

No. 67PA07-2

TWENTY-NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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SANDY MUSH PROPERTIES,  
INC. AND FLORIDA ROCK  
INDUSTRIES, INC.

v

RUTHERFORD COUNTY, by and  
through THE RUTHERFORD  
COUNTY BOARD OF  
COMMISSIONERS

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) From Rutherford  
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PETITION FOR DISCRETIONARY REVIEW  
UNDER G.S. 7A-31

(Filed 22 January 2008)  
(Allowed 11 June 2008)

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**FILED**  
JAN 22 2008  
SUPREME COURT OF  
NORTH CAROLINA

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Sandy Mush Properties, Inc. ("Petitioner"), pursuant to N.C. Rule of Appellate Procedure 15 and N.C. Gen. Stat. § 7A-31, respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the decisions of the Court of Appeals in Case No. COA06-068, 181 N.C. App. 224, 638 S.E.2d 557 (January 2, 2007) (App. p. 19), and in Case No. COA06-068-2 filed on

December 18, 2007 and mandated on December 28, 2007, of copy of which is attached (App. p. 1), or in the alternative, to review the Court of Appeals December 18, 2007 decision. This Petition is being filed on the basis that the subject matter of the appeal in this case has significant public interest, involves legal principles of major significance to the jurisprudence of the State, and the decision of the Court of Appeals is contrary to prevailing law. In support of this Petition, Petitioners show the following:

**FACTS AND PROCEDURAL SUMMARY**

This Petition is another step in an ongoing dispute with Rutherford County regarding the Appellants' right to operate a rock quarry on a 180-acre parcel of property owned by Sandy Mush (the "Tract"), and the facts have been outlined in detail in a Petition for Discretionary Review filed with the Court on February 6, 2007, which is incorporated by reference as if fully set forth herein (App. p. 4).

A very cursory summary of the facts and the procedural history of this matter is as follows:

- (i) In 2000, Sandy Mush, as owner of the Tract, entered into a lease with Hanson Aggregates Southeast for Hanson to operate a quarry on the Tract.
- (ii) In September of 2000, Hanson applied for a mining permit to operate a quarry.
- (iii) In September of 2000 and continuing up to October 1, 2001, the Tract was not in any zoning district and a quarry was a permitted use.

- (iv) In July of 2001, the Rutherford County Superior Court directed the County to issue a building permit for the construction of an office and a scale in conjunction with a quarry, which the County had refused to do. No other local permits were required for a quarry.
- (v) On October 1, 2001, Rutherford County issued the building permit and the Court of Appeals, after a rehearing, held that the July 2001 Order was proper and was not affected by an improper moratorium. Sandy Mush Properties, Inc. v. Rutherford Co., ex rel. Bd. of Commissioners, 164 N.C. App. 162, 595 S.E.2d 233 (May 2004).
- (vi) On October 1, 2001, shortly after the building permit was issued, the County then adopted a School Zone Protective Ordinance that precluded the industrial use of any property located within 2,000 feet of a school boundary. The main portion of the Tract that contains large granite deposits is within 2,000 feet of the rear boundary of a school. The State issued a mining permit that was assigned to Sandy Mush in December of 2002.
- (v) Following the May 2004 decision by the Court of Appeals upholding the Order directing the issuance of the building permit, the County then advised the Appellants that the permit had expired and was no longer valid.
- (vi) This action was filed for Declaratory Relief requesting the Court to determine that the building permit had not expired and that the Appellants (Florida Rock having since leased the property in replacement of Hanson) had a vested right to use the Tract as a quarry.
- (vii) The Superior Court of Rutherford County upheld the validity of the building permit but ruled that there was no right to use the Tract for a quarry and both parties appealed that decision.
- (viii) On January 2, 2007, the Court of Appeals upheld the Superior Court on both issues in an opinion entitled Sandy Mush Properties, Inc. v. Rutherford County, 181 N.C. App. 224, 638 S.E.2d 557 (2007) (App., p. 19).
- (ix) Pursuant to Petitions for Discretionary Review, this Court entered an Order dated August 23, 2007, in which it denied review of the decision upholding the validity of the building permit but granted discretionary review on the Appellant's Petition for the limited purpose of

“remanding this case to the Court of Appeals for reconsideration of its decision in light of Robins v. Town of Hillsborough, 361 N.C. 193, 639 S.E.2d 421 (2007). See App. p. 26.

- (x) On December 18, 2007, the Court of Appeals rendered a second decision (App., p. 1), in which it essentially concluded that Robins did not involve a vested right issue and, therefore, did not apply.
- (xi) The Petition has continued to perform work on the Tract that is necessary to keep the building permit in force.

The Appellant now petitions this Court for discretionary review of both decisions of the Court of Appeals in which the Appellant's right to use the Tract as quarry has been denied.

#### **REASONS CERTIFICATION SHOULD ISSUE**

As stated previously, this case involves an issue that is of significant public interest to individual land rights and involves long-standing legal principles in the land use jurisprudence of this State. In addition, the Appellant feels that the decisions denying them the right to use this Tract as a quarry are contrary to both the applicable statute and principles that have been established in other cases.

Without rehashing the arguments previously asserted, the Appellants feel that the Court of Appeals' decisions are in error in that:

- The Court of Appeals failed to consider that N.C.G.S. 153-344(b) provides that amendments in zoning regulations “shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which (i) building permits have been issued ... prior to enactment of the ordinance making the change ...”
- The Court of Appeals misconstrued the decision in Simpson v. City of Charlotte, 115 N.C. App. 51, 443 S.E.2d 772 (1994), where the Court

held in a very similar case that for the owner of property to have obtained a vested right to operate a quarry in the City of Charlotte, which was a permitted use, it must have obtained a building permit prior to the enactment of a change in the Ordinance by the City of Charlotte. Any such building permit would have had to be for the buildings associated with a quarry because no building permit for a quarry itself is required.

- The Court of Appeals has completely ignored the rationale followed in Woodlief v. Mecklenburg Co., 176 N.C. App. 205, 625 S.E.2d 904 (2006), where the standards in an application for a floodland development permit were controlled by the ordinance in effect at the time of the application and not by a later ordinance that did not contain specific language that existing applications were grandfathered, and in Robins v. Town of Hillsborough, 361 N.C. 193, 639 S.E.2d 421 (2007), where the plaintiff, who was in the process of completing all approvals necessary for site plan approval to construct an asphalt plant, was held to have the right to have his plan reviewed under the ordinance in effect at the time the application was filed.

It is readily acknowledged that in Simpson and Robins, no building permit had been issued, and the Court of Appeals in Simpson and this Court in Robins did not base these decisions on vested rights. Although the principles underlying these decisions are very similar in nature to the case now before this Court, the facts were not nearly as strong for the property owner in either of them as the facts presented in this case. It does not make sense to allow one group of owners, who have filed applications to use their property, protection from changes in zoning or regulations while denying that same protection to an owner who has applied for all of the necessary permits and has even obtained a building permit. The Supreme Court should resolve this issue.



**ISSUE TO BE BRIEFED**

Should the Court issue this Petition for Discretionary Review, the Petitioner intends to present the following issue in its brief for review:

(1) Does the Petitioner have a right to use its Property as a quarry pursuant to N.C.G.S. § 153A-344 or applicable law?

This the 18<sup>th</sup> day of January, 2008.

KENNEDY COVINGTON LOBDELL &  
HICKMAN, L.L.P.

By: 

Roy H. Michaux, Jr.  
N.C. Bar No. 2990

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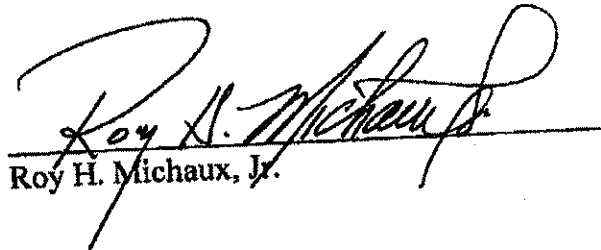
**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Plaintiff-Appellant's Second Petition for Discretionary Review was served by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Forrest A. Ferrell  
Warren Hutton  
Sigmon, Clark, Mackie, Hutton, Harvey  
& Ferrell, P.A.  
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Walter H. Dalton  
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P.O. Box 800  
Rutherfordton, NC 28139-0800

This 18<sup>th</sup> day of January, 2008.

  
Roy H. Michaux, Jr.