure that there are no other Jackson County permit requirements. If there are, please let me know immediately and in writing, so that Duke Energy Carolinas can proceed to evaluate whether to apply for any such permit(s). Please note further that Duke Energy Carolinas believes as set forth in my letter to Mr. Wittekind that it in fact does not need to apply for a specific demolition permit, but is submitting its application to Mr. Wittekind out of deference to the County and out of an abundance of caution. We are similarly submitting the Land Development Application to you in the same spirit.

You have previously indicated that Land Development Applications are typically dealt with and issued soon after the application is filed, generally in less than one week. I look forward to hearing from you in connection with the Application submitted within that time frame. I understand from our previous correspondence that no fee is due Jackson County in order to process this application, but if I am wrong about that let me know and I will gladly submit the appropriate payment.



Linda Cable
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Sincerely,

A handwritten signature in black ink that reads "D. Hugh Barwick". The signature is written in a cursive style with a large initial "D" and a prominent "H".

D. Hugh Barwick
Demolition Project Manager

cc: John Wittekind
Ken Westmoreland

07/16/07



JACKSON COUNTY PLANNING OFFICE
401 Grindstaff Cove Road, Suite A-258
Sylva, N.C. 28779
Phone: 828-631-2261
Fax: 828-631-2262

Application Number

Building Permit Number

Environmental Health Permit Number

LAND DEVELOPMENT APPLICATION

Please PRINT All Information Clearly

SITE INFORMATION

Parcel ID Number: 7631-35-5169		Application Date: July 20, 2009	
Site's Physical Address: 150 N. River Road, Dillsboro, NC 28725			
Specific Directions to Site: From Hwy. 441/23 South, turn left on North River Road and proceed about 0.25 miles. Dillsboro Dam and			
Powerhouse will be on your right.			
Subdivision Name:	Lot Number:	Township: Dillsboro Rural	Municipality: Dillsboro
Fire District: Sylva	High Quality Water: No	Stream Classification: C-TR	
Is This Site Within: <input type="checkbox"/> Watershed <input checked="" type="checkbox"/> Floodplain <input type="checkbox"/> Cashiers Dev. District <input type="checkbox"/> Protected Ridge			

OWNER/APPLICANT INFORMATION

Property's Owner's Name (as listed on tax parcel): Nantahala Power & Light Co. (Duke Energy)		Owner's Phone Number: 704/382-0805	
Property Owner's Mailing Address: 526 S. Church Street, P.O. Box 1006		City: Charlotte	State: NC
Local Contact's / Agent's Name: Hugh Barwick		Local Contact's/Agent's Phone Number: 704/382-0805	
Local Contact's / Agent's Mailing Address: 526 S. Church Street, P.O. Box 1006		City: Charlotte	State: NC
Contractor's Name: (Not selected at this time)		Contractor's Phone:	
Architect/Engineer's Name: NA		Architect/Eng. Phone:	

PROJECT DATA

Improvement Description: Demolition of Dillsboro Dam and Powerhouse		
Cost of Improvement: NA	Building Size: About 1,800 sq. ft.	Parcel/Lot Size: About 3 a
Acres of Disturbed Area: About 2 a	Power Provider: Duke Energy	
Utilities: <input type="checkbox"/> TWSA <input type="checkbox"/> Well <input type="checkbox"/> Septic <input type="checkbox"/> Other (Please specify)		
<input type="checkbox"/> SINGLE FAMILY RESIDENCE <input type="checkbox"/> MULTI FAMILY DEVELOPMENT <input type="checkbox"/> MANUFACTURED HOME <input type="checkbox"/> ACCESSORY STRUCTURE <input type="checkbox"/> RETAIL/OFFICE BUILDING <input type="checkbox"/> INDUSTRIAL DEVELOPMENT <input type="checkbox"/> HEAVY COMMERCIAL <input type="checkbox"/> SUBDIVISION DEVELOPMENT <input type="checkbox"/> JUNK YARD <input type="checkbox"/> OFF PREMISE SIGN <input checked="" type="checkbox"/> DEMOLITION	<input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> NEW <input checked="" type="checkbox"/> EXISTING	<input type="checkbox"/> ADDITION <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> MOBILE HOME PARKS <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> CASHIER'S COMMERCIAL DISTRICT <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> INTERIOR REMODELING OR REPAIRS ONLY (COMPLIANCE PERMIT NOT REQUIRED) MISCELLANEOUS: <input type="checkbox"/> ELECTRICAL <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> MECHANICAL <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> PLUMBING <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> CAMPGROUND <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING <input type="checkbox"/> CELL TOWER <input type="checkbox"/> NEW <input type="checkbox"/> EXISTING

CERTIFICATION

I hereby certify that the information provided herein, to the best of my knowledge is correct. Any violation of an approved land use ordinance or regulation may be grounds for revocation of any or all county permits. I acknowledge that I have been informed of land use regulations subject to my property or development.

D. Hugh Barwick
Owner/Agent's Signature

July 20, 2009
Date

I hereby certify that no further action is required by the Planning Office:	
Planning Director or Designee	Date

Approved to proceed with permitting process:	
Planning Director or Designee	Date
<i>This permit expires 12 months from the date of approval!</i>	

JACKSON COUNTY PLANNING OFFICE

401 Grindstaff Cove Road
Suite A-258
Sylva, NC 28779
planning@jacksonnc.org



Linda Cable, Director
lindacable@jacksonnc.org
Phone (828) 631-2261
FAX (828) 631-2262

August 5, 2009

Mr. Hugh Barwick
Duke Energy Carolinas-Hydor Licensing EC12Y
526 S. Church Street/PO Box 1006
Charlotte, NC 28201-1006

Re: Land Development Compliance Permit

Dear Mr. Barwick,

The Land Development permit you requested for demolition of the Dillsboro Power House conflicts with Jackson County's Dillsboro Dam Heritage Park Plan. Based on this information I am not processing your permit application, therefore your Land Development permit application for a demolition of the power house is denied.

Without the Land Development Application a building permit approval a building permit application for demolition will not be processed.

In light of the threat of litigation and ongoing litigation any further inquiries with regard to this matter should be directed to our councils. Therefore, I've copied this letter to Mr. Paul Holt, County Attorney and Mr. Paul Nolan, Esq., Consulting Attorney.

Sincerely,


Linda Cable
Planning Director

CC: Ken Westmoreland, County Manager
John Wittekind, Director of Building Inspections
Paul Holt, County Attorney
Paul Nolan, Esq. Attorney
Molly McIntosh, K&L Gates, LLP

